



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

Patricia L. Hoover
Complainant

Complaint No. 2011-12

v.

Township of Howell (Monmouth)
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 voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Complainant’s request is invalid under OPRA because although request Item No. 1 identifies specific government records sought and provides a case name, it fails to provide a specific date range or time frame for the records sought and request Items No. 2 and No. 3 fail to specify a case name or other identification regarding the matter to which the records sought pertain, fail to provide a specific date range or time frame for the records sought and would require research beyond the scope of a custodian’s duties, 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 (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).

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**

**Patricia L. Hoover¹
Complainant**

GRC Complaint No. 2011-12

v.

**Township of Howell (Monmouth)²
Custodian of Records**

Records Relevant to Complaint: Copies of:

1. Reports and officer's notes regarding the investigation of magazines sent to Patricia Hoover.
2. Detective Romano's notes regarding comments, notes, and memos on Trevor Dittmer.
3. Results of polygraph test.

Request Made: December 2, 2010

Response Made: December 15, 2010

Custodian: Bruce Davis

GRC Complaint Filed: January 10, 2011³

Background

December 2, 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 15, 2010

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the ninth (9th) business day following receipt of such request. The Custodian states that access to the requested records is denied because the records requested by the Complainant are related to a criminal investigation and are thereby exempt from OPRA whether the cases are open or closed.

January 10, 2011

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:⁴

¹ No legal representation listed on record.

² Represented by McKenna G. Kingdon, Esq. (Howell, NJ).

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

⁴ The Complainant also attached additional correspondence that is not relevant to the adjudication of this complaint.

- Complainant's OPRA request dated December 2, 2011
- Custodian's response to the OPRA request dated December 15, 2011⁵

The Complainant states that the requested records pertain to an investigation of a matter in which she was the victim. The Complainant further asserts that the Township Manager at the time, Tom Charniecki, informed her that the case would no longer be handled by the Township Police Department and would instead be investigated by management. The Complainant asserts that the Custodian has withheld the information contained in the requested records from her since 2005.

The Complainant agrees to mediate this complaint.

January 10, 2011

Offer of Mediation sent to the Custodian.

January 11, 2011

The Custodian agrees to mediate this Complaint.

April 8, 2011

The Complaint is referred back from Mediation.

April 8, 2011

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

April 13, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated December 2, 2011
- Custodian's response to the OPRA request dated December 15, 2011

The Custodian certifies that upon receipt, he forwarded the request to the Township Police Department. The Custodian further certifies that the Police Department found over a dozen supplemental investigatory narrative reports that may have been responsive to the Complainant's request. The Custodian certifies that these records must be permanently retained and cannot be destroyed. The Custodian certifies that the Police Department forwarded these records to the Township's Legal Department; after review, Counsel determined that the records were exempt from disclosure under OPRA because they qualified as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1 and Janeczko v. N.J. Department of Law and Public Safety, GRC Complaint No. 2002-79 (June 2004) and 2002-80 (June 2004).

⁵ The Complainant also attached additional documentation that is not relevant to the adjudication of this complaint.

Analysis

Whether the Custodian timely responded to the Complainant's OPRA request?

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 mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁶ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In the instant matter, the Custodian received the Complainant's request on December 2, 2010. Evidence in the record reveals that the Custodian responded to the Complainant's request in writing on December 15, 2010, the ninth (9th) business day following receipt of such request. Accordingly, the Custodian failed to provide a timely response to the Complainant's request pursuant to N.J.S.A. 47:1A-5.i.

Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a

⁶ It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

“deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra.

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, the Complainant sought:

1. Reports and officer’s notes regarding investigation of magazines sent to Patricia Hoover.
2. Detective Romano’s notes regarding comments, notes, and memos.
3. Results of Trevor Dittmer polygraph test.

Although the Custodian argues that any records responsive to this request are exempt from disclosure under OPRA pursuant to the criminal investigatory exemption provided in N.J.S.A. 47:1A-1.1 and Janeczko v. N.J. Department of Law and Public Safety, GRC Complaint No. 2002-79 (June 2004) and 2002-80 (June 2004), the Complainant’s request is invalid under OPRA because it is overly broad and unclear.

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),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

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the court enumerated the responsibilities of a custodian and a requestor as follows:

"OPRA identifies the responsibilities of the requestor and the agency relevant to the prompt access the law is designed to provide. The custodian, who is the person designated by the director of the agency, N.J.S.A. 47:1A-1.1, must adopt forms for requests, locate and redact documents, isolate exempt documents, assess fees and means of production, identify requests that require "extraordinary expenditure of time and effort" and warrant assessment of a "service charge," and, when unable to comply with a request, "indicate the specific basis." N.J.S.A. 47:1A-5(a)-(j). The requestor must pay the costs of reproduction and submit the request with information that is essential to permit the custodian to comply with its obligations. N.J.S.A. 47:1A-5(f), (g), (i).

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

⁸ As stated in Bent, *supra*.

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...”

The Council has held the same. For example, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), the Council held that relevant portions of the Complainant’s request were “not requests for identifiable government records, [as] the requests [were] invalid and the Custodian [was] 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 matter, although request Item No. 1 identifies specific government records sought and provides a case name, such request item fails to provide a specific date range or time frame for the records sought. Request Items No. 2 and No. 3 fail to specify a case name or other identification regarding the matter to which the records sought pertain and fail to provide a specific date range or time frame for the records sought. The Complainant’s request therefore requires *research* in order to determine records that are responsive to the request; research is not the statutory duty of a custodian. Accordingly, the Complainant’s request is invalid under OPRA .

Therefore, the Complainant’s request is invalid under OPRA because although request Item No. 1 identifies specific government records sought and provides a case name, it fails to provide a specific date range or time frame for the records sought, and request Items No. 2 and No. 3 fail to specify a case name or other identification regarding the matter to which the records sought pertain, fail to provide a specific date range or time frame for the records sought and would require research beyond the scope of a custodian’s duties, 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 (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).

Because the Council determines herein that the Complainant’s request is invalid under OPRA, the Council declines to address whether the requested records would be exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1 and Janeczko v. N.J. Department of Law and Public Safety, GRC Complaint No. 2002-79 (June 2004) and 2002-80 (June 2004).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. The Complainant's request is invalid under OPRA because although request Item No. 1 identifies specific government records sought and provides a case name, it fails to provide a specific date range or time frame for the records sought and request Items No. 2 and No. 3 fail to specify a case name or other identification regarding the matter to which the records sought pertain, fail to provide a specific date range or time frame for the records sought and would require research beyond the scope of a custodian's duties, 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 (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).

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 18, 2012