



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

May 29, 2012 Government Records Council Meeting

Daniel Gatson
Complainant

Complaint No. 2011-28

v.

New Jersey Department of Corrections
Custodian of Record

At the May 29, 2012 public meeting, the Government Records Council (“Council”) considered the May 22, 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 request fails to identify specific government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant’s request is overly broad and is invalid under OPRA 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 of Affordable Housing, 390 N.J. Super. 166 (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 29th Day of May, 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: June 4, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 29, 2012 Council Meeting**

**Daniel Gatson¹
Complainant**

GRC Complaint No. 2011-28

v.

**New Jersey Department of Corrections²
Custodian of Records**

Records Relevant to Complaint: Any and all papers, written or printed book, documents, drawings, map, plan, photographs, microfilm, data processed or image processed documents, information stored or maintained electronically or by sound recording or in a similar device, or any copy thereof, that has been made, maintained, kept on file or received in the official course of business, which concern the Complainant or mentions the Complainant's name.³

Request Made: December 30, 2010

Response Made: January 10, 2011

Custodian: John Falvey⁴

GRC Complaint Filed: January 25, 2011⁵

Background

December 30, 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.

January 10, 2011

Custodian's response to the OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the same business day as receipt of such request.⁶ The Custodian states that access to the requested records is denied because the Complainant's request is overly broad and does not adequately identify records sought. The Custodian also states that OPRA only requires the Custodian to respond to a request for specific records, not information, and does not require the Custodian to create a government record in order to respond. The Custodian further states that the

¹ No legal representation listed on record.

² No legal representation listed on record

³ The Complainant used the definition of a government record as listed in N.J.S.A. 47:1A-1.1.

⁴ The Custodian at the time of the Complainant's OPRA request and the Statement of Information was Deirdre Fedkenheuer.

⁵ The GRC received the Denial of Access Complaint on said date.

⁶ The Custodian certifies in the Statement of Information that she received the Complainant's OPRA request on January 10, 2011.

Complainant's request is invalid pursuant to MAG Entertainment v. Division of Alcohol Beverage Control, 375 N.J. Super. 534 (App. Div. 2005).

January 25, 2011

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching a letter from the Custodian to the Complainant dated January 10, 2011.⁷

February 17, 2011

Offer of Mediation sent to both parties.

February 18, 2011

Facsimile from the Custodian to the GRC. The Custodian declines the offer of mediation.⁸

February 22, 2011

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

March 7, 2011

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for an SOI on February 22, 2011 and to date has not received a response. Further, the GRC states that if the SOI is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

March 8, 2011⁹

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated December 20, 2010
- Letter from the Custodian to the Complainant dated January 10, 2011

The Custodian certifies that she received the Complainant's OPRA request on January 10, 2011 and responded via letter denying said request because it was overly broad and did not adequately identify records sought. The Custodian further certifies that she informed the Custodian in that same letter that OPRA only requires a government agency make identifiable government records readily accessible to a requestor. The Custodian argues that custodians are only required to respond to requests for specific records and are not required to conduct an "open-ended search of agency's files" pursuant to MAG Entertainment v. Division of Alcohol Beverage Control, 375 N.J. Super. 534 (App. Div. 2005).

⁷ The Complainant made no legal arguments or factual assertions in support of his Denial of Access Complaint. The Complainant also does not state whether he wishes to participate in the mediation process.

⁸ The Complainant agreed to mediate this complaint. The Complainant signed the agreement to mediate on February 22, 2011, although it is unclear when the GRC received the Complainant's agreement to mediate.

⁹ The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant's OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

The Custodian argues that the Complainant's OPRA request is invalid because it does not adequately identify a government record. The Custodian also argues that OPRA only requires the Custodian to respond to a request for specific records, not for information and it does not require the Custodian to create a government record in order to respond. The Custodian further argues that pursuant to MAG Entertainment v. Division of Alcohol Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), a request is invalid where it requires a Custodian to conduct research and correlate data from various records.

Analysis

Whether the Complainant's 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.

The Complainant filed an OPRA request for, "any and all papers, written or printed book, documents, drawings, map, plan, photographs, microfilm, data processed or image processed documents, information stored or maintained electronically or by sound recording or in a similar device, or any copy thereof, that has been made, maintained, kept on file or received in the official course of business, which concern the Complainant or mentions the Complainant's name." The Custodian denied the Complainant access to

the requested records via letter stating that it was overly broad and does not adequately identify records sought.

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),¹⁰ 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."¹¹

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

¹⁰ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹¹ As stated in Bent, *supra*.

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.

Further, 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)."

In the instant complaint, the Complainant's request mirrored the definition of a government record in N.J.S.A. 47:1A-1.1 and sought every record in the Custodian's possession which concerns the Complainant or mentions the Complainant's name. The

Complainant's request therefore failed to specifically identify a government record. The Complainant's OPRA request would have the Custodian not only search, but research, every single government record in the Custodian's possession to determine if said record relates to the Complainant or mentions his name.

Therefore, because the Complainant's request fails to identify specific government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant's request is overly broad and is invalid under OPRA 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 of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant's request fails to identify specific government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant's request is overly broad and is invalid under OPRA 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 of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

May 22, 2012