



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

FINAL DECISION

April 8, 2010 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2009-108

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the April 8, 2010 public meeting, the Government Records Council (“Council”) considered the April 1, 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 for every e-mail from the Custodian’s e-mail account from September 7, 2007 through September 10, 2007, the week of March 23, 2008 and the week of March 30, 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, 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 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. *See also* Sandoval v. NJ State Parole Board, GRC Complaint No. 2006-167 (October 2008).

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**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2009-108

v.

**Borough of South Bound Brook (Somerset)²
Custodian of Records**

Records Relevant to Complaint:

1. Every e-mail sent to and received from the Custodian's e-mail account from September 7, 2007 through September 10, 2007.
2. Every e-mail sent to and received from the Custodian's e-mail account during the week of March 23, 2008.
3. Every e-mail sent to or received from the Custodian's e-mail account during the week of March 30, 2008.

Request Made: March 22, 2009

Response Made: March 26, 2009

Custodian: Donald E. Kazar

GRC Complaint Filed: April 1, 2009³

Background

March 22, 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 (3rd) business day following receipt of such request.⁴ Counsel states that access to the Complainant's request is denied. Counsel states that pursuant to OPRA, the Borough is required to disclose only "identifiable" government records and does not encompass open-ended searches of a municipality's files. Counsel states that the Complainant's request does not identify any specific government records; rather, the request is overly broad and is therefore invalid.

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

² Represented by William T. Cooper III, Esq. (Somerville, NJ).

³ The GRC received the Denial of Access Complaint on said date.

⁴ The Complainant submitted his OPRA request on March 22, 2009, a Sunday. 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 22, 2009.

The Complainant states that he submitted an OPRA request to the Custodian on March 21, 2009.⁵ 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 to the Complainant’s request.

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, 2009.⁶

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 and is therefore invalid.

May 12, 2009

Letter from the Complainant’s Counsel to the GRC.⁷ Counsel argues that the Custodian’s denial of access to the records sought in the Complainant’s OPRA request is

⁵ The evidence of record shows that the OPRA request was dated March 22, 2009

⁶ 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”).

without any legal basis. Counsel contends that the Complainant identified a specific category of records (e-mails) that are readily identifiable by date and individual within an specific date range (September 7, 2007 through September 10, 2007, the week of March 23, 2008 and the week of March 30, 2008).

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 every e-mail sent to and received in the Custodian's e-mail account from September 7, 2007 to September 10, 2007, during the week of March 23, 2008 and the week of March 30, 2008. Counsel contends that despite the Borough's position that it is required to disclose only identifiable government records, it is possible that content within the requested e-mails could fall within the attorney-client privilege exception to disclosure contained in OPRA, as well as the pending litigation and personnel matter exemptions.

Further, Counsel asserts that the requested records could fall under several other exemptions recognized by OPRA, including attorney work product and possible litigation 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.⁸ Counsel argues that any requested material from the time period identified by the Complainant likely included information generated on behalf of a public employee in connection with a grievance against the Borough; disclosure of such would divulge the Borough's strategy and/or negotiation position.

Finally, Counsel asserts that, notwithstanding the foregoing, no records responsive to the Complainant's OPRA request exist. Counsel asserts that the computer system at the Borough crashed in March 2009 and all e-mails sent or received throughout the Borough prior to that time were lost; therefore, no records responsive exist.

⁷ Counsel requests that this 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.

⁸ Counsel notes that the Complainant was an employee of the Borough until August, 2007, at which point he separated from the Borough's employment through a settlement agreement. Counsel also asserts that the instant request came about because of a discrepancy over the amount paid to the Complainant pursuant to the settlement agreement.

December 10, 2009

E-mail from the GRC to the Custodian. The GRC states that it is in receipt of the Custodian Counsel's letter dated May 18, 2009 and has additional questions. The GRC requests that the Custodian legally certify to the following:

1. Whether any records responsive to the Complainant's March 22, 2009 OPRA request existed at the time of the Complainant's request?

The GRC requests that the Custodian provide the requested legal certification by December 14, 2009.

December 12, 2009

E-mail from the Custodian's Counsel to the GRC. Counsel confirms that the GRC has granted an extension until December 15, 2009 to submit the requested certification.

December 15, 2009

Custodian's legal certification. The Custodian certifies that the e-mails responsive to the Complainant's request were lost because the Borough's e-mail system was corrupted. The Custodian certifies that the Borough is unable to retrieve any e-mail messages sent or received prior to March 17, 2009.

Analysis

Whether the Complainant's request for records is valid under OPRA?

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’s request sought “every e-mail sent to and received from the Custodian’s e-mail account from September 7, 2007 through September 10, 2007 ... the week of March 23, 2008 ... [and] the week of March 30, 2008.” The Custodian’s Counsel responded in writing on behalf of the Custodian on March 26, 2009 stating that the Complainant’s request does not identify any government records; rather, the request is overly broad and is therefore invalid.

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),⁹ 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.”¹⁰

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...”

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

¹⁰ As stated in Bent, *supra*.

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).”

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.*

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

The Complainant’s request in the instant complaint sought every e-mail from the Custodian’s e-mail account from “September 7, 2007 through September 10, 2007 ... the week of March 23, 2008 ... [and] the week of March 30, 2008.” E-mails responsive to the Complainant’s request could have been either *sent to or sent from* the Custodian’s e-mail account, as long as they were in this e-mail 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. 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 OPRA request for every e-mail from the Custodian's e-mail account from September 7, 2007 through September 10, 2007, the week of March 23, 2008 and the week of March 30, 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. *See also Sandoval, supra.*¹¹

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant's OPRA request for every e-mail from the Custodian's e-mail account from September 7, 2007 through September 10, 2007, the week of March 23, 2008 and the week of March 30, 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, 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 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. *See also Sandoval v. NJ State Parole Board*, GRC Complaint No. 2006-167 (October 2008).

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 1, 2010

¹¹ The GRC declines to address whether any records responsive to the Complainant's OPRA request exist because the request is not valid under OPRA.