



**State of New Jersey**  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

LORI GRIFA  
*Acting Commissioner*

**FINAL DECISION**

**February 23, 2010 Government Records Council Meeting**

Robert A. Verry  
Complainant

Complaint No. 2009-107

v.

Borough of South Bound Brook (Somerset)  
Custodian of Record

At the February 23, 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 because the Complainant’s OPRA request does not specify identifiable government records, the request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

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 23<sup>rd</sup> Day of February, 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: March 2, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 23, 2010 Council Meeting**

**Robert A. Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-107**

v.

**Borough of South Bound Brook (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copy of South Bound Brook Borough's proof that the Complainant received his annual notice for calendar years 2004 through 2007 from his employer.<sup>3</sup>

**Request Made:** March 21, 2009

**Response Made:** March 26, 2009

**Custodian:** Donald E. Kazar

**GRC Complaint Filed:** April 1, 2009<sup>4</sup>

**Background**

**March 21, 2009**

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

**March 26, 2009**

Custodian Counsel's response to the OPRA request. On behalf of the Custodian, Counsel responds in writing to the Complainant's OPRA request on the third (3<sup>rd</sup>) business day following receipt of such request.<sup>5</sup> Counsel states that access to the Complainant's OPRA request is denied. Counsel states that the Complainant's request fails to identify any specific government record. Counsel states that OPRA is not intended as a research tool to force public agencies to identify and siphon useful information pursuant to Bent v. Township of Stafford, 381 N.J. Super. 30 (App. Div. 2005).

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<sup>1</sup> Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

<sup>2</sup> Represented by William T. Cooper III, Esq. (Somerville, NJ).

<sup>3</sup> The Complainant was previously employed by the Borough of South Bound Brook.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

<sup>5</sup> The Complainant submitted his OPRA request on March 21, 2009, a Saturday. The Custodian received said request on Monday, March 23, 2009.

**April 1, 2009**

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching the Complainant’s OPRA request dated March 21, 2009.

The Complainant states that he submitted an OPRA request to the Custodian on March 21, 2009. The Complainant states that he has not received a response to date. The Complainant contends that the Custodian’s failure to respond is a knowing and willful violation of OPRA.

The Complainant does not agree to mediate this complaint.

**April 1, 2009**

E-mail from the Custodian to the GRC. The Custodian states that he is not sure why the Complainant did not receive the Custodian Counsel’s March 26, 2009 response.

**April 14, 2009**

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

**April 14, 2009**

E-mail from the Custodian to the GRC. The Custodian requests an extension of time to respond until April 27, 2009 because the Custodian’s Counsel will not return from vacation until April 20, 2009.

**April 14, 2009**

E-mail from the GRC to the Custodian. The GRC grants an extension of time until April 27, 2009 to submit the requested SOI.

**April 27, 2009**

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated March 22, 2009.
- Letter from the Custodian’s Counsel to the Complainant dated March 26, 2009.<sup>6</sup>

The Custodian certifies that he received the Complainant’s OPRA request on March 23, 2009. The Custodian certifies that a written response was sent by Counsel to the Complainant on March 26, 2009 denying access to the request because it failed to identify a specific government record.

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<sup>6</sup> The Custodian did not certify as to the search undertaken. Additionally, the Custodian did not certify as to whether any records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”).  
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### **May 12, 2009**

Letter from the Complainant's Counsel to the GRC.<sup>7</sup> Counsel argues that the instant complaint is in regard to the Complainant's request for four (4) specific documents, which were the Complainant's annual notices regarding his rights under the Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1 et seq. Counsel contends that the Complainant identified a specific document and that his request was not overly broad. Counsel argues that the GRC has previously held that requests for records that fall within a narrow date range are not overly broad. *See O'Shea v. Township of Stillwater (Sussex)*, GRC Complaint No. 2007-253 (August 2009), *Paff v. Borough of Roselle (Union)*, GRC Complaint No. 2007-255 (June 2008) and *Donato v. Jersey City Police Department*, GRC Complaint No. 2005-251 (April 2007).

Counsel requests that for the foregoing reasons, the GRC find in favor of the Complainant.

### **May 18, 2009**

Letter from the Custodian's Counsel to the GRC. Counsel states that the Complainant requested "proof" that he received annual notice for calendar years 2004 through 2007.<sup>8</sup> Counsel argues that the Complainant's request does not identify a specific government record and is an open-ended request that is not permissible under OPRA. Counsel asserts that a valid request under OPRA must reasonably identify a record and not generally data, information or statistics. *Bent v. Township of Stafford*, 381 N.J. Super. 30 (App. Div. 2005).

Additionally, Counsel contends that the Complainant made the instant request based on a dispute and Notice of Tort Claim filed by the Complainant. Counsel asserts that based on the Borough's assumption that legal proceedings with the Complainant were imminent, the requested items, if disclosed, would provide an unfair advantage to an adversarial litigant.

Finally, Counsel contends that despite the foregoing, no records responsive to the Complainant's OPRA request exist.

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<sup>7</sup> Counsel requests that the attached letter be considered an amendment to the Complainant's Denial of Access Complaint pursuant to *N.J.A.C. 5:105-2.3(h)(1)*, which allows a complainant to amend a Denial of Access Complaint within thirty (30) days of filing of such. Although the Complainant's Counsel correctly cites to the GRC's regulation, his calculation of the deadline following the Complainant's April 1, 2009 filing of the instant complaint actually represents forty-two (42) days.

<sup>8</sup> Counsel notes that the Complainant was an employee of the Borough until August, 2007, at which point he became separated from the Borough through a settlement agreement.

## Analysis

### **Whether the Complainant's OPRA request is a valid OPRA request?**

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.

In the instant matter before the Council, the Complainant requested copies of "South Bound Brook Borough's proof that the Complainant received his annual notice for calendar years 2004 through 2007 from his employer." On behalf of the Custodian, the Custodian's Counsel responded in writing on March 26, 2009 stating that the Complainant's request failed to identify a specific government record.

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),<sup>9</sup> 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.”<sup>10</sup>

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) 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).”

In the instant complaint, the Complainant’s request for “proof” that he received his annual notice for the years 2004 through 2007 fails to identify a specific identifiable government record and would have forced the Custodian to research all files in his possession to locate and identify records that are responsive to the Complainant’s request. OPRA does not require that Custodians conduct research to fulfill requests. See MAG, supra and Bent, supra. Specifically, the Complainant does not articulate what type of “proof” he is seeking or what type of “annual notice” is being requested.

Therefore, because the Complainant’s OPRA request does not specifically identify government records, the request is invalid pursuant to MAG, supra, Bent, supra, NJ Builders, supra and Schuler, supra.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that because the Complainant’s OPRA request does not specify identifiable government records, the

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<sup>9</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>10</sup> As stated in Bent, supra.

request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Prepared By: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

February 16, 2010