



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

July 27, 2010 Government Records Council Meeting

Glenn L. Cavanagh, Esq.
Complainant

Complaint No. 2009-302

v.

New Jersey Department of Law & Public Safety,
New Jersey State Police
Custodian of Record

At the July 27, 2010 public meeting, the Government Records Council (“Council”) considered the July 20, 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 request for “[a]ny and all NJ State Police rules, regulations, policy, operating procedures, Attorney General opinions, Superintendent opinions and letters, reports and memoranda regarding or related to the policy and procedure of the NJ State Police regarding the collection, preservation and storage of evidence obtained during and in relation to criminal investigations and prosecutions including but not limited to United States or foreign currency seized as evidence” is overly broad and would require the Custodian to conduct research among all of the records in her control to locate records containing the specific subject matter requested by the Complainant, it is invalid under OPRA. *See* 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); 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 27th Day of July, 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: August 2, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 27, 2010 Council Meeting**

**Glenn L. Cavanagh, Esq.¹
Complainant**

GRC Complaint No. 2009-302

v.

**New Jersey Department of Law & Public Safety, NJ State Police²
Custodian of Records**

Records Relevant to Complaint: Any and all NJ State Police rules, regulations, policy, operating procedures, Attorney General opinions, Superintendent opinions and letters, reports and memoranda regarding or related to the policy and procedure of the NJ State Police regarding the collection, preservation and storage of evidence obtained during and in relation to criminal investigations and prosecutions including but not limited to United States or foreign currency seized as evidence.

Request Made: October 15, 2009³

Response Made: October 29, 2009

Custodian: Linda Largey-Whitehead⁴

GRC Complaint Filed: November 9, 2009⁵

Background

October 15, 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.

October 29, 2009

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the same business day as receipt of such request. The Custodian states that access to the requested record is denied because the Attorney General Regulations, *N.J.A.C. 13:1E-3.2*, state that training records are confidential; in addition, pursuant to Executive Order 21, proposed rules and regulations are in effect until they are formally adopted.

¹ No legal representation listed on record.

² Represented by DAG Jennifer S. Hsia, on behalf of the NJ Attorney General.

³ The Custodian received the request on October 29, 2009.

⁴ Ms. Largey-Whitehead is the current Records Custodian. The Custodian at the time of the request was Christopher Nunziato.

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

November 9, 2009

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

- Complainant’s OPRA request dated October 15, 2009
- E-mail from the Custodian to the Complainant dated October 29, 2009

The Complainant asserts that the above requested information is normally publicly distributed through discovery proceedings in civil and criminal cases and therefore is not confidential. The Complainant also states that he would be willing to sign a stipulation that he would not publicly disseminate the requested material to quiet the concerns of the NJ State Police.

The Complainant does not agree to mediate this complaint.

November 16, 2009

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

December 11, 2009

E-mail from DAG Jennifer Hsia to the GRC. DAG Hsia states that she received the GRC’s Request for the Statement of Information and asks when the five (5) business days to file the SOI will expire.

December 11, 2009

E-mail from the GRC to DAG Hsia. The GRC states that a request for SOI was sent on November 16, 2009 and thus the SOI is due to be filed on November 23, 2009. The GRC grants a five (5) business day extension to December 18, 2009.

December 18, 2009

E-mail from DAG Hsia to the GRC requesting an extension of time until January 8, 2010 to file the Custodian’s SOI. DAG Hsia states that she contacted the Complainant and he agreed to such an extension.⁶

December 18, 2009

E-mail from the GRC to DAG Hsia. The GRC grants the requested extension of time.

January 7, 2010

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated October 15, 2009.
- Letter from the Custodian to the Complainant dated October 29, 2009

⁶ The GRC does not have a copy of the e-mail between DAG Hsia and the Complainant. However, the Complainant was carbon copied on the e-mail from DAG Hsia to the GRC.
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The Custodian certifies that he searched the relevant database for records which may be responsive to the Complainant's request. The Custodian certifies that he found two (2) Standing Operating Procedures that were responsive to the Complainant's request. The Custodian certifies that he denied the Complainant access to these records because the Department of Law and Public Safety proposed regulations state that Standard Operating Procedures are not government records subject to OPRA; the Custodian certifies that access to these records was therefore denied pursuant to Executive Order 21 and paragraph 6 of Executive Order 26.

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's request for "[a]ny and all NJ State Police rules, regulations, policy, operating procedures, Attorney General opinions, Superintendent opinions and letters, reports and memoranda regarding or related to the policy and procedure of the NJ State Police regarding the collection, preservation and storage of evidence obtained during and in relation to criminal investigations and prosecutions including but not limited to United States or foreign currency seized as evidence" is overly broad and would require the Custodian to conduct research among all of the records in her control

to locate records containing the specific subject matter requested by the Complainant. Such a request is invalid under OPRA.

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..." 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)."

Because the Complainant's request for "[a]ny and all NJ State Police rules, regulations, policy, operating procedures, Attorney General opinions, Superintendent opinions and letters, reports and memoranda regarding or related to the policy and

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

⁸ As stated in Bent, *supra*.

procedure of the NJ State Police regarding the collection, preservation and storage of evidence obtained during and in relation to criminal investigations and prosecutions including but not limited to United States or foreign currency seized as evidence” is overly broad and would require the Custodian to conduct research among all of the records in her control to locate records containing the specific subject matter requested by the Complainant, it is invalid under OPRA. See 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); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Because the Complainant’s request is invalid under OPRA, the Council declines to consider the applicability of E.O. 21 and E.O. 26 to the instant matter.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant’s request for “[a]ny and all NJ State Police rules, regulations, policy, operating procedures, Attorney General opinions, Superintendent opinions and letters, reports and memoranda regarding or related to the policy and procedure of the NJ State Police regarding the collection, preservation and storage of evidence obtained during and in relation to criminal investigations and prosecutions including but not limited to United States or foreign currency seized as evidence” is overly broad and would require the Custodian to conduct research among all of the records in her control to locate records containing the specific subject matter requested by the Complainant, it is invalid under OPRA. See 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); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

July 20, 2010