



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
Commissioner

FINAL DECISION

July 31, 2012 Government Records Council Meeting

Jerry W. Pecaro
Complainant

Complaint No. 2011-190

v.

County of Union
Custodian of Record

At the July 31, 2012 public meeting, the Government Records Council (“Council”) considered the July 24, 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 constitutes an overly broad, blanket request that fails to specifically name an identifiable government record sought 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) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).

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 31st Day of July, 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: August 6, 2012

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**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 31, 2012 Council Meeting**

Jerry W. Pecaro¹
Complainant

GRC Complaint No. 2011-190

v.

County of Union²
Custodian of Records

Records Relevant to Complaint:

Any and all records, official police reports, complaints, memoranda, correspondence, or files between Ed Koenig of the Union County Prosecutor's Office, Jerry Pecaro, and Theresa Pecaro regarding the harassment of the Pecaro family by Police Officer Mike Mathis of the Berkley Heights, New Jersey Police Department from 2007 through 2010."

Request Made: April 26, 2011

Response Made: May 10, 2011

Custodian: Marlena Russo

GRC Complaint Filed: May 24, 2011³

Background

April 26, 2011

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.

May 10, 2011

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the first (1st) business day following receipt of such request.⁴ The Custodian acknowledges receipt of the Complainant's request on May 9, 2011 and informs the Complainant that a response to his request will be supplied by May 19, 2011.

May 18, 2011

Letter from the Custodian to the Complainant. The Custodian states that access to the requested records is denied because the records are exempt from disclosure under OPRA because they qualify as criminal investigatory records and personnel records.

¹ No legal representation listed on record.

² Represented by Mosuood Muftau, Esq., County Counsel, on behalf of Union County.

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

⁴ The Custodian certifies in the Statement of Information that she received the Complainant's OPRA request on May 9, 2012.

May 24, 2011

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

- Complainant’s OPRA request dated April 26, 2011
- Letter from the Custodian to the Complainant dated May 10, 2011

The Complainant states that the Custodian has improperly denied him access to the requested records. The Complainant contends that the Custodian’s reasons for denial are invalid because the Pecaro family is party to the requested records. The Complainant does not agree to mediate this complaint.

June 6, 2011

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

June 22, 2011

Letter from the Union County Prosecutor’s Office Sergeant of Investigations, Edward R. Koenig to the GRC. Sgt. Koenig certifies that his duties include the investigation of Internal Affairs matters and that he is responsible for complaints from citizens regarding Union County law enforcement agencies and special projects of a confidential nature and statistical reporting of all Internal Affairs matters from each county law enforcement agency. Sgt. Koenig certifies that the requested records are confidential Internal Affairs records and cannot be disclosed.

June 22, 2011

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated April 26, 2011
- Letter from the Custodian to the Complainant dated May 10, 2011
- Letter from the Custodian to the Complainant dated May 18, 2011⁵
- Letter from Sgt. Edward R. Koenig to the GRC dated June 22, 2011

The Custodian certifies a search for the requested records yielded approximately 100 pages of complaints, official police reports, memoranda, correspondence, and an internal affairs file. The Custodian further certifies that none of the responsive records have been destroyed as they have a permanent retention schedule.

The Custodian also argues that N.J.S.A. 47:1A-3.a. and Janeczko v. NJ Dep’t. of Law and Public Safety, Div. of Criminal Justice, GRC Complaint Nos. 2002-70 and 2002-80 (June 2004), supports the Custodian’s denial of access to the requested records as Janeczko allows an exemption from disclosure under OPRA for criminal investigatory records involving all manner of crimes, resolves or unresolved. The Custodian further contends that release of the requested records would be inimical to the public interest because such disclosure would jeopardize the Prosecutor’s Office’s ability to conduct

⁵ The Custodian attached additional documentation that is not relevant to the adjudication of this complaint.
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investigations and accordingly, the Custodian's denial of access is lawful pursuant to N.J.S.A. 47:1A-3.a. and N.J.S.A. 47:1A-6.

In addition, the Custodian cites N.J.S.A. 40A-14-181 in asserting that "every law enforcement agency shall adopt and implement guidelines which shall be consistent with the guidelines governing the Internal Affairs Policy and Procedures of Police Management Manual. The Custodian argues that this case should be dismissed as the requested records are not only criminal investigatory records, but are also part of an Internal Affairs Investigation that exempts the records from disclosure. The Custodian contends that this matter should be dismissed as there has been no unlawful denial of access.

June 6, 2012

Letter from the GRC to the Custodian. The GRC requests additional information from the Custodian in order to adjudicate this complaint. Accordingly, the GRC calls upon the Custodian to provide a certified answer to the following:

1. Whether the records responsive to the Complainant's OPRA request were part of or are currently part of a criminal investigation?
2. Whether there are any statutes, regulations or Attorney General Guidelines requiring that the responsive records be made, maintained or kept on file?

June 8, 2012

Letter from Sgt. Koenig to the GRC. On behalf of the Custodian, Sgt. Koenig responds to the GRC's June 6, 2012 letter. Sgt. Koenig certifies that all of the requested records are classified as both criminal investigatory records and internal affairs investigatory records. Sgt. Koenig further certifies that the records were not subject to disclosure pursuant to the Attorney General Guidelines that state "the nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information" and cannot be disclosed per N.J.S.A. 47:1A-9 and N.J.S.A. 40A:14-181.

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 the validity of the Complainant’s request seeking “any and all records, official police reports, complaints, memoranda, correspondence, or files between Ed Koenig of the Union County Prosecutor’s Office, Jerry Pecaro, and Theresa Pecaro regarding the harassment of the Pecaro family by Police Officer Mike Mathis of the Berkley Heights, New Jersey Police Department from 2007 through 2010.” Here, the Complainant’s request is invalid under OPRA because he has failed to name a specific identifiable record sought and because the request is overly broad.

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),⁶ 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."⁷

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). *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, 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.

Analyzed under the standards laid out in MAG, the Complainant's request is overly broad in that it seeks broad categories of records pertaining to a particular subject matter; as such, the request fails to specify an identifiable government record sought and requires research outside of a Custodian's duties. The request at issue simply names any

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

⁷ As stated in Bent, *supra*.

and all types of records that the Complainant believes that the Custodian may have. Such overly broad and blanket requests are the exact type of requests the Court in MAG sought to invalidate. *See also Bent* and NJ Builders.

Therefore, the Complainant's request is invalid under OPRA because it constitutes an overly broad, blanket request that fails to specifically name an identifiable government record sought 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) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant's request is invalid under OPRA because it constitutes an overly broad, blanket request that fails to specifically name an identifiable government record sought 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) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

July 24, 2012