



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

Frank T. Miller
Complainant

Complaint No. 2009-226

v.

New Jersey Department of Corrections
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the September 13, 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 Complainant’s request failed to specify identifiable government records, the request is invalid under OPRA. N.J.S.A. 47:1A-1.1. *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, 180 (App. Div. 2007), *Schuler v. Borough of Bloomsbury*, GRC Complaint No. 2007-151 (February 2009), and *Feiler-Jampel v. Somerset County Prosecutor’s Office*, GRC Complaint No. 2007-190 (March 2008). Accordingly, the Custodian has lawfully denied the Complainant’s request. N.J.S.A. 47:1A-6.
2. Because the Custodian in the complaint currently before the Council certified that there are no records responsive to the Complainant’s request and there is no evidence on record to refute the Custodian’s certification, the Custodian has not unlawfully denied the Complainant access to the request DNA sample. N.J.S.A. 47:1A-6; *Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).

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**

**Frank T. Miller¹
Complainant**

GRC Complaint No. 2009-226

v.

**New Jersey Department of Corrections²
Custodian of Records**

Records Relevant to Complaint: Identification DNA Typing (DNA Profile).

Request Made: June 21, 2009

Response Made: June 25, 2009

Custodian: Deirdre Fedkenheuer³

GRC Complaint Filed: July 15, 2009⁴

Background

June 21, 2009⁵

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.

June 25, 2009

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the same day as receipt of such request. The Custodian states that access to the requested record is denied because the requested DNA profile is considered a medical or mental health record which is exempt from disclosure under OPRA pursuant to Executive Order No. 26 (Governor McGreevey).

July 3, 2009

Letter from the Complainant to the GRC. The Complainant asserts that the Custodian's response to the OPRA request was based upon a belief that the records the Complainant sought were a medical or mental health record that would be exempt from disclosure pursuant to Executive Order No. 26. The Complainant asserts that, instead, he is requesting the actual DNA sample that was taken from him pursuant to state law. The

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The original Custodian, Michelle Hammel, responded to the Complainant's OPRA request.

⁴ The GRC received the Denial of Access Complaint on July 27, 2009.

⁵ The Complainant's OPRA request is dated June 21, 2009 and is stamped as received by the New Jersey Department of Corrections ("NJDOC") on June 25, 2009.

Complainant cites N.J.S.A. 30:1B-6⁶, N.J.S.A. 30:1B-10⁷, N.J.S.A. 53:1-20.17⁸ et seq., and N.J.A.C. 10A:14-3A.1⁹, and N.J.A.C. 10A:14-3A.2¹⁰ as supporting his request.

July 15, 2009

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

- Complainant’s OPRA request dated June 21, 2009
- Letter from the Custodian to the Complainant dated June 25, 2009
- Letter from the Complainant to the GRC dated July 3, 2009, with attachments

The Complainant asserts that he is not requesting a medical record but instead seeks the actual DNA sample that was taken by the NJDOC on June 7, 2005.

The Complainant agrees to mediate this complaint.

August 5, 2009

Offer of Mediation sent to the Custodian.

August 6, 2009

The Custodian does not agree to mediate this complaint.

August 6, 2009

Letter from the Custodian to the Complainant. The Custodian states that the Custodian originally thought that the Complainant sought medical records, and that it is now understood that the Complainant wants the actual DNA sample that was collected by the NJDOC in accordance with the DNA Database and Databank Act of 1994.

The Custodian further asserts that the NJDOC is unable to provide the Complainant with the requested DNA sample because the DNA samples, though obtained by the Department of Corrections, are turned over to the State Police to be maintained in the state’s DNA database. The Custodian states that N.J.S.A. 53:1-20.27 requires that these records are confidential. Moreover, the Custodian asserts that even if the NJDOC kept copies of such records, the records would be exempt from disclosure under OPRA by operation of N.J.S.A. 47:1A-9.

August 28, 2009

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

September 1, 2009

⁶ Detailing the powers of the Commissioner of the Department of Corrections.

⁷ Stating that “[a]ll functions, powers and duties of the Commissioner of Institutions and Agencies and the Department of Institutions and Agencies with respect to all county and city jails or places of detention, county or city workhouses, county penitentiaries, privately maintained institutions and noninstitutional agencies for the care, treatment, government and discipline of adult inmates are hereby transferred to the Department of Corrections”

⁸ “This Act shall be known and may be cited as the ‘DNA Database and Databank Act of 1994.’”

⁹ Detailing how DNA should be collected.

¹⁰ Regarding procedures of how DNA collections must be recorded and maintained.

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated June 21, 2009
- Letter from the Custodian to the Complainant dated June 25, 2009, with attachment
- Letter from the Custodian to the Complainant dated August 6, 2009

The Custodian certifies that the NJDOC is not in possession of any records responsive to the Complainant's OPRA request. The Custodian certifies that the DNA profile sought by the Complainant is not maintained by the NJDOC and that pursuant to the DNA Database and Databank Storage Act of 1994 (N.J.S.A. 53:1-20.17 et seq.), the DNA sample collected by the NJDOC is now in the possession of the Division of State Police. The Custodian maintains that the records maintained by the State Police are confidential and that records which are designated confidential by another statute shall not be released pursuant to N.J.S.A. 47:1A-9 and Executive Order 26 (McGreevey). The Custodian's SOI certifies to the following events:

The Custodian certifies that on or about June 25, 2009, the NJDOC received an OPRA request from the Complainant seeking records which the Complainant identified as "DNA profile". The Custodian certifies that the Complainant's request was assigned a request number of #5839.

The Custodian certifies that, in addition, on August 6, 2009, in response to the complaint filing, the Complainant was advised that the documents he requested could not be provided as they were not made, maintained, or kept on file with the NJDOC.

The Custodian maintains that, the Complainant's request was properly denied on June 25, 2009 because medical and mental health records are not disclosable pursuant to N.J.S.A. 47:1A-1 et seq. and Executive Order 26 (McGreevey).

The Custodian further asserts that the Complainant mistakenly relies upon N.J.A.C. 10A:14-3A.2 to support the position that the NJDOC is required to maintain a copy of his DNA sample. Instead, the Custodian asserts that N.J.A.C. 10A:14-3A.2(b) only requires the NJDOC to *document* that each inmate has supplied a DNA sample. In support of this argument, the Custodian cites N.J.A.C. 10A:14-3A.2(b), which states in pertinent part:

"Each time an inmate DNA sample is collected, a State of New Jersey DNA Databank Specimen Submission Form shall be completed and signed by designated Departmental staff. The inmate shall be required to sign and date the form and a copy of the form shall be maintained in the inmate classification folder. . . ." N.J.A.C. 10A:14-3A.2(b).

In citing this regulation, the Custodian contends that the DNA sample submission form, and not the DNA profile information itself, is all that is required to be maintained by the NJDOC.

Finally, the Custodian certifies that the Complainant was further advised that even if the requested documents were maintained by the NJDOC, they are not disclosable under OPRA because they had already been designated as confidential pursuant to the DNA Database and Databank Act of 1994 (N.J.S.A. 53:1-20.17 et seq.). The Custodian argues that OPRA explicitly recognizes that other statutes or regulations may govern the confidentiality of documents and provides that its provisions:

. . . “shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.” N.J.S.A. 47:1A-9.b.

Analysis

Whether the DNA profile requested by the Complainant is a government record under N.J.S.A. 47:1A-1.1?

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 does not permit the release of information which has been made exempt from disclosure by virtue of any other law for:

“... [t]he provisions of this act, P.L.2001, c.404 (C.47:1A-5 et al.), shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to P.L.1963, c.73 (C.47:1A-1 et seq.); any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.” N.J.S.A. 47:1A-9.a.

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 this case, the Complainant seeks the *actual* sample of DNA that was taken by the NJDOC on June 25, 2005. The Complainant’s letter dated July 3, 2009 makes it clear that he seeks the actual sample of DNA and not some other record related to the DNA extraction. However, when measured against the definition of a government record set forth in OPRA, a sample of DNA does not meet the statutory definition of a government record set forth at N.J.S.A. 47:1A-1.1, as it is not a “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...” N.J.S.A. 47:1A-1.1.

Moreover, 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). As the court noted in invalidating MAG’s request under OPRA:

“Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.” *Id.* at 549.

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.*

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),¹¹ 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.”¹²

¹¹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹² As stated in Bent, *supra*.

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court enumerated the responsibilities of a custodian and a requestor as follows:

“OPRA identifies the responsibilities of the requestor and the agency relevant to the prompt access the law is designed to provide. The custodian, who is the person designated by the director of the agency, N.J.S.A. 47:1A-1.1, must adopt forms for requests, locate and redact documents, isolate exempt documents, assess fees and means of production, identify requests that require "extraordinary expenditure of time and effort" and warrant assessment of a "service charge," and, when unable to comply with a request, "indicate the specific basis." N.J.S.A. 47:1A-5(a)-(j). *The requestor must pay the costs of reproduction and submit the request with information that is essential to permit the custodian to comply with its obligations.* N.J.S.A. 47:1A-5(f), (g), (i). Research is not among the custodian's responsibilities.” (Emphasis added), NJ Builders, 390 N.J. Super. at 177.

Moreover, 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 Feiler-Jampel v. Somerset County Prosecutor’s Office, GRC Complaint No. 2007-190 (March 2008), the Complainant requested “[a]ny and all documents and evidence” relating to an investigation being conducted by the Somerset County Prosecutor’s Office. The GRC reasoned that while the Complainant’s request was for an entire investigation file identified by number and containing numerous individual records, the Complainant failed to identify specific government records. The GRC held that:

“because the records requested comprise an entire SCPO file, the request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records. Because

OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the SCPO files to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG, supra and Bent, supra and the Council's decisions in Asarnow, supra and Morgano, supra."

In the instant complaint, the Complainant's request for the actual DNA sample taken from him by the NJDOC does not seek a specific identifiable government record as defined in OPRA.

Therefore, because the Complainant's request failed to specify identifiable government records, the request is invalid under OPRA. N.J.S.A. 47:1A-1.1. MAG, supra, NJ Builders, supra, Bent, supra, Schuler, supra, and Feiler-Jampel, supra. Accordingly, the Custodian has lawfully denied the Complainant's request. N.J.S.A. 47:1A-6.

Moreover, the Custodian has certified in the SOI that no records responsive to the request exist at the NJDOC. The Complainant has not submitted any evidence to refute the Custodian's certification in this regard.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The GRC determined that the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed, and the Complainant provided no evidence to refute the Custodian's certification.

Here, the Custodian has certified in the SOI that no records responsive to the request exist at the NJDOC. Because the Custodian certified that there are no records responsive to the Complainant's request; and there is no evidence on record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the request DNA sample. N.J.S.A. 47:1A-6; Pusterhofer, supra.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant's request failed to specify identifiable government records, the request is invalid under OPRA. N.J.S.A. 47:1A-1.1. 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, 180 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), and

Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (March 2008). Accordingly, the Custodian has lawfully denied the Complainant's request. N.J.S.A. 47:1A-6.

2. Because the Custodian in the complaint currently before the Council certified that there are no records responsive to the Complainant's request and there is no evidence on record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the request DNA sample. N.J.S.A. 47:1A-6; Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

September 13, 2010