



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

May 29, 2012 Government Records Council Meeting

Donna Antonucci
Complainant

Complaint No. 2010-284

v.

City of Hoboken (Hudson)
Custodian of Record

At the May 29, 2012 public meeting, the Government Records Council (“Council”) considered the May 22, 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 every item listed in the Complainants’ request is a request for information and not a request for a specific identifiable government record, and because when a request fails to specifically identify the records sought that request is not encompassed by OPRA, and because the Complainant’s request required the Custodian to perform research to identify the location depicted in each photograph and whether any citations were issued for alleged violations, the Custodian has met the burden of proof that access to these records was not unlawfully denied pursuant to the Superior Court’s decisions in 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 the Council’s decision in 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 29th Day of May, 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: June 1, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 29, 2012 Council Meeting**

**Donna Antonucci¹
Complainant**

GRC Complaint No. 2010-284

v.

**City of Hoboken (Hudson)²
Custodian of Records**

Records Relevant to Complaint: See Exhibit A³

Request Made: September 22, 2010

Response Made: September 30, 2010

Custodian: Michael Mastropasqua

GRC Complaint Filed: October 28, 2010⁴

Background

September 22, 2010

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed in Exhibit A on an official OPRA request form.

September 22, 2010

Memorandum from the City Clerk to Zoning Officer Ann Holtzman. The Clerk asks the Zoning Officer to review the Complainant's OPRA request and advise the Clerk if any records are located that are responsive to the Complainant's request.

September 22, 2010

Memorandum from the City Clerk to Brandy Forbes in the Office of Community Development. The Clerk asks Ms. Forbes to review the Complainant's OPRA request and advise the Clerk if any records are located that are responsive to the Complainant's request.

¹ Represented by Alysia M. Proko-Smickley, Esq. (Hoboken, NJ).

² No legal representation listed on record.

³ The Complainant's request comprises forty-eight (48) pages. The request contains twenty-three (23) numbered photographs from unidentified locations presumably within the City of Hoboken. In a separate narrative, the Complainant tells the Custodian to see the attached photographs. Thereafter, the Complainant refers to each photograph by number and tries to identify the location by an address or nearby landmark. The Complainant then asks the Custodian a series of questions about each photographed scene. The only records the Complainant requests are copies of violations cited, if applicable, and a copy of the municipal code or codes that govern the display of signs depicted in the various photographs.

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

September 27, 2010

Letter from City Zoning Officer, Ms. Holtzman, to the Complainant. Ms. Holtzman informs the Complainant that she is in receipt of the Complainant's OPRA request. Ms. Holtzman tells the Complainant that the Complainant requested very few records but because the Complainant asked for the municipal code governing signage, she is providing the Complainant with a copy of said code as an attachment to this letter.

September 30, 2010

Custodian's response to the OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that the Complainant requested information, analysis, and opinions from the municipal staff rather than government records. The Custodian informs the Complainant that a request for such information is an improper OPRA request.

October 28, 2010

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

- Complainant's OPRA request dated September 22, 2010
- Letter from the City Zoning Officer to the Complainant dated September 27, 2010
- Custodian's response to the OPRA request dated September 30, 2010

The Complainant states that she submitted her OPRA request to the Custodian on September 22, 2010 and received a written response from the Custodian on September 30, 2010. The Complainant states that the Custodian and the Zoning Officer deliberately avoided answering each item in her OPRA request and must be fined \$10,000.00. The Complainant states that in addition to asking for the municipal zoning code she also asked for an interpretation of the law. The Complainant states that the Custodian has a duty to answer these questions to make it feasible for citizens to avoid violations.⁵

The Complainant does not agree to mediate this complaint.

April 6, 2011

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

April 12, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated September 22, 2010
- Memorandum from the City Clerk to the Zoning Officer dated September 22, 2010
- Memorandum from the City Clerk to Ms. Forbes in the Office of Community Development dated September 22, 2010
- Letter from the City Zoning Officer to the Complainant dated September 27, 2010
- Custodian's response to the OPRA request dated September 30, 2010

⁵ The Complainant also restated some of the facts and assertions already set forth in her OPRA request. Donna Antonucci v. City of Hoboken (Hudson), 2010-284 – Findings and Recommendations of the Executive Director

- Thirty-one (31) page New Jersey Department of State, Division of Archives and Records Management (“DARM”) General Records Retention Schedule for Municipal Agencies, undated

The Custodian certifies that his search for the requested records involved asking the Zoning Officer and Ms. Forbes in the Office of Community Development to determine if there were any records responsive to the Complainant’s request and to report promptly the results of their search to the Custodian. The Custodian also certifies that Hoboken City Code Section 197-31 is a permanent record and cannot be destroyed in accordance with the Records Destruction Schedule established and approved by DARM.⁶

The Custodian certifies that the Complainant’s request required an analysis and interpretation of the Complainant’s questions as well as an investigation of, and research into, each of the photographs provided by the Complainant as part of her OPRA request. The Custodian states that he was able to determine from the photographs and the associated narrative provided by the Complainant that she was seeking a copy of Hoboken City Code Section 197-31, as well as copies of violation citations for violations which may have appeared in the photographs. The Custodian further certifies that a copy of Hoboken City Code Section 197-31 was disclosed to the Complainant on or before September 30, 2010. The Custodian certifies that because the specific addresses of the photographed properties and the specific dates that the photographs were taken was unknown to the city officials attempting to respond to the Complainant’s request, no specifically identifiable records could be located. The Custodian certifies that because no specifically identifiable records could be located, the Custodian lawfully denied the Complainant’s request for violation citations or any other records that may have been responsive to the request. The Custodian cites 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), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) in support of his position.

The Custodian further certifies that the balance of the Complainant’s request sought information and interpretations. The Custodian cites to the Council’s decision in Neugebauer and Muzio v. Borough of Leonia, GRC Complaint No. 2008-69 (September 2009) as holding that where a complainant’s request is a request for information and not a request for a specific identifiable government record, the request is not encompassed by OPRA; therefore, the custodian cannot be determined to have unlawfully denied access to government records under OPRA. The Custodian certifies that in the instant complaint the Complainant requested information and interpretations, which was not a valid request pursuant to the Council’s decision in Neugebauer and Muzio, *supra*.

April 12, 2011

E-mail from the Complainant to the Custodian’s Counsel. The Complainant acknowledges receipt of the Custodian’s SOI and informs the Custodian’s Counsel that she is on vacation and will not be able to review the SOI until she returns on April 18, 2011.

⁶ The Custodian means Hoboken City Code Section 196-31, which governs signage in the municipality. Donna Antonucci v. City of Hoboken (Hudson), 2010-284 – Findings and Recommendations of the Executive Director

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.

In this complaint, the Complainant’s OPRA request consisted of numerous photographs from unidentified locations. In a separate narrative, the Complainant referred the Custodian to each photograph and attempted to identify the location by an address or nearby landmark. The Complainant then asked the Custodian a series of questions about each photographed location. The only records the Complainant requested were copies of violation citations, if such citations were issued, and a copy of the municipal code or codes that govern the display of signs which were depicted in the various photographs. The Complainant left it up to the Custodian to perform research to identify the location depicted in the photograph and whether any citations were issued for alleged violations. The Complainant also asked the Custodian several questions about each photograph designed to elicit information, not records. Often, the Complainant was not even sure of a location depicted in the photographs she provided. For example, the Complainant drew the Custodian’s attention to “Picture 6” and stated, “Real estate sign somewhere on Madison, Jefferson, Adams, Monroe...”

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.*

In addition, 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

Moreover, 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

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

⁸ As stated in Bent, *supra*.

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), N.J. 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...” Accordingly, the test under MAG then, is whether a requested record is a *specifically identifiable* government record.

Under such rationale, the GRC has repeatedly found that blanket requests are not valid OPRA requests. In the matter of Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), the relevant part of the Complainant’s request sought:

- Item No. 2: “From the Borough Engineer’s files: all engineering documents for all developments or modifications to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
- Item No. 3: From the Borough Engineer’s files: all engineering documents for all developments or modifications to North St., to the south and east of Wilson St.
- Item No. 4: From the Borough Attorney’s files: all documents related to the development or modification to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
- Item No. 5: From the Borough Attorney’s files: all documents related to the development or modification to North Street, to the south and east of Wilson St.”

In reviewing the complainant’s request, the Council found 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).”

This matter is substantially different from the facts presented in Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). In Burnett, the plaintiff appealed from an order of summary judgment entered against him in his suit to compel production by the County of Gloucester of documents requested pursuant to OPRA, consisting of “[a]ny and all *settlements, releases or similar documents* entered into, approved or accepted from 1/1/2006 to present.” *Id.* at 508. (Emphasis added). The Appellate

Division determined that the request sought a specific type of document, although it did not specify a particular case to which such document pertained, and was therefore not overly broad. *Id.* at 515-16.

In the instant complaint, the Complainant failed to identify with specificity *any* government record. Even the Complainant's request for a municipal code was not specific, but rather was in the context of a query about a particular location depicted in a numbered photograph. As such, although the Custodian did disclose a copy of Hoboken City Code Section 196-31 to the Complainant, he was under no obligation pursuant to OPRA to do so because OPRA "is not intended as a research tool litigants may use to force government officials to identify and siphon useful information." MAG, supra at 546.

Accordingly, because every item listed in the Complainant's request is a request for information and not a request for a specific identifiable government record, and because when a request fails to specifically identify the records sought that request is not encompassed by OPRA, and because the Complainant's request required the Custodian to perform research to identify the location depicted in each photograph and whether any citations were issued for alleged violations, the Custodian has met the burden of proof that access to these records was not unlawfully denied pursuant to the Superior Court's decisions in MAG, supra, Bent, supra, New Jersey Builders Association, supra, and the Council's decision in Schuler, supra.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because every item listed in the Complainants' request is a request for information and not a request for a specific identifiable government record, and because when a request fails to specifically identify the records sought that request is not encompassed by OPRA, and because the Complainant's request required the Custodian to perform research to identify the location depicted in each photograph and whether any citations were issued for alleged violations, the Custodian has met the burden of proof that access to these records was not unlawfully denied pursuant to the Superior Court's decisions in 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 the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Prepared By: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.
Executive Director

May 22, 2012