



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

Heidi Brunt
Complainant

Complaint No. 2011-13

v.

Middletown Board of Education (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 the Complainant’s request is invalid under OPRA because it is an overly broad blanket request that fails to specifically name identifiable government records and because the request requires 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); 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**

Heidi Brunt¹
Complainant

GRC Complaint No. 2011-13

v.

Middletown Board of Education (Monmouth)²
Custodian of Records

Records Relevant to Complaint:

1. Correspondence (e-mails, letters, memos, faxes) to the Board of Education (“BOE”) members, administrative staff or employees of the BOE regarding the standards based grading system from 2009-2010.
2. The proposal from the BOE employee responsible for bringing the standards based report card system to Middletown Elementary School.³

Request Made: December 14, 2010

Response Made: December 22, 2010

Custodian: Amy P. Gallagher

GRC Complaint Filed: January 14, 2011⁴

Background

December 14, 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 in an e-mail referencing OPRA. The Complainant indicates that the preferred method of delivery is e-mail and requests that the records be scanned and provided at no charge.

December 22, 2010⁵

Custodian’s response to the OPRA request attaching a copy of Middletown BOE minutes dated June 14, 2010. The Custodian responds in writing via e-mail to the Complainant’s OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that Item No. 1 of the Complainant’s request (correspondence, including e-mails, letters, memos, and faxes, to BOE members, administrative staff or employees of the BOE regarding the standards based grading

¹ No legal representation listed on record.

² Represented by Christopher B. Parton, Esq., of Kenney, Gross, Kovats, & Parton (Red Bank, NJ).

³ The Complainant also requested additional documents not at issue in the instant complaint.

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

⁵ The Custodian also attached additional records that are responsive to a portion of the Complainant’s request that is not relevant to the instant Complaint.

system from 2009-2010) is overly broad as it does not name either a sending or receiving party. The Custodian further states that access to Item No. 2 of the Complainant's request (the proposal from the BOE employee responsible for bringing the standards based report card system to Middletown Elementary School) is denied because it does not exist as a single identifiable record and is instead the cumulative result of work done by the Report Card Revision Committee. The Custodian states that she has attached a copy of the Committee's June 14, 2010 pre-meeting workshop minutes as verification of this fact.

January 13, 2011

E-mail from the Custodian to the Complainant. The Custodian states that following a discussion with the Complainant that clarified some issues surrounding her December 14, 2010 request, the Custodian was able to locate some records that are responsive to the Complainant's request. The Custodian further states that in response to the Complainant's request for correspondence, the Custodian located over 1,400 e-mails that may be responsive to this request and it would impose an undue burden to discern which e-mails are and are not responsive to the Complainant's request. The Custodian states that a preliminary scan through the subject line of the e-mails reveals that the responsive e-mails would likely be exempt from disclosure as advisory, consultative, and deliberate ("ACD") material pursuant to OPRA.

The Custodian asserts that she did search through the e-mails to see if any of the correspondence came from people other than employees and administrators and only e-mails from the Complainant were responsive to the request. The Custodian maintains that she made further inquiries with central office staff to find responsive faxes and memos. The Custodian asserts that the central office did not find any such records.

The Custodian further states that no minutes were kept during any meetings regarding the development of new report cards and any notes that do exist constitute ACD material. The Custodian asserts that she is attaching a PowerPoint presentation from a June 20, 2010 BOE presentation on report card standards, a Grade 1-5 Report Card Revision Committee Report and a "Superintendent's Update Article" from June 2010 that discussed new standard-based report card implementation.

The Custodian states that if the Complainant wishes to specify a particular record sought and name a specific sender and recipient thereof, she can assist the Complainant in retrieving additional records.

January 14, 2011

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

- Complainant's OPRA request dated December 14, 2010
- Custodian's response to the OPRA request dated December 22, 2010
- E-mail from the Custodian to the Complainant dated January 13, 2011

- A copy of an undated BOE PowerPoint Presentation⁶

The Complainant states that he contacted the Custodian and told her that it is her duty as the Records Custodian to locate records by asking her elected officials and staff for the correspondence responsive to the Complainant's request. The Complainant contends that on January 13, 2011 the Custodian provided him with a PowerPoint file and an internal 2008 memo that discussed the BOE's approval of the System for Kindergarten and Multi-age grades. The Complainant further asserts that the Custodian directed him to the BOE's website and provided him with a letter dated November 15, 2010 that informed parents that the new report cards were in use.

The Complainant states that the January 13, 2011 e-mail and attached PowerPoint presentation is proof that the Custodian knowingly and willfully denied her access to Item No. 2 of the instant request. The Complainant states that the Custodian informed her that because there are over 1,400 possible records that are responsive to Item No. 1 of this Complaint, the Complainant's OPRA request is considered an undue burden on the BOE's office. The Complainant further asserts that the Custodian denied her access to the 1,400 e-mails responsive to Item No. 1 of the request because they are considered ACD material. The Complainant contends that the Custodian admitted that the e-mails were not reviewed, and therefore it is impossible for the Custodian to determine whether the e-mails are ACD material. The Complainant argues that this is irrelevant because the Custodian willingly sent her ACD material when the Custodian provided her with the 2008 memo.

The Complainant does not agree to mediate this complaint.

March 8, 2011

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

March 14, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated December 14, 2010
- Custodian's response to the OPRA request dated December 22, 2010
- E-mail from the Custodian to the Complainant dated January 13, 2011
- A copy of an undated BOE PowerPoint Presentation⁷

The Custodian certifies that she received the Complainant's OPRA request on December 14, 2010 and responded to such request on December 22, 2010. The Custodian certifies that the school district's files were reviewed in order to locate the requested records. The Custodian also certifies that she communicated with the district administrators who were involved in the development of the standards based report card.

⁶ The Complainant attached additional documentation that is not relevant to the adjudication of this Complaint.

⁷ The Custodian attached additional documentation that is not relevant to the adjudication of this Complaint.

The Custodian certifies that no records responsive to the Complainant's request have been destroyed.

In addition, the Custodian certifies that there are no records responsive to the Complainant's request. The Custodian argues that Complainant's request is also defective because it seeks inter-agency communications that constitute privileged ACD material. The Custodian further contends that the Complainant's request lacked specificity. The Custodian argues that fulfillment of such a broad request would be unreasonably burdensome and likely unsuccessful as it is not clear what the Complainant is seeking.

However, the Custodian certifies that upon receiving the Custodian's December 22, 2010 response to the OPRA request, the Complainant contacted the BOE and attempted to clarify her request. The Custodian certifies that in response to the Complainant's clarification, the Custodian provided a BOE PowerPoint Presentation, memo and article to the Complainant on January 13, 2011.

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 (e-mails, letters, memos, faxes) to the BOE members, administrative staff or employees of the BOE regarding the standards based grading system from 2009-2010.
2. The proposal from the BOE employee responsible for bringing the standards based report card system to Middletown Elementary School.

Here, the Complainant's request is invalid under OPRA because it is broad and unclear and fails to name identifiable government records with reasonable specificity. 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),⁸ 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."⁹

⁸ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁹ As stated in Bent, *supra*.

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 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:

2. 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.
3. 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.
4. 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.

5. 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)."

In the instant matter, Item No. 1 of the Complainant's request is overbroad in that it is a blanket request for general correspondence which fails to reasonably specify exact senders, recipients, and pertinent date ranges; such request is therefore invalid under OPRA pursuant to Bent and MAG. Furthermore, Item No. 2 of the Complainant's request is invalid under OPRA because it fails to name a valid sender and recipient of the sought after proposal. The fulfillment of the Complainant's request would require the Custodian to conduct research beyond the scope of her statutory duties. Appropriately, the Complainant's entire request is invalid.

Therefore, the Complainant's request is invalid under OPRA because it is an overly broad blanket request that fails to specifically name identifiable government records and because the request requires 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); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The Council takes notice of the Custodian's efforts to satisfy the Complainant's invalid request, as the Custodian searched for the requested records and provided the Complainant with documentation that she found was responsive to the Complainant's request. Because the Complainant's request is invalid under OPRA, however, the Council declines to address whether such records would be exempt from disclosure under OPRA as advisory, consultative or deliberative material or whether the Custodian waived such exemption by disclosure of such records.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant's request is invalid under OPRA because it is an overly broad blanket request that fails to specifically name identifiable government records and because the request requires 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); 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