



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

April 25, 2012 Government Records Council Meeting

Daniel Gatson
Complainant

Complaint No. 2010-276

v.

Morris County Prosecutor's Office
Custodian of Record

At the April 25, 2012 public meeting, the Government Records Council ("Council") considered the April 18, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian's response to the Complainant's OPRA request failed to address each request item sought and did not provide a lawful basis for the denial of access to each requested record, Custodian's response was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. Because the Complainant's request Items No. 1 through No. 4 fail to identify a specific government record and would require the Custodian to conduct research, such request is invalid under OPRA 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, 37 (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) and Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010).
3. The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., by providing an insufficient response to the Complainant's request. The Complainant's request Items No. 1 through No. 4 fail to specifically identify a government record and therefore is invalid under OPRA. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.



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 25th Day of April, 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: April 30, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 25, 2012 Council Meeting**

**Daniel Gatson¹
Complainant**

GRC Complaint No. 2010-276

v.

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

Records Relevant to Complaint: Copies of the following:

1. Any and all audio taped interviews conducted between January 1, 1998 through January 1, 2002 by any and all members of the Morris County Prosecutor's Office ("MCPO") with Dammen McDuffie.
2. Any and all notes, documents, texts, e-mails and facsimiles that were prepared between January 1, 1998 through January 1, 2002 by any or all members of MCPO regarding Dammen McDuffie and the Complainant.
3. Any and all letters, notes, documents, texts, e-mails, and facsimiles that were received by any or all members of MCPO on behalf of Dammen McDuffie.
4. Any and all letters, e-mails texts, and facsimiles received by any and all members of MCPO from January 1, 1998 through January 1, 2003 from the Somerset County Prosecutor's Office ("SCPO"), Bergen County Prosecutor's Office ("BCPO") and the Federal Bureau of Investigations, ("FBI") pertaining to Dammen McDuffie, the Complainant and the search of certain properties.³

Request Made: March 29, 2010

Response Made: April 6, 2010

Custodian: Sheila M. Leary

GRC Complaint Filed: October 22, 2010⁴

Background

March 29, 2010

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.

¹ No legal representation listed on record.

² Represented by Daniel W. O'Mullan, Esq. (Morristown, NJ)

³ The Complainant lists three (3) addresses in his OPRA request.

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

April 6, 2010

Custodian's response to the OPRA request. The Custodian responds in writing on the Complainant's OPRA request on the first (1st) business day following receipt of such request.⁵ The Custodian states that access to the requested records is denied because said records are criminal investigatory records and are exempt from disclosure as inter-agency or intra-agency advisory communications.

October 22, 2010

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:⁶

- Complainant's OPRA request dated March 29, 2010
- Letter from the Custodian to the Complainant dated April 6, 2010

The Complainant states that he filed an OPRA request on April 5, 2010 seeking the records relevant to this complaint listed above. The Complainant also states that on April 6, 2010 the Custodian denied access to these records because said records were criminal investigatory and inter-agency or intra-agency advisory communications.

The Complainant states that the records he requests are "made, maintained or kept on file in the agency's official course of business" pursuant to N.J.S.A. 47:1A-1.1. The Complainant argues that the Custodian failed to prove that the requested records pertain to an investigation or that their release would be inimical to the public interest.

The Complainant agrees to mediate this complaint.

October 27, 2010

Offer of Mediation sent to the Custodian.⁷

November 15, 2010

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

November 19, 2010⁸

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated March 29, 2010

⁵ The Custodian certifies in the Statement of Information that she received the Complainant's OPRA request on April 5, 2010.

⁶ It appears the Complainant attempted to file a complaint regarding this matter with the Superior Court of New Jersey, Appellate Division, on September 13, 2010. However, the Appellate Division dismissed the appeal on September 17, 2010 because pursuant to N.J.S.A. 47:1A-6, "a person who is denied access to a government record by a custodian of the record may file an action in Superior Court or file a complaint with the [GRC]." The Appellate Division states that the Complainant has not filed a complaint with either the Superior Court or the GRC.

⁷ The Custodian does not respond to the offer of mediation.

⁸ The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant's OPRA 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 as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

- Letter from the Custodian to the Complainant dated April 6, 2010

The Custodian certifies that she received the Complainant's OPRA request on April 5, 2010. The Custodian also certifies that she responded to the Complainant's OPRA request on April 6, 2010 denying him access to the requested records because they are criminal investigatory records and are exempt from disclosure as inter-agency or intra-agency advisory communications.. The Custodian asserts that the records responsive to the Complainant's OPRA request are criminal investigatory records pursuant to N.J.S.A. 47:1A-3.b.

Analysis

Whether the Custodian's response to the Complainant's OPRA request was sufficient?

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 also provides that:

"[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ..." N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

"[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request ...* In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ...*" (Emphasis added.) N.J.S.A. 47:1A-5.i.

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 Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the Complainant’s Counsel asserted that the Custodian violated OPRA by failing to respond to each of the Complainant’s request items individually within seven (7) business days. The GRC examined how the facts in Paff applied to its prior holding in O’Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005) (finding that the Custodian’s initial response stating that the Complainant’s request was a duplicate of a previous request was legally insufficient because the Custodian has a duty to answer each request item individually). The Council reasoned that, “[b]ased on OPRA and the GRC’s holding in O’Shea, a custodian is vested with the responsibility to respond to each individual request item within seven (7) business days after receipt of such request.” The GRC ultimately held that:

“[a]lthough the Custodian responded in writing to the Complainant’s August 28, 2007 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g.” *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-166 (April 2009) and Kulig v. Cumberland County Board of Chosen Freeholders, GRC Complaint No. 2008-263 (November 2009).

The evidence of record indicates that the Custodian responded in writing to the Complainant’s OPRA request within the statutorily mandated seven (7) business day response period stating that access to the requested records is denied because said records are criminal investigatory records and are exempt from disclosure as inter-agency or intra-agency advisory communications. The evidence of record also indicates that the Custodian did not address each of the Complainant’s request items individually, rather gave a blanket denial for all records requested.

Because the Custodian’s response to the Complainant’s OPRA request failed to address each request item sought and did not provide a lawful basis for the denial of access to each requested record, Custodian’s response was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).

Whether the Complainant's request Items No. 1 through No. 4 is valid 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.

In determining that MAG Entertainment's request for "all documents or records" from the Division of Alcoholic Beverage Control pertaining to selective enforcement was invalid under OPRA, the Appellate Division noted that:

"[m]ost 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.*

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

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

¹⁰ As stated in Bent, *supra*.

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 the instant complaint, the Complainant requested copies of the following: 1) Any and all audio taped interviews conducted between January 1, 1998 through January 1, 2002 by any and all members of the MCPO with Dammen McDuffie; 2) Any and all notes, documents, texts, e-mails and facsimiles that were prepared between January 1, 1998 through January 1, 2002 by any or all members of MCPO regarding Dammen McDuffie and the Complainant; 3) Any and all letters, notes, documents, texts, e-mails, and facsimiles that were received by any or all members of MCPO on behalf of Dammen McDuffie; and 4) Any and all letters, e-mails texts, and facsimiles received by any and all members of MCPO from January 1, 1998 through January 1, 2003 from the SCPO, BCPO and the FBI pertaining to Dammen McDuffie, the Complainant and the search of certain properties.¹¹

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.*

Moreover, in Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010), the Council examined what constitutes a valid request for e-mails under OPRA. The Council determined that:

"In accord with MAG, supra, and its progeny, in order to specifically identify an e-mail, OPRA requests must contain (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted, and (3) a

¹¹ The Complainant lists three (3) addresses in his OPRA request.

valid e-mail request must identify the sender and/or the recipient thereof.” (Emphasis in original). Id.

In the instant matter, the Complainant’s request for e-mails provided a specific range of dates in which the requested e-mails were transmitted. However, request Items No. 2 and No. 4 failed to name a specific identifiable sender and recipient: rather, the request seeks e-mails from and to a specific class of employee (specifically, Morris County Prosecutor’s Office, Somerset County Prosecutor’s Office, Bergen County Prosecutor’s Office, and the Federal Bureau of Investigations) and not individually named senders and recipients. Furthermore, the Complainant’s request Item No. 3 failed to identify a date range. See Elcavage, *supra*. In order for the Custodian to respond to this request, the Custodian would be required to evaluate all e-mails in their database which contained the particular key words sought by the Complainant in order to determine whether the named recipients of such communications were employees of these agencies. Such a request is not feasible as there are probably hundreds of employees that work for the agencies identified in the request and no specific employees were named in the Complainant’s request.

Therefore, because the Complainant’s request Items No. 1 through No. 4 fail to identify a specific government record and would require the Custodian to conduct research, such request is invalid under OPRA 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, 37 (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) and Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010).

Whether the Custodian’s insufficient response rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

In the instant complaint, although the Custodian's response was timely, she failed to address each request item and failed to provide a lawful basis for the denial of access to each requested record to the Complainant's OPRA request. However, the Complainant's OPRA request is invalid under OPRA because it fails to specifically identify a government record and would require the Custodian to conduct research.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., by providing an insufficient response to the Complainant's request. The Complainant's request for Items No. 1 through No. 4 fails to specifically identify a government record and therefore is invalid under OPRA. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian's response to the Complainant's OPRA request failed to address each request item sought and did not provide a lawful basis for the denial of access to each requested record, Custodian's response was insufficient pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. Because the Complainant's request Items No. 1 through No. 4 fail to identify a specific government record and would require the Custodian to conduct research, such request is invalid under OPRA 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, 37 (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) and Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010).

3. The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., by providing an insufficient response to the Complainant's request. The Complainant's request Items No. 1 through No. 4 fail to specifically identify a government record and therefore is invalid under OPRA. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Harlynn A. Lack
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 18, 2012