



**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*

**RICHARD E. CONSTABLE, III**  
*Acting Commissioner*

**FINAL DECISION**

**April 25, 2012 Government Records Council Meeting**

Robert Verry  
Complainant

Complaint No. 2010-337

v.

Borough of South Bound Brook (Somerset)  
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 Complainant’s request fails to specify identifiable government records and requires the Custodian to conduct research that is outside of the scope of a custodian’s duties as affirmed by MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005), the Complainant’s request is invalid under OPRA. Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
2. Because the use of the word “may” in the GRC’s regulations at *N.J.A.C. § 5:105-2.4* provide the Council with the discretion to accept or reject a Custodian’s Statement of Information which is submitted beyond the five business day deadline set forth therein, the Council declines to reject the Custodian’s Statement of Information in the matter herein despite the fact that it was submitted beyond the five business day submission deadline.

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 25<sup>th</sup> 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**

**Robert Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-337**

v.

**Borough of South Bound Brook (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of:

1. Correspondence to [the] Police Committee dated October 20, 2010.
2. The reviewed Fittin Notice of Motion to Compel.
3. The reviewed attached exhibits.
4. Drafted Opposition to Fittin's Motion to Compel Discovery.
5. Correspondence from Minchello re: PBA response dated October 20, 2010.

**Request Made:** November 21, 2010

**Response Made:** December 1, 2010

**Custodian:** Donald E. Kazar

**GRC Complaint Filed:** December 20, 2010<sup>3</sup>

**Background**

**November 21, 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 1, 2010**

Custodian's response to the OPRA request. The Custodian's Counsel responds in writing via letter to the Complainant's OPRA request on the sixth (6<sup>th</sup>) business day following receipt of such request. Counsel states that access to request item No. 1 is denied on the grounds that this record is advisory, consultative, and deliberative ("ACD") material that is exempt from disclosure. Counsel further states that access to request Item No. 5 is also denied as the information contained therein constitutes information generated by or on behalf of public employers or public employees in connection with collective negotiations which is exempt from disclosure under OPRA.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Francesco Taddeo, Esq., of Taddeo Law (Somerville, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

**December 12, 2010**

E-mail from the Complainant to the Custodian. The Complainant argues that in order for the attorney work product doctrine to apply, the materials must have been prepared in anticipation of litigation and not in the ordinary course of business. The Complainant maintains he needs to see the actual content of the requested records to judge whether such an exemption is valid. The Complainant maintains that he will reconsider the filing of a Denial of Access Complaint if he is provided with the subject matter of the requested records and the actual content of the records so that he may judge the validity of the exemption cited.

**December 20, 2010**

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

- Complainant’s OPRA request dated November 21, 2010
- Custodian’s response to the OPRA request dated December 1, 2010
- Letter from the Complainant to the Custodian dated December 12, 2010<sup>4</sup>

The Complainant states that without giving a “general nature description” of each record, the Custodian cannot maintain that the requested records are exempt. The Complainant states that identifying the records as “correspondence” does not satisfy the law as Paff v. New Jersey Department of Labor, Board of Review, 370 N.J. Super. 346, 354-55 (2005) requires an agency to explain their reason for denying each record in a manner that will enable other parties to assess the applicability of the privilege or protection. The Complainant maintains that the Borough has made only a vague and conclusory assertion of ACD privilege. The Complainant further argues that the requested records should have at least been provided to him with redactions.

The Complainant does not agree to mediate this complaint.

**January 11, 2011**

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

**February 4, 2011**

Custodian’s SOI.<sup>5</sup> The Custodian certifies that none of the requested records were destroyed. The Custodian certifies that Counsel denied access to the requested correspondence because such correspondence is privileged, confidential, attorney-client communications and cites Gannett New Jersey Partners, LP v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005) in support of this proposition. The Custodian further argues that the requested records are also exempt from disclosure because they contain information in connection with collective bargaining negotiations and statements involving negotiations. The Custodian further argues that these communications qualify as ACD material and are exempt from disclosure as provided by OPRA. The Custodian states that Counsel provided the requested “Fittin Notice of Motion to Compel” to the

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<sup>4</sup> The Complainant attached additional documentation not relevant to the adjudication of this matter.

<sup>5</sup> The Custodian failed to state the relevant records’ retention schedules.

Complainant on December 1, 2010. The Custodian contends that the Complainant's arguments are without legal basis.

### **February 11, 2011**

The Complainant's response to the Custodian's SOI. The Complainant asserts that the Custodian has failed to submit the SOI within five (5) business days and that the submissions contained therein are improper and should be excluded from the record. In light of these assertions, the Complainant contends that the submitted SOI is not valid and should not be considered by the GRC.

### **Analysis**

#### **Whether the Complainant's records 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 complaint, of issue is whether the Complainant's request is valid under OPRA. The Complainant requested:

1. "Correspondence to [the] Police Committee dated October 20, 2010
2. The reviewed Fittin Notice of Motion to Compel.
3. The reviewed attached exhibits.

4. Drafted Opposition to Fittin's Motion to Compel Discovery.
5. Correspondence from Minchello re: PBA response dated October 20, 2010."

To wit, 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.*

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),<sup>6</sup> 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."<sup>7</sup>

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

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<sup>6</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>7</sup> As stated in Bent, *supra*.

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.

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)."

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.*

In Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010), the Council clarified 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 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 fails to name identifiable records with reasonable specificity. To wit, Request Items No. 1 and 5 fail to name a sender in the first instance and a recipient in the second. Additionally, Request Items No. 2, 3, and 4 pertaining to the “Fittin Motion to Compel “ are overly broad and fail to name relevant identifiers such as docket numbers and date ranges.

Therefore, because the Complainant’s request fails to specify identifiable government records and requires the Custodian to conduct research that is outside of the scope of a custodian’s duties as affirmed by MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005), the Complainant’s request is invalid under OPRA. Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Although the Council also takes notice of the Custodian’s argument that some of the records responsive to such a request may be exempt from disclosure as ACD material or generated by or on behalf of public employers or public employees in connection with collective negotiations, the Council declines to address this issue as the Complainant’s request is invalid under OPRA.



## **Whether the Custodian’s properly submitted a Statement of Information?**

OPRA provides in pertinent part that “[t]he custodian shall have the opportunity to present the board with any statement or information concerning the complaint which the custodian wishes.” N.J.S.A. 47:1A-7.e.

Moreover, the GRC’s regulations state in pertinent part:

“(f) Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than five business days from the date of receipt of the SOI form from the Council's staff. Custodians must sign the SOI. The Council will not accept additional submissions from the custodian unless the Executive Director orders same or offers its express approval for same. Failure to comply with this time period *may* result in the complaint being adjudicated based solely on the submissions of the complainant.” (Emphasis added). *N.J.A.C. § 5:105-2.4.*

In the instant matter, the Complainant contends that because the Custodian submitted his SOI to the GRC beyond the five (5) business day deadline to do so, the SOI’s submission is improper as are the attachments and documentation contained therein and further contends that the Council should disregard such submission.

However, because the use of the word “may” in the GRC’s regulations at *N.J.A.C. § 5:105-2.4* provide the Council with the discretion to accept or reject a Custodian’s SOI which is submitted beyond the five business day deadline set forth therein, the Council declines to reject the Custodian’s SOI in the matter herein despite the fact that it was submitted beyond the five business day submission deadline.

## **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant’s request fails to specify identifiable government records and requires the Custodian to conduct research that is outside of the scope of a custodian’s duties as affirmed by MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005), the Complainant’s request is invalid under OPRA. Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
2. Because the use of the word “may” in the GRC’s regulations at *N.J.A.C. § 5:105-2.4.* provide the Council with the discretion to accept or reject a Custodian’s Statement of Information which is submitted beyond the five business day deadline set forth therein, the Council declines to reject the

Custodian's Statement of Information in the matter herein despite the fact that it was submitted beyond the five business day submission deadline.

Prepared By: Darryl C. Rhone  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

April 18, 2012