



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

FINAL DECISION

April 8, 2010 Government Records Council Meeting

Joseph A. Elcavage
Complainant

Complaint No. 2009-07

v.

West Milford Township (Passaic)
Custodian of Record

At the April 8, 2010 public meeting, the Government Records Council (“Council”) considered the February 16, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the evidence of record indicates that the Custodian in a timely manner disclosed to the Complainant in electronic format all of the records responsive to the Complainant’s request for Item No. 1 of the records relevant to the complaint, the Custodian did not unlawfully deny the Complainant access to said records.
2. Because the Complainant’s request for Item No. 2 of the records relevant to the complaint, electronic copies of all e-mails from Bettina Bieri’s township account from January 1, 2008 to June 17, 2008, fails to seek specific identifiable government records, the Complainant’s request is overly broad and is therefore invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and the Council’s decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Accordingly, the Custodian has not unlawfully denied the Complainant access to said records.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box



006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 8th Day of April, 2010

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: April 13, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 8, 2010 Council Meeting**

**Joseph A. Elcavage¹
Complainant**

GRC Complaint No. 2009-07

v.

**West Milford Township (Passaic)²
Custodian of Records**

Records Relevant to Complaint:

1. Electronic copies of all e-mails from Bettina Bieri's personal and work e-mail accounts regarding township business or referencing Joseph A. Elcavage from January 1, 2008 to June 17, 2008.
2. Electronic copies of all e-mails from Bettina Bieri's township account from January 1, 2008 to June 17, 2008.

Requests Made: June 17, 2008³

Responses Made: June 24, 2008 and June 25, 2008

Custodian: Antoniette Battaglia

GRC Complaint Filed: December 29, 2008⁴

Background

June 17, 2008

Complainant's Open Public Records Act ("OPRA") requests. The Complainant requests the records relevant to this complaint listed above on official OPRA request forms.

June 24, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request seeking the records listed in Item No. 1 of the records relevant to the complaint on the fifth (5th) business day following receipt of such request. The Custodian advises the Complainant that there are no records responsive to the Complainant's request in the e-mail accounts the Complainant specified in his request; however, the Custodian informs the Complainant that Bettina Bieri opened a temporary e-mail account from January 2, 2008 through January 9, 2008 which contains fourteen (14) e-mails responsive to the Complainant's request. The Custodian states that she disclosed to the Complainant in electronic format all of the e-mails responsive to the Complainant's request contained within the temporary account.

¹ No legal representation listed on record.

² Represented by Fred Semrau, Esq., of Dorsey & Semrau (Boonton, NJ).

³ Two (2) separate OPRA requests were submitted with the same date.

⁴ The GRC received the Denial of Access Complaint on said date.

June 25, 2008

Custodian's supplementary response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request seeking the records listed in Item No. 2 of the records relevant to the complaint on the sixth (6th) business day following receipt of such request. The Custodian advises the Complainant that the request is denied because it is overly broad pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Baldwin v. NJ Department of Transportation, GRC Complaint No. 2007-208 (March 2008). The Custodian further states that if the request was not overly broad, the Complainant would have to pay a special service charge for her time to prepare a document index for the hundreds of records that would be encompassed by his request.

December 29, 2008

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's OPRA requests dated June 17, 2008. The Complainant states that he provided his OPRA requests to the Custodian on June 17, 2008. The Complainant indicates that he did not receive a response to his requests.

The Complainant does not agree to mediate this complaint.

January 6, 2009

Request for the Statement of Information ("SOI") sent to the Custodian.

January 13, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated June 17, 2008
- Custodian's response to the OPRA request dated June 24, 2008
- Custodian's supplementary response to the OPRA request dated June 25, 2008

The Custodian certifies that her search for the requested records involved contacting Bettina Bieri and seeking legal advice from Counsel. The Custodian also certifies that the records responsive to the request must be retained for three (3) years pursuant to schedule 0503-0001 and that no records responsive to the Complainant's request have been destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that none of the records responsive to the Complainant's request for Item No. 1 of the records relevant to the complaint exist in Bettina Bieri's personal or work e-mail accounts. The Custodian further certifies that Bettina Bieri opened a temporary e-mail account from January 2, 2008 through January 9, 2008 which contains fourteen (14) e-mails responsive to the Complainant's request. The Custodian certifies that all of these records were disclosed to the Complainant in electronic format on June 24, 2008.

With respect to Item No. 2 of the records relevant to the complaint, the Custodian avers that the request is denied because it is overly broad pursuant to MAG, *supra*, and

Baldwin, *supra*. The Custodian further avers that if the Complainant's request was not overly broad, the Complainant would have to pay a special service charge for the Custodian's time to prepare a document index because hundreds of records are encompassed within the Complainant's request for Item No. 2.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

"...[t]he public agency shall have the burden of proving that the denial of access is authorized by law..." N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The Complainant asserts that the Custodian never responded to his OPRA requests. The evidence of record, however, reveals that the Custodian did respond in a timely manner to the Complainant's requests. The Custodian certified that in the Complainant's request for Item No. 1, the only records which existed that were responsive to the Complainant's request were fourteen (14) e-mails in Bettina Bieri's temporary e-mail account. The Custodian certifies that all of these records were disclosed to the Complainant in electronic format on June 24, 2008.

Because the evidence of record indicates that the Custodian in a timely manner disclosed to the Complainant in electronic format all of the records responsive to the

Complainant's request for Item No. 1 of the records relevant to the complaint, the Custodian did not unlawfully deny the Complainant access to the requested records.

The Custodian denied the Complainant's request for Item No. 2 of the records relevant to the complaint because the Custodian certified that the request was overly broad. The Custodian cited MAG, supra, and Baldwin, supra, in support of her position.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files.*" (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁵ the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."⁶

More on point here than Baldwin, supra, is New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). In New Jersey Builders, the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also quoted N.J.S.A. 47:1A-5.g in that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." The court further stated that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to...generate new records..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that "[b]ecause the Complainant's OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005)."

⁵ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁶ As stated in Bent, supra.

The test under MAG then, is whether a requested record is a *specifically identifiable* government record. If so, the record is disclosable, barring any exemptions to disclosure contained in OPRA. The GRC established the criteria deemed necessary to specifically identify an e-mail communication in Sandoval v. NJ State Parole Board, GRC Complaint No. 2006-167 (October 2008). In Sandoval, the Complainant requested “e-mail...between [two individuals] from April 1, 2005 through June 23, 2006 [using seventeen (17) different keywords].” The Custodian denied the request, claiming that it was overly broad. The Council determined:

“The Complainant in the complaint now before the GRC requested specific e-mails *by recipient, by date range and by content*. Based on that information, the Custodian has identified [numerous] e-mails which fit the specific recipient and date range criteria Complainant requested.” (Emphasis added.) *Id.*

Item No. 2 of the Complainant’s request sought electronic copies of all e-mails from Bettina Bieri’s township account from January 1, 2008 to June 17, 2008. E-mails responsive to the Complainant’s request could have been either *sent to or sent from* Bettina Bieri, as long as they were in her township account. The Complainant therefore identified the e-mails by sender and/or recipient.

Because the Complainant framed his request in a manner which encompasses the sender and/or recipient of e-mail correspondence, the GRC finds it necessary to expand upon the Council’s earlier decision in Sandoval, *supra*, for clarification purposes by including the sender and/or the recipient as a required identifying characteristic of e-mail records.

Thus, an OPRA request for an e-mail or e-mails shall therefore focus upon the following four (4) characteristics:

- Content and/or subject
- Specific date or range of dates
- Sender
- Recipient

In accord with MAG, *supra*, and its progeny, in order to specifically identify an e-mail, OPRA requests must contain (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted, and (3) a valid e-mail request must identify the sender and/or the recipient thereof.

In addition to identifying the e-mails by sender and/or recipient, the Complainant also identified the e-mails by date range. The Complainant failed, however, to specify the content and/or subject of the e-mails sought. As such, the Complainant’s request failed to seek specifically identifiable e-mail records.

Accordingly, because the Complainant’s request for Item No. 2 of the records relevant to the complaint, electronic copies of all e-mails from Bettina Bieri’s township

account from January 1, 2008 to June 17, 2008, fails to seek specific identifiable government records, the Complainant's request is overly broad and is therefore invalid under OPRA pursuant to MAG, *supra*, Bent, *supra*, New Jersey Builders, *supra*, and the Council's decision in Schuler, *supra*. Accordingly, the Custodian has not unlawfully denied the Complainant access to said records.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the evidence of record indicates that the Custodian in a timely manner disclosed to the Complainant in electronic format all of the records responsive to the Complainant's request for Item No. 1 of the records relevant to the complaint, the Custodian did not unlawfully deny the Complainant access to said records.

2. Because the Complainant's request for Item No. 2 of the records relevant to the complaint, electronic copies of all e-mails from Bettina Bieri's township account from January 1, 2008 to June 17, 2008, fails to seek specific identifiable government records, the Complainant's request is overly broad and is therefore invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Accordingly, the Custodian has not unlawfully denied the Complainant access to said records.

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

February 16, 2010