



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

January 31, 2012 Government Records Council Meeting

Shawn Smith
Complainant

Complaint No. 2010-238

v.

New Jersey Department of Corrections
Custodian of Record

At the January 31, 2012 public meeting, the Government Records Council (“Council”) considered the January 24, 2012 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 is overly broad, fails to identify specific government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant’s request is invalid under OPRA. 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 of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Additionally, while the NJDOC certifies in their SOI that they are not in possession of any records that are responsive to the Complainant’s request, the Council declines to address this issue because the Complainant’s request is invalid under OPRA.

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 31st Day of January, 2012

Robin Berg Tabakin, Chair
Government Records Council



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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: February 6, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 31, 2012 Council Meeting**

**Shawn Smith¹
Complainant**

GRC Complaint No. 2010-238

v.

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

Records Relevant to Complaint: Copies of:

1. Records from Cumberland County Prosecutor to Commissioner Devon Brown about complaints filed by inmates as a result of an incident on January 1, 2005.
2. Records from Federal Bureau of Investigation (“FBI”) to the Department of Corrections (“DOC”) Commissioner about Shawn Smith and safety concerns Shawn Smith expressed.
3. Records from the Department of Justice (“DOJ”) about Shawn Smith to the DOC in January, February, and March of 2005.
4. Records regarding abuse and grand jury actions of Cumberland County Prosecutor, Ronald Casella.³

Request Made: August 20, 2010

Response Made: August 27, 2010

Custodian: John Falvey

GRC Complaint Filed: September 13, 2010⁴

Background

August 20, 2010

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this Complaint listed above in a letter to the Custodian referencing OPRA.⁵

August 27, 2010

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s request on the fifth (5th) business day following receipt of such request. The Custodian states that access to the requested record is denied because the

¹ No legal representation listed on record.

² Represented by DAG Jason Postelnik on behalf of the NJ Attorney General.

³ The Complainant’s request sought additional records that are not at issue in the instant complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ The Complainant states in his request that if he names a record incorrectly, the Custodian should correct it for him when responding to his request.

New Jersey Superior Court's decision in MAG Entertainment, LLC. v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 536 (March 2005), holds that OPRA is not intended to be used as a "research tool litigants may use to force government officials to identify and siphon useful information." *Id.*

The Custodian states that it is obvious to him that the Complainant's OPRA request relates to an existing civil action regarding the Complainant and that the Complainant is attempting to use OPRA to circumvent discovery. The Custodian asserts that the Complainant failed to use an official DOC OPRA request form and states that she has forwarded him several blank copies of the form for his use. The Custodian informs the Complainant that he is entitled to challenge the DOC's decision in Superior Court or file a complaint with the Government Records Council ("GRC").

September 13, 2010

Denial of Access Complaint filed with the GRC attaching a copy of the Custodian's response to the OPRA request dated August 27, 2010.

The Complainant states that he does not have a copy of the OPRA request to attach to the Denial of Access Complaint. The Complainant argues that it is not up to the Custodian to determine whether or not he is requesting records pursuant to a civil action. The Complainant maintains that the requested records are not part of discovery and that he has a right to all of the requested records that are not privileged. The Complainant states that he should not be instructed as to how he should make future OPRA requests.

The Complainant agrees to mediate this Complaint.

October 1, 2010

The Offer of Mediation is sent to the Custodian.

October 1, 2010

Custodian's phone call to the GRC. The Custodian declines mediation.

October 1, 2010

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

October 4, 2010

The Custodian agrees to mediate this Complaint.⁶

October 6, 2010

The Complaint is referred to mediation.

April 18, 2011

The Complaint is referred back from mediation.

May 3, 2011

Custodian's SOI with the following attachments:

⁶ Upon receiving the request for a Statement of Information, the Custodian agreed to mediate the Complaint.

- Complainant's OPRA request dated August 22, 2010
- Custodian's response to the OPRA request dated August 27, 2010

The Custodian certifies that none of the requested records are available and accordingly none were provided to the Complainant.⁷

Analysis

Whether the Complainant's request 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.

In the instant matter, the Complainant's 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

⁷ The Custodian certifies that he also lawfully addressed a request for additional records that are not in dispute in this Complaint.

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),⁸ 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."⁹

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.

⁸ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁹ As stated in Bent, *supra*.

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).”

The test under MAG then, is whether a request seeks a *specifically identifiable* government record. If so, the record is disclosable, barring any exemptions to disclosure contained in OPRA.

Further, in Sallie v. New Jersey Department of Banking and Insurance, Consumer Protection Service, GRC Complaint No. 2008-163 (October 2009), the complainant sought access to any available record concerning complaint number 200700136 including but not limited to records from the Passaic County Surrogate Court and the Superior Court of New Jersey. The Council found that this blanket request for various documents was invalid under OPRA.

In the matter before the Council, the Complainant’s request seeks “records” pertaining to several subjects. The Complainant’s request failed to identify specific government records sought. The Complainant’s request is therefore a blanket request for a class of various documents rather than a request for a specific government record. Moreover, the Complainant’s request would require the Custodian to conduct research through every file in his possession to locate and identify responsive records.

Therefore, because the Complainant’s request is overly broad, fails to identify specific government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant’s request is invalid under OPRA. 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 of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

While the NJDOC certifies in their SOI that they are not in possession of any records that are responsive to the Complainant's request, the Council declines to address this issue because the Complainant's request is invalid under OPRA.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant's request is overly broad, fails to identify specific government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant's request is invalid under OPRA. 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 of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Additionally, while the NJDOC certifies in their SOI that they are not in possession of any records that are responsive to the Complainant's request, the Council declines to address this issue because the Complainant's request is invalid under OPRA.

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

January 24, 2012