



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

October 26, 2010 Government Records Council Meeting

U'Bay Lumumba
Complainant

Complaint No. 2009-181

v.

Essex County Prosecutor's Office
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council ("Council") considered the October 19, 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. Although the original Custodian initially denied access to request item no. 1 on the basis that said request item, if existed, is not a public record pursuant to N.J. Court Rule 3:6-7, the Custodian certified in her Statement of Information that no records responsive to request item no. 1 exist. Therefore, the original Custodian has not unlawfully denied access to request item no. 1.
2. Because the Complainant's request item no. 2 fails to identify with reasonable clarity the records sought and because fulfilling request item no. 2 requires research which the Custodian is not obligated to conduct, said request item is invalid 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 Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). As such, the original Custodian has not unlawfully denied access to request item no. 2.

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 26th Day of October, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: November 1, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 26, 2010 Council Meeting**

**U'Bay Lumumba¹
Complainant**

GRC Complaint No. 2009-181

v.

**Essex County Prosecutor's Office²
Custodian of Records**

Records Relevant to Complaint:

1. Essex County Prosecutor Lawrence Monaco's pre-Grand Jury memorandum statement to the grand jury.
2. Pre-trial arraignments and pre-trial motions.³

Request Made: March 26, 2009

Response Made: April 8, 2009

Custodian: Debra G. Sims⁴

GRC Complaint Filed: June 5, 2009⁵

Background

March 26, 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.

April 8, 2009

Original Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the same business day as receipt of said request. Regarding request item no. 1, the Custodian states that such a document, if it existed, is not a public record pursuant to Court Rule 3:6-7. The Custodian further states that any documents in the Prosecutor's investigatory file which may have been used as part of the Grand Jury preparation are exempt from disclosure under N.J.S.A. 47:1A-1.1.

¹ No legal representation listed on record.

² Represented by Essex County Counsel (Newark, NJ).

³ The Complainant requested an additional record; however, said record is not the subject of this Denial of Access Complaint.

⁴ The Custodian at the time of the Complainant's OPRA request and Denial of Access Complaint was Charlotte Smith, Esq.

⁵ The GRC received the Denial of Access Complaint on said date.

Regarding request item no. 2, the Custodian states that the request does not provide sufficient information to identify a responsive government record. The Custodian further states that the Prosecutor's file is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

April 20, 2009

Letter from Complainant to original Custodian. The Complainant requests reconsideration of the Custodian's denial to his OPRA request. The Complainant asserts that the Court Rule cited by the Custodian does not exempt the requested Grand Jury statement from disclosure under OPRA. The Complainant contends that Court Rule 3:13-3(a) provides that "...upon written request by the defendant the prosecuting attorney shall permit the defendant to inspect and copy any relevant grand jury proceedings recorded pursuant to R. 3:6-6." The Complainant also claims that the requested Grand Jury statement does not constitute a criminal investigatory record pursuant to N.J.S.A. 47:1A-1.1.

Regarding his request for pre-trial motions, the Complainant states that the specific records sought are any and all pre-trial conferences and motions.

May 1, 2009

Letter from original Custodian to Complainant. The Custodian states that she is in receipt of the Custodian's letter dated April 20, 2009; however, the Custodian states that she finds no basis to reverse her original response to the Complainant's OPRA request.

June 5, 2009

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated March 26, 2009
- Custodian's response to the OPRA request dated April 8, 2009
- Letter from Complainant to Custodian dated April 20, 2009
- Letter from Custodian to Complainant dated May 1, 2009

The Complainant states that he submitted his OPRA request on March 26, 2009. The Complainant states that the Custodian denied said request on April 8, 2009 pursuant to N.J.S.A. 47:1A1.1 and Court Rule 3:6-7. The Complainant states that he contacted the Custodian via letter dated April 20, 2009 and asked the Custodian to reconsider her denial of his OPRA request. The Complainant states that the Custodian responded via letter dated May 1, 2009 in which she denied his request for reconsideration.

The Complainant asks the Council to consider the arguments set forth in his reconsideration request dated April 20, 2009.

June 25, 2009

Offer of Mediation sent to both parties.

June 29, 2009

The original Custodian declines mediation.⁶

July 22, 2009

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

July 23, 2009

E-mail from Hillary Brunell of the Essex County Prosecutor’s Office to GRC. Ms. Brunell requests an extension of time until July 31, 2009 to submit the Custodian’s completed SOI.

July 23, 2009

E-mail from GRC to Hillary Brunell of the Essex County Prosecutor’s Office. The GRC grants a five (5) business day extension of time to submit the Custodian’s completed SOI. The GRC states that the extended deadline date is August 5, 2009.

July 29, 2009

Original Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated March 26, 2009
- Letter from Complainant to Custodian dated April 20, 2009

The original Custodian certifies that she received the Complainant’s OPRA request on March 26, 2009 and provided a written response on April 8, 2009. The Custodian also certifies that she received the Complainant’s clarification letter dated April 20, 2009 and provided a written response on May 1, 2009.

Regarding request item no. 1, the Custodian asserts that Grand Jury materials of any kind are not public records pursuant to Court Rule 3:6-7. Additionally, the Custodian contends that any documents in the Prosecutor’s investigatory file which may have been used as part of the Grand Jury preparation are exempt from disclosure under N.J.S.A. 47:1A-1.1. The Custodian certifies that she is not aware of any record maintained by the Prosecutor that is responsive to the request for “pre-Grand Jury memorandum statement.” The Custodian asserts that the Complainant failed to provide a specific file number or other identifiers which would have assisted the Custodian in locating a file.

Regarding request item no. 2, the Custodian certifies that she notified the Complainant in writing on April 8, 2009 that said request did not provide sufficient information to identify a responsive record. The Custodian certifies that she received the Complainant’s clarification letter April 20, 2009 wherein the Complainant sought “any/all Pre-Trial Conferences and Motions.” The Custodian certifies that she responded via letter dated May 1, 2009 indicating that she would not change her response identified in her initial letter to the Complainant dated April 8, 2009.

The Custodian asserts that the Complainant’s request item no. 2 is overly broad and ambiguous. The Custodian certifies that although there are several files corresponding to the Complainant’s name, he failed to provide a file number, indictment

⁶ The Complainant did not respond to the Offer of Mediation.

number, or criminal charge that would have assisted the Custodian in identifying the requested records. The Custodian contends that even using Indictment No. 4005-11-86 as the Complainant mentioned in request item no. 3, which is not the subject of this Denial of Access Complaint, his reference to “pre-arraignment” motions is still unclear. The Custodian certifies that motions are labeled by date, indictment number, the case name and subject matter, they are not labeled as pre- or post- arraignment. The Custodian certifies that in order to determine whether a motion was pre-arraignment, the Custodian would need to know the file number, the arraignment date, and the date the particular motion was filed with the court.

The Custodian states that OPRA was not intended as “a research tool...to force government officials to identify and siphon useful information” for requestors. Bent v. Township of Stafford Police Department, 381 N.J. Super. 30, 39 (App. Div. 2005), citing MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546-49 (App. Div. 2005). However, the Custodian contends that even if the Complainant’s request item no. 2 provided sufficient detail to identify responsive records, a Prosecutor’s Office file is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

The Custodian certifies that her search for the requested records included obtaining the homicide file from the Homicide Unit. The Custodian certifies that said file is maintained under the name State v. Michael Chavis, H # 127-86 (Indictment number 4005-11-86).

May 25, 2010

Letter from the GRC to the original Custodian. The GRC states that the Custodian certified in her SOI dated July 29, 2009 that she received the Complainant’s OPRA request on March 26, 2009. However, the GRC states that the Custodian also indicated in her written response to the Complainant, dated April 8, 2009, that she received the Complainant’s OPRA request on said date. The GRC requests a legal certification indicating the date on which the Custodian received the Complainant’s OPRA request which is the subject of this Denial of Access Complaint.

May 25, 2010

Original Custodian’s Certification. The Custodian certifies that the Complainant sent his OPRA request dated March 26, 2009 via U.S. mail and thus the Custodian certifies that she did not receive said request until April 8, 2009. The Custodian certifies that she provided the Complainant with a written response to his request on the same date.

June 25, 2010

Letter from Hilary Brunell of the Essex County Prosecutor’s Office. Ms. Brunell states that as of July 1, 2010 the Custodian of Records for the Essex County Prosecutor’s Office is Debra Sims, Deputy Chief Assistant Prosecutor.

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 stated that he submitted his OPRA request on March 26, 2009. The original Custodian certified that she received said request on April 8, 2009 and provided a written response on the same date. The Custodian denied access to request item no. 1 on the basis that the requested record is exempt from public access pursuant to N.J. Court Rule 3:6-7 and N.J.S.A. 47:1A-1.1. However, in the Custodian’s Statement of Information, the Custodian certified that she is not aware of any record maintained by the Prosecutor that is responsive to the request for “pre-Grand Jury memorandum statement.” The Custodian asserted that the Complainant failed to provide the specific file number or other identifiers which would have assisted the Custodian in locating a file.

Therefore, although the original Custodian initially denied access to request item no. 1 on the basis that said request item, if existed, is not a public record pursuant to N.J. Court Rule 3:6-7, the Custodian certified in her Statement of Information that no records responsive to request item no. 1 exist. Therefore, the original Custodian has not unlawfully denied access to request item no. 1.

Additionally, the original Custodian denied access to request item no. 2 on the basis that the Complainant’s request was not specific enough and because said records are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. In the Custodian’s Statement of Information, the Custodian asserted that the Complainant’s request item no. 2 is overly broad and ambiguous. The Custodian certified that although there are several files

corresponding to the Complainant's name, he failed to provide a file number, indictment number, or criminal charge that would have assisted the Custodian in identifying the requested records.

Further, the Custodian certified that motions are labeled by date, indictment number, the case name and subject matter, and they are not labeled as pre- or post-arraignment. The Custodian certified that in order to determine whether a motion was pre-arraignment, the Custodian would need to know the file number, the arraignment date, and the date the particular motion was filed with the court.

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),⁷ 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."⁸

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..."

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 this instant complaint, the Complainant sought access to pre-trial arraignments and pre-trial motions without reference to any specific case. The original Custodian certified that motions are labeled by date, indictment number, case name and subject matter, and that they are not labeled as pre- or post-arraignment. In order to make such a

⁷ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁸ As stated in Bent, *supra*.

determination, the Custodian would have to research the date of an arraignment before attempting to determine which records, if any, are responsive to the Complainant's OPRA request. Pursuant to MAG, *supra*, the Custodian is under no obligation to conduct research in response to an OPRA request.

Therefore, because the Complainant's request item no. 2 fails to identify with reasonable clarity the records sought and because fulfilling request item no. 2 requires research which the Custodian is not obligated to conduct, said request item is invalid pursuant to MAG, *supra*, Bent, *supra*, NJ Builders, *supra*, and Schuler, *supra*. As such, the original Custodian has not unlawfully denied access to request item no. 2.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the original Custodian initially denied access to request item no. 1 on the basis that said request item, if existed, is not a public record pursuant to N.J. Court Rule 3:6-7, the Custodian certified in her Statement of Information that no records responsive to request item no. 1 exist. Therefore, the original Custodian has not unlawfully denied access to request item no. 1.
2. Because the Complainant's request item no. 2 fails to identify with reasonable clarity the records sought and because fulfilling request item no. 2 requires research which the Custodian is not obligated to conduct, said request item is invalid 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 Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). As such, the original Custodian has not unlawfully denied access to request item no. 2.

Prepared By: Dara Lownie
Communications Manager/Information Specialist

Approved By: Catherine Starghill, Esq.
Executive Director

October 19, 2010