



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

May 24, 2011 Government Records Council Meeting

Cynthia Burton
Complainant

Complaint No. 2010-330

v.

NJ Department of Law & Public Safety,
Division of State Police
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the May 17, 2011 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. The Complainant’s request for “travel” and “expense” records fails to identify the specific government records sought, said request is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (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, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007- 151 (February 2009). As such, the Custodian has not unlawfully denied access to said portion of the Complainant’s OPRA request.
2. The Custodian has lawfully denied access to the requested payroll records because said records are exempt from public access under N.J.S.A. 47:1A-9.a. which upholds exemptions contained in an Executive Order of the Governor, or any regulation promulgated pursuant to an Executive Order of the Governor. Executive Order No. 47 (Christie 2010) permits rules proposed by the NJ Department of Law & Public Safety to remain in full effect. N.J.A.C. 13:1E-3-2(a)3 exempts records which may reveal an agency’s surveillance, security or investigative techniques or procedures and N.J.A.C. 13:1E-3.2(a)7 exempts “[t]he duty assignment of an individual law enforcement officer or any personally identifiable information that may reveal or lead to information that may reveal such duty assignment, including, but not limited to, overtime data pertaining to an individual law enforcement officer.” Despite payroll records being public records under N.J.S.A. 47:1A-10, the release of said records in this instance leaves the Executive Protection Bureau vulnerable to how heavy of a security level it places on protecting various dignitaries and are therefore exempt under the regulations cited above. Because the requested records are exempt under the regulations cited above, the Council need not address the claimed executive privilege exemption.



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 24th Day of May, 2011

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: June 1, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 24, 2011 Council Meeting**

**Cynthia Burton¹
Complainant**

GRC Complaint No. 2010-330

v.

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

Records Relevant to Complaint: All travel, payroll and other expense records for costs incurred to cover the Governor as he traveled around the state and country to campaign for candidates between Labor Day 2010 and Election Day 2010, as well as such records involving the Governor's participation in events for Reform Jersey Now during 2010.

Request Made: December 6, 2010

Response Made: December 13, 2010

Custodian: D/SFC Christopher Nunziato

GRC Complaint Filed: December 15, 2010³

Background

December 6, 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.

December 13, 2010

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request. The Custodian states that he conducted a search of the Division's records and identified various records responsive to the request. However, the Custodian states that access to the requested records is denied because releasing the records would reveal confidential security measures and/or surveillance techniques that would create a safety risk and the requested records are therefore exempt from disclosure under N.J.S.A. 47:1A-1.1. Additionally, the Custodian states that said records are exempt from disclosure under Executive Order No. 47 (Christie 2010) and the executive privilege.

¹ No legal representation listed on record.

² Represented by Senior DAG Mary Beth Wood, on behalf of the NJ Attorney General.

³ The GRC received the Denial of Access Complaint on said date.

December 15, 2010

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

- Complainant’s OPRA request dated December 6, 2010
- Custodian’s response to the Complainant’s OPRA request dated December 13, 2010

The Complainant states that she submitted her OPRA request on December 6, 2010 and that the Custodian denied said request on December 13, 2010. The Complainant asserts that she does not understand the security risk of reporting on something that has already happened, such as the State Police costs associated with the Governor’s travel. The Complainant contends it is reasonable to expect that a sharp security force would handle future trips in different ways than it did in 2010.

The Complainant also states that she has read the exception which discusses the secrecy of records to protect an individual trooper’s name. The Complainant states that she is not seeking the names of the people on the governor’s security team; she seeks the details, including overtime or compensatory time, of how much it costs for the security team to travel with the Governor, as well as how many troopers traveled with the Governor.

Additionally, the Complainant claims that executive privilege cannot be used to conceal how tax dollars are spent and the costs incurred by state workers. The Complainant asserts that executive privilege is designed to protect frank communications between a governor and his or her advisors.

The Complainant also agrees to mediate this complaint.

January 7, 2011

Offer of Mediation sent to Custodian.

January 10, 2011

The Custodian declines mediation.

February 7, 2011

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

February 10, 2011

E-mail from Custodian’s Counsel to GRC. Counsel requests an extension to submit the Custodian’s completed Statement of Information.

February 10, 2011

E-mail from GRC to Custodian’s Counsel. The GRC grants an extension to submit the Custodian’s completed SOI until the close of business on February 22, 2011.

February 22, 2011

Custodian’s SOI with the following attachments:

- Copy of court's decision in North Jersey Media Group, Inc. v. NJ Department of Law & Public Safety, Division of State Police, Docket No. MER-L-907-08 (Law Div. November 4, 2010).
- Custodian's response to the Complainant's OPRA request dated December 13, 2010
- Certification of Lt. Albert Ponenti dated February 21, 2011
- Letter from the Custodian's Counsel to GRC dated February 22, 2011

The Custodian certifies that he received the Complainant's OPRA request on December 6, 2010. The Custodian certifies that he provided the Complainant with a written response to her OPRA request on December 13, 2010.

The Custodian also certifies that he did not undertake a search for the requested records because said records are exempt from disclosure under OPRA's exemption for records that would reveal confidential security measures and/or surveillance techniques that would create a safety risk. The Custodian asserts that the records are also exempt under Executive Order No. 47 (Christie).

Further, the Custodian certifies that no records responsive to the 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.

The Custodian provides a document index detailing the records responsive to the Complainant's OPRA request below:

(A) List of all records responsive to Complainant's OPRA request (include the number of pages for each record).	(B) List the Records Retention Requirement and Disposition Schedule for each records responsive to the Complainant's OPRA request	(C) List of all records provided to Complainant, in their <u>entirety</u> or <u>with redactions</u> (include the <u>date</u> such records were provided).	(D) If records were disclosed with redactions, give a general nature description of the redactions.	(E) If records were denied in their entirety, give a general nature description of the record.	(F) List the legal explanation and statutory citation for the denial of access to records in their <u>entirety</u> or <u>with redactions</u>.
Travel, payroll and expense records for costs incurred to protect the Governor while campaigning between Labor Day 2010 and Election Day 2010	7 years	None	N/A	Travel, payroll and expense records for the executive protection detail providing security to the Governor	OPRA's exemption for confidential security measures; Executive Order 47; executive privilege
Travel, payroll and expense records for costs	7 years	None	N/A	Travel, payroll and expense records for the	OPRA's exemption for confidential

incurred to protect the Governor while participating in events for Reform Jersey now in 2010				executive protection detail providing security to the Governor	security measures; Executive Order 47; executive privilege
--	--	--	--	--	--

Lt. Albert Ponenti certifies that he is employed by the NJ Department of Law & Public Safety, Division of State Police as the Bureau Chief of the Executive Protection Bureau (“EPB”) and further certifies that he holds the rank of Lieutenant. Lt. Ponenti certifies that the EPB is a unit of the Division of State Police that specializes in, among other things, providing security for the State’s Chief Executive.

Lt. Ponenti certifies that the Custodian properly withheld the requested records because the requestor is not entitled to information regarding the number of Division personnel assigned to an EPB detail. Lt. Ponenti certifies that disclosure of information about compensatory time and overtime would necessarily disclose those staffing levels that are deserving of protections. Lt. Ponenti certifies that public dissemination of staffing information for the type of protective service details at issue here would provide critical insight into the EPB’s designation of staffing levels for specific details and/or types of details, and could reasonably allow a wrongdoer to potentially use this information to determine staffing levels of future details. Lt. Ponenti also certifies that the release of the requested records would allow a terrorist, criminal, or lone wolf attacker to identify the strength of the executive protection force on any given day and the planned protection strategies and security protocols used by the EPB in protecting the Governor or other dignitaries.

Additionally, Lt. Ponenti certifies that secrecy and unpredictability are crucial for safety during the travels of high-ranking public officials who are potential targets for terrorism. Lt. Ponenti certifies that if details of past travels are exposed in writing, patterns and likely destinations can quite easily be deciphered. Lt. Ponenti certifies that releasing detailed knowledge of regular or routine stops during the course of the Governor’s schedule would provide extensive insight into his everyday routine and personal preferences. Lt. Ponenti certifies that said information could provide a veritable roadmap of the Governor’s future activities and preferences to criminals or terrorists and allow them to use this information to anticipate the location and security strength provided at any given time and plan an attack accordingly.

Further, Lt. Ponenti certifies that what may seem as innocuous information to a lay person could provide vital intelligence to a terrorist group or criminal-minded individual. Lt. Ponenti certifies that the EPB’s greatest strength is keeping information surrounding a “protectee’s” movements, locations and destinations off the radar.

February 22, 2011

Letter from Custodian’s Counsel to GRC in support of the Custodian’s SOI. The Custodian’s Counsel states that the Complainant submitted her OPRA request on December 6, 2010 which the Custodian denied on December 13, 2010. Counsel states

that in the Complainant's Denial of Access Complaint she indicated that she has "trouble understanding the security risk of reporting on something that has already happened" and believed it was "reasonable to expect that a sharp security force would handle such future trips in different ways than they did in 2010."

Counsel asserts that the Custodian properly denied access to the Complainant's OPRA request because of the significant safety and security concerns identified by the State Police in maintaining the confidentiality of the information sought, and because Executive Order No. 47 (Christie 2010) specifically exempts the records sought from disclosure. As such, Counsel contends that the GRC should affirm the Custodian's denial of access and dismiss this complaint.

Additionally, Counsel asserts that in evaluating public records requests which implicate homeland security concerns, like the request underlying this matter, New Jersey's courts have consistently recognized the compelling public interest in maintaining confidentiality and have deferred to governmental explanations of the nexus between confidentiality and security. Counsel contends that the "mere chance" of a terrorist attack or other criminal act against the Governor or any other dignitary under EPB protection "would be a terrible blow to the State" and should weigh heavily in balancing the competing interests for and against disclosure. Philadelphia Newspapers v. State, 232 N.J. Super. 458, 465 (App. Div. 1989).

Further, Counsel states that in ACLU v. County of Hudson, 352 N.J. Super. 44 (App. Div. 2002), the court recognized that "there can be no question" that there is "a compelling interest in securing the safety of the nation's citizens against terrorist attack." *Id.* at 78. Counsel states that relying on cases decided by the United States Supreme Court, the court observed that this "compelling interest" extended to protecting the confidentiality of information essential to national security. *Id.* at 78-79 (citing Central Intelligence Agency v. Sims, 471 U.S. 159, 175 (1985); Snepp v. United States, 444 U.S. 507, 509 n.3 (1980)). Counsel states that the court also noted:

"[I]ntelligence gathering in the computer age is like the construction of a mosaic where the importance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." ACLU, *supra*, 352 N.J. Super. at 79 (internal citations omitted).

Counsel claims that because EPB security protocols are consistent whether they are employed for the Governor, a former Governor, or a visiting dignitary, disclosure of that information would endanger the Governor, other State officials, and visiting foreign or domestic dignitaries.

Moreover, Counsel states that the Third Circuit has similarly adopted a deferential standard in evaluating deferral Freedom of Information Act ("FOIA") requests for information withheld on national security grounds, affording substantial weight to an agency's affidavit concerning the need to withhold security-related records in view of the

agency's "unique insights" into the "adverse effects [that] might occur as a result of public disclosure." American Friends Service Comm. V. Dept. of Defense, 831 F.441, 444 (3rd Cir. 1987) (citations omitted). Counsel states that federal courts post-September 11 have consistently concluded that they are in an extremely poor position to second-guess the executive's judgment in areas of national security like counter-terrorism. See Center for National Sec. Studies v. U.S. Dept. of Justice, 318 F.3d 918, 927-28 (D.C. Cir. 2003).

Additionally, Counsel states that the GRC has also taken the view that the balance between disclosure and the risk of terrorism must be struck in favor of the public interest in confidentiality. Mariano v. DEP, GRC Complaint No. 2003-140 (February 2004). Counsel asserts that when balancing the goal of providing access to public records against the risk that disclosure of such information might impede the State's ability to defend its citizens from terrorism, the GRC has found that the State's interest substantially outweighs the interest of a requestor. Counsel states that even where there is a legitimate business reason, "once the requested information is released, there is no way of ensuring that such information would remain in the hands of parties who would use it for proper purposes." Mariano, *supra*.

Further, Counsel states that the issue of disclosing EPB records has recently been considered in North Jersey Media Group v. State (unreported)(Docket No. MER-L-907-08, Law Div. 2010). Counsel states the court concluded, in denying North Jersey Media's request for staffing levels for the protection details offered by EPB, that "the secrecy of staffing levels of the EPB's details is critical to its ability to effectively protect this State's dignitaries." (Slip op. at 15). Counsel states that the court further held it was "not difficult to conclude" that the EPB documents would, if disclosed, "endanger the safety of people and property" and that was what "OPRA's exemption for security measures protects." (Slip op. at 17).

Counsel claims that the strong public policy, recognized in OPRA, regulation, executive order and case law, of ensuring the confidentiality of information related to homeland security and the safety of persons overwhelmingly weighs against the release of the requested records. Counsel contends that the arguments the Complainant raises in her Denial of Access Complaint are incorrect, irrelevant and represent an insufficient basis not enough to disregard the State Police's assertion of confidentiality on homeland security grounds.

Furthermore, Counsel states that on November 3, 2010 Governor Christie issued Executive Order No. 47 which set forth proposed OPRA exemptions for certain records retained by Executive Branch agencies. Counsel states that proposed *N.J.A.C. 13:1E-3.2(a)3* states that records which may reveal an agency's surveillance, security or investigative techniques or procedures are not government records subject to public access under OPRA. Similarly, Counsel states that proposed *N.J.A.C. 13:1E-3.2(a)7* states that the duty assignment of an individual law enforcement officer or any personally identifiable information that may reveal or lead to duty assignment, including but not limited to overtime data pertaining to a law enforcement officer shall not be publically accessible. Counsel asserts that these proposed regulations are in full force and effect

pursuant to Executive Order No. 47 and further support the Custodian's denial of the Complainant's OPRA request.

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 ...A government record shall not include the following information which is deemed to be confidential for the purposes of [OPRA]...security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software" (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 mandates that:

"[t]he provisions of this act... shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to...regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor..." N.J.S.A. 47:1A-9.a.

OPRA also states that:

"...an individual's name, title, position, salary, *payroll record*, length of service, date of separation and the reason therefor, and the amount and type of any pension received *shall be a government record...*" (Emphasis added). N.J.S.A. 47:1A-10.

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 stated that she submitted her OPRA request on December 6, 2010 and the Custodian denied access to said request on December 13, 2010. The Custodian certified that he denied access to the Complainant’s request on the basis that the records are exempt from public access as “security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software” pursuant to N.J.S.A. 47:1A-1.1. The Custodian also certified that said records are exempt from public access pursuant to Executive Order No. 47 (Christie 2010).

Further, the Custodian’s Counsel stated that on November 3, 2010 Governor Christie issued Executive Order No. 47 which set forth proposed OPRA exemptions for certain records retained by Executive Branch agencies. Counsel stated that proposed *N.J.A.C.* 13:1E-3.2(a)3 provides that records which may reveal an agency’s surveillance, security or investigative techniques or procedures are not government records subject to public access under OPRA. Similarly, Counsel stated that proposed *N.J.A.C.* 13:1E-3.2(a)7 states that the duty assignment of an individual law enforcement officer or any personally identifiable information that may reveal or lead to duty assignment, including but not limited to overtime data pertaining to a law enforcement officer shall not be publically accessible. Counsel asserted that these proposed regulations are in full force and effect pursuant to Executive Order No. 47 and support the Custodian’s denial of the Complainant’s OPRA request.

Additionally, the Custodian’s Counsel contended that in evaluating public records requests which implicate homeland security concerns, like the request underlying this matter, New Jersey’s courts have consistently recognized the compelling public interest in maintaining confidentiality, and have deferred to governmental explanations of the nexus between confidentiality and security. Counsel asserted that the “mere chance” of a terrorist attack or other criminal act against the Governor or any other dignitary under EPB protection “would be a terrible blow to the State” and should weigh heavily in balancing the competing interests for and against disclosure. Philadelphia Newspapers v. State, 232 N.J. Super. 458, 465 (App. Div. 1989).

Counsel also claimed that because EPB security protocols are consistent whether they are employed for the Governor, a former Governor, or a visiting dignitary, disclosure of that information would endanger the Governor, other State officials, and visiting foreign or domestic dignitaries.

In further support of the Custodian’s denial of access, the Custodian included a certification from the Bureau Chief of EPB with his Statement of Information. Lt. Ponenti certified that disclosure of information about compensatory time and overtime would necessarily disclose those staffing levels that are deserving of protections. Lt.

Ponenti certified that public dissemination of staffing information for the type of protective service details at issue here would provide critical insight into the EPB's designation of staffing levels for specific details and/or types of details, and could reasonably allow a wrongdoer to potentially use this information to determine staffing levels of future details. Lt. Ponenti also certified that the release of the requested records would allow a terrorist, criminal, or lone wolf attacker to identify the strength of the executive protection force on any given day and the planned protection strategies and security protocols used by the EPB in protecting the Governor or other dignitaries.

Conversely, the Complainant asserted in her Denial of Access Complaint that she does not understand the security risk of reporting on something that has already happened, such as the State Police side of the costs associated with the Governor's travel. The Complainant contended it is reasonable to expect that a sharp security force would handle future trips in different ways than it did in 2010.

The Complainant also stated that she has read the exception to disclosure cited by the Custodian which discusses the secrecy of records to protect an individual trooper's name. The Complainant stated that she is not seeking the names of the people on the governor's security team; she seeks the details, including overtime or compensatory time, of how much it costs for the security team to travel with the Governor, as well as how many troopers traveled with the Governor.

The requested records at issue in this complaint are travel, payroll and expense records for costs incurred to cover the Governor during two (2) specific time periods. With regard to the Complainant's request for "travel and expense records," said request could encompass a number of records such as stipend records, payment vouchers, invoices, toll receipts, parking receipts, hotel receipts, etc. The terms "travel records" and "expense records" are broad terms that do not specifically refer to any identifiable government record.

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),⁴ 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.”⁵

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...”

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).”

This instant 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.

Here, as previously stated, “travel records” and “expense records” are not requests for a specific identifiable government record. In order for this portion of the request to seek specific government records the requestor would have to identify the specific types of travel records sought (such as toll receipts, parking receipts, stipend records, etc.) as well as the specific types of expense records (food vouchers/receipts, purchase orders,

⁴ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁵ As stated in Bent, *supra*.

invoices, etc.). As written, the Complainant's request for travel and expense records provides a broad generic description of a category of records rather than identifying specific government records. Although the Complainant does provide specific time frames for the request, such information still does not make this request meet the level of specificity required for a valid OPRA request.

Therefore, the Complainant's request for "travel" and "expense" records fails to identify the specific government records sought, said request is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (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, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007- 151 (February 2009). As such, the Custodian has not unlawfully denied access to said portion of the Complainant's OPRA request.

However, the Complainant also requested payroll records and has specifically indicated that she is seeking the overtime or compensatory time reflecting how much it costs for the security team to travel with the Governor. OPRA specifically mandates that "an individual's...payroll record...shall be a government record..." N.J.S.A. 47:1A-10. OPRA also contains an exemption at N.J.S.A. 47:1A-1.1 for "security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software." Thus, to deny access to payroll records on the basis that said records are exempt under N.J.S.A. 47:1A-1.1 is contradictory to OPRA's subsequent provision at N.J.S.A. 47:1A-10 which specifically indicates that payroll records are public records.

Furthermore, OPRA also contains the following provision:

"[t]he provisions of this act... shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to...regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor..." N.J.S.A. 47:1A-9.a.

N.J.S.A. 47:1A-9.a therefore mandates that OPRA's provisions do not supersede any exemption contained in an Executive Order of the Governor, or any regulation promulgated pursuant to an Executive Order of the Governor. The Custodian in this matter alleged that Executive Order No. 47 (Christie 2010) also exempts the requested records from public access.

Executive Order No. 47 (Christies 2010) provides that:

"[t]he exemptions from public access that have been proposed by the Departments of Law and Public Safety, Corrections, Military and Veterans Affairs, Environmental Protection, and Community Affairs, set forth in Appendix A attached hereto, shall be and shall remain in full force and

effect pending their adoption as final rules pursuant to the provisions of the Administrative Procedure Act.”

“Appendix A” as referred to in Executive Order No. 47 includes *N.J.A.C. 13:1E-3* which contains confidentiality of records provisions applicable to the New Jersey Department of Law and Public Safety. Specifically, *N.J.A.C. 13:1E-3.1* states that “[t]he rules in this subchapter apply to the Department of Law & Public Safety and all divisions and agencies in the Department...” Because the Division of State Police is a division within the Department of Law & Public Safety, these rules apply to the subject public agency in this matter.

N.J.A.C. 13:1E-3-2(a)3 provides that “records which may reveal the identity of a confidential informant, a confidential source, a citizen informant, or an agency’s surveillance, security or investigative techniques or procedures or undercover personnel” are not considered government records subject to public access. Also, *N.J.A.C. 13:1E-3.2(a)7* provides that “[t]he duty assignment of an individual law enforcement officer or any personally identifiable information that may reveal or lead to information that may reveal such duty assignment, including, but not limited to, overtime data pertaining to an individual law enforcement officer” is not considered a government record.

Here, the Bureau Chief of the EPB certified that disclosing information about compensatory time and overtime would disclose the staffing levels that could allow a wrongdoer to use the information to determine staffing levels of future security details. Although the Complainant stated that she is not seeking the names of the officers, she is seeking the number of officers that traveled with the Governor as well as their payroll information. Even without releasing the identity of the officers in the Governor’s security team, disclosing the number of officers would reveal the level of strength used in the Governor’s security force. Similarly, by releasing payroll records of unnamed personnel would also permit a requestor to determine the strength of the security force. Such information leaves the EPB vulnerable to how heavy of a security level it places on protecting various dignitaries. Releasing the requested payroll records in this particular instance would reveal security techniques and procedures which are exempt under *N.J.A.C. 13:1E-3-2(a)3*, as well as “information that may reveal or lead to information that may reveal...duty assignment[s]” of a law enforcement officer pursuant to *N.J.A.C. 13:1E-3.2(a)7*.

Therefore, the Custodian has lawfully denied access to the requested payroll records because said records are exempt from public access under *N.J.S.A. 47:1A-9.a* which upholds exemptions contained in an Executive Order of the Governor, or any regulation promulgated pursuant to an Executive Order of the Governor. Executive Order No. 47 (Christie 2010) permits rules proposed by the NJ Department of Law & Public Safety to remain in full effect. *N.J.A.C. 13:1E-3.2(a)3* exempts records which may reveal an agency’s surveillance, security or investigative techniques or procedures and *N.J.A.C. 13:1E-3.2(a)7* exempts “[t]he duty assignment of an individual law enforcement officer or any personally identifiable information that may reveal or lead to information that may reveal such duty assignment, including, but not limited to, overtime data pertaining to an individual law enforcement officer.” Despite payroll records being public records under *N.J.S.A. 47:1A-10*, the release of said records in this instance leaves

the EPB vulnerable to how heavy of a security level it places on protecting various dignitaries and are therefore exempt under the regulations cited above. Because the requested records are exempt under the regulations cited above, the Council need not address the claimed executive privilege exemption.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Complainant's request for "travel" and "expense" records fails to identify the specific government records sought, said request is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (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, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007- 151 (February 2009). As such, the Custodian has not unlawfully denied access to said portion of the Complainant's OPRA request.
2. The Custodian has lawfully denied access to the requested payroll records because said records are exempt from public access under N.J.S.A. 47:1A-9.a. which upholds exemptions contained in an Executive Order of the Governor, or any regulation promulgated pursuant to an Executive Order of the Governor. Executive Order No. 47 (Christie 2010) permits rules proposed by the NJ Department of Law & Public Safety to remain in full effect. N.J.A.C. 13:1E-3-2(a)3 exempts records which may reveal an agency's surveillance, security or investigative techniques or procedures and N.J.A.C. 13:1E-3.2(a)7 exempts "[t]he duty assignment of an individual law enforcement officer or any personally identifiable information that may reveal or lead to information that may reveal such duty assignment, including, but not limited to, overtime data pertaining to an individual law enforcement officer." Despite payroll records being public records under N.J.S.A. 47:1A-10, the release of said records in this instance leaves the Executive Protection Bureau vulnerable to how heavy of a security level it places on protecting various dignitaries and are therefore exempt under the regulations cited above. Because the requested records are exempt under the regulations cited above, the Council need not address the claimed executive privilege exemption.

Prepared By: Dara Lownie
Communications Manager

Approved By: Catherine Starghill, Esq.
Executive Director

May 17, 2011