



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

December 18, 2012 Government Records Council Meeting

Mark T. Messinger
Complainant

Complaint No. 2011-276

v.

Borough of North Plainfield (Somerset)
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the November 20, 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 because the Complainant’s OPRA request for e-mails fails to provide (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) adequate identification of the sender and/or the recipient thereof, said request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) and Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010). As such, the Custodian has not unlawfully denied said request. Additionally, because the Complainant’s OPRA request is invalid, the Council declines to address whether any records responsive are exempt from public access pursuant to the Attorney General’s Guidelines.

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 18th Day of December, 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: December 20, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 18, 2012 Council Meeting**

**Mark T. Messinger¹
Complainant**

GRC Complaint No. 2011-276

v.

**Borough of North Plainfield (Somerset)²
Custodian of Records**

Records Relevant to Complaint: Digital copy of:

1. All electronic communications between the police department administration (Lieutenants and above) and Sgts. Ciempola and Bond that either originate, terminate or both within North Plainfield Borough e-mail addresses.
2. All electronic communications between Sgt. Ciempola and Sgt. Bond that either originates terminate or both within North Plainfield Borough e-mail addresses.

Request Made: August 8, 2011

Response Made: August 15, 2011

Custodian: Richard Phoenix

GRC Complaint Filed: August 18, 2011³

Background

August 18, 2011

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

- Complainant’s OPRA request dated August 8, 2011
- E-mail from Deputy Clerk to Complainant dated August 8, 2011
- Custodian’s response to the Complainant’s request dated August 15, 2011
- E-mail from Complainant to the Custodian dated August 15, 2011
- Copy of OPRA
- Copy of New Jersey Attorney General *Internal Affairs Police & Procedures November 2000 Revision*

The Complainant states that he submitted his OPRA request on August 8, 2011 via e-mail for various electronic records. The Complainant states that on August 15, 2011 he received the Custodian’s denial of the OPRA request on the basis that the

¹ No legal representation listed on record.

² Represented by Philip G. George, Esq., of Eric M. Bernstein & Associates, LLC (Warren, NJ).

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

requested records pertain to an Internal Affairs investigation and are therefore exempt pursuant to N.J.S.A. 47:1A-1 et seq., N.J.S.A. 47:1A-5 and the New Jersey Attorney General *Internal Affairs Police & Procedures November 2000 Revision* § 11-44 and § 11-46.

The Complainant contends that there is no exemption under OPRA for internal affairs investigations. The Complainant states that pursuant to N.J.S.A. 47:1A-3, “this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced.” The Complainant asserts that the internal affairs investigation commenced after the date of his OPRA request and likely commences to prevent him from obtaining the requested records. Additionally, the Complainant contends that the requested records are not confidential pursuant to the Attorney General’s Guidelines.

The Complainant does not agree to mediate this complaint.

September 23, 2011

Custodian’s Statement of Information (“SOI”) with the following attachments:

- Mason v. City of Hoboken, 2008 NJ Super Unpub LEXIS 1660 (January 29, 2008)
- Complainant’s OPRA request dated August 8, 2011
- E-mail from Deputy Clerk to Complainant dated August 8, 2011
- E-mail from Deputy Clerk to Custodian and Chief of Police dated August 8, 2011
- Custodian’s response to the Complainant’s request dated August 15, 2011
- E-mail from Complainant to the Custodian dated August 15, 2011
- Internal memorandum from Captain B.A. Tufaro to Chief Parenti dated August 16, 2011⁴

The Custodian certifies that he received the Complainant’s OPRA request on August 8, 2011 and denied said request on August 15, 2011.

The Custodian certifies that the internal memorandum from Captain B.A. Tufaro to Chief Parenti dated August 16, 2011 details the efforts made to determine the nature and extent of the Complainant’s OPRA request. The Custodian certifies that the Borough originally believed that it could retrieve only approximately thirty (30) days’ worth of e-mails because information is routinely overwritten in the computer system which uses servers located off site. However, the Custodian states that Captain Tufaro was able to determine that the system had approximately three (3) years of information stored and available and said data has been held pending the outcome of this complaint.

The Custodian also certifies that he is not sure of the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management

⁴ The Custodian attached additional records which are not relevant to the adjudication of this Denial of Access Complaint.

Services. The Custodian certifies that there is a thirty (30) day retention period for e-mails and other electronic documents. Additionally, the Custodian certifies that under the Attorney General's guidelines, a seventy-five (75) year retention period exists for matters involving homicides, and five (5) years from the date of separation of any officer investigated by Internal Affairs.

The Custodian contends that he has not unlawfully denied access to the Complainant's OPRA request because said request is so general and expansive that it fails to identify any specific government records. The Custodian states that in Barber v. University of Medicine and Dentistry of New Jersey, GRC Complaint No. 2006-105 (August 2006), the Council held that a custodian had not denied access to records where the request sought to "review e-mails, letters and memos" from certain named individuals for certain time frames ranging from three (3) years to fifteen (15) years. The Custodian states that the Council held said request failed to request identifiable government records.

The Custodian asserts that in this instant matter, no data can be identified according to the Complainant's request without a wholesale evaluation of each and every e-mail stored electronically in the server of the Borough. The Custodian states that in Bent v. Stafford Township Police Department, 381 N.J. Super. 30 (App. Div. 2005), the Appellate Division held that:

"OPRA only allows requests for records, not requests for information. In this regard, OPRA is not intended as a research tool...to force government officials to identify and siphon useful information. In other words, a records custodian is not required to conduct research among its records...and correlate data from various government records in the custodian's possession. To qualify under OPRA then, the request must reasonably identify a records and not generally data, information or statistics." *Id.* at 37 (Citation and internal quotation omitted).

Additionally, the Custodian states that in Mason v. City of Hoboken, 2008 WL 221409 (App. Div. 2008), the Appellate Division held that a request for e-mails in digital form was not a request for identifiable government records. The Custodian states that the request in Mason sought:

"[a]ll written and electronic voice mails, correspondence, between City of Hoboken and its representatives and vendors/suppliers consultants on the Mayor's Park Plan. To include, but not limited to artists, photographer, printer, outdoor, media, etc. If available in electronic form please supply in that form." *Id.* at 1.

The Custodian also asserts that even if the GRC were to determine that the Complainant's OPRA request is a valid OPRA request that seeks identifiable government records, said records are exempt from public access. Specifically, the Custodian asserts that pursuant to the Attorney General's Guidelines, any correspondence that touches or concerns an Internal Affairs investigation must be kept confidential. The Custodian states that the Guidelines provide that, "[o]nly the law enforcement executive or his designee is empowered to release publically the details of an internal investigation or

disciplinary action.” Internal Affairs Policy and Procedures Appendix A, § III(G)(4), page 11-62.

September 25, 2011

The Complainant’s response to the Custodian’s SOI. The Complainant objects to the Custodian’s contention that a “massive amount of information” has been requested. The Complainant states that only two (2) e-mail accounts need to be reviewed: Sgts. Bond and Ciempola. The Complainant states that their inboxes and sent folders could be reviewed for e-mails to/from each other, Lt. Mack, Lt. Kohler, Lt. Clyne, Capt. Tufaro and Chief Parenti.

Additionally, the Complainant states that the Internal Affairs investigation began on August 11, 2011, which is three (3) days after the date of his OPRA request. Thus, the Complainant contends that said investigation was initiated as a “smoke and mirrors” attempt to deny him access to records.

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 ...” (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.

The Custodian certified that he received the Complainant's OPRA request on August 8, 2011 and denied said request on August 15, 2011. The Custodian denied the Complainant's OPRA request on the basis that the requested records pertain to an Internal Affairs investigation and are therefore exempt pursuant to N.J.S.A. 47:1A-1 et seq., N.J.S.A. 47:1A-5 and the New Jersey Attorney General *Internal Affairs Police & Procedures November 2000 Revision* § 11-44 and § 11-46.

However, in the Custodian's SOI the Custodian also contends that he has not unlawfully denied access to the Complainant's OPRA request because said request is so general and expansive that it fails to identify any specific government records.

Both the courts and the GRC have determined the level of specificity required for an OPRA request to be valid. Specifically, 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),⁵ 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

⁵ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents.”⁶

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 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.

However, the GRC has established criteria deemed necessary to specifically identify an e-mail communication, as is at issue here, in Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010). Specifically, the Council determined that “[i]n accordance with MAG, *supra*, and its progeny, in order to specifically identify an e-mail the OPRA request 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) identification of the sender and/or the recipient thereof.” *Id.*

Here, the Complainant fails to identify the content and/or subject of the e-mail and fails to identify the specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted. Additionally, while the Complainant does name Sgts. Ciempola and Bond as senders and/or the recipients of the requested e-mails, the Complainant also references “police department administration (Lieutenants and above)” without naming any specific persons. As such, the Custodian would then be required to figure out the identities of all other police department administration with the rank of Lieutenant and above, which is not required under OPRA. The Complainant does not identify any specific individuals until his September 25, 2011 response to the Custodian’s SOI.

⁶ As stated in Bent, *supra*.

In a similar matter, Wolosky v. Borough of Morris Plains (Morris), GRC Complaint No. 2010-190 (October 2011), the complainant sought access to e-mails sent or received by the Municipal Clerk's office to or from each and every other Municipal Clerk in Morris County regarding Jesse Wolosky and/or his OPRA request from June 29, 2010 to July 22, 2010. Because the complainant identified a category of individuals, rather than a list of specific individual names, the Council held that:

“[a] search for the individual employees' names and related e-mail addresses would constitute *research* that is not the statutory duty of a Custodian. Such a request is not in accordance with the requirements of MAG. Accordingly, the Complainant's request is invalid.”

Therefore, because the Complainant's OPRA request for e-mails fails to provide (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) adequate identification of the sender and/or the recipient thereof, said request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) and Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010). As such, the Custodian has not unlawfully denied said request. Additionally, because the Complainant's OPRA request is invalid, the Council declines to address whether any records responsive are exempt from public access pursuant to the Attorney General's Guidelines.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant's OPRA request for e-mails fails to provide (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) adequate identification of the sender and/or the recipient thereof, said request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) and Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (April 8, 2010). As such, the Custodian has not unlawfully denied said request. Additionally, because the Complainant's OPRA request is invalid, the Council declines to address whether any records responsive are exempt from public access pursuant to the Attorney General's Guidelines.

Prepared By: Dara L. Barry
Communications Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

November 20, 2012⁷

⁷ This complaint was prepared and scheduled for adjudication at the Council's November 27, 2012 meeting; however, said meeting was cancelled due to lack of quorum.