



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

December 18, 2012 Government Records Council Meeting

David Marc Drukaroff
Complainant

Complaint No. 2011-306

v.

Atlantic County Prosecutor's Office
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 the Complainant's request is invalid under OPRA because it fails to specify 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). Although the Custodian asserted that access to the requested records was denied because said records constitute OPRA exempt criminal investigatory records, the invalidity of the Complainant's request preempts the need for such analysis.

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**

**David Marc Drukaroff¹
Complainant**

GRC Complaint No. 2011-306

v.

**Atlantic County Prosecutor's Office²
Custodian of Records**

Records Relevant to Complaint: Scientific evidence that proves that the shootings of Alfred Carmichael, Albert Compton, and Albert Gracco in Atlantic City, NJ are linked together.

Request Made: September 9, 2011

Response Made: September 12, 2011

Custodian: Julie Horowitz

GRC Complaint Filed: September 21, 2011³

Background

September 9, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed in a letter referencing OPRA. The Complainant states that he wants the scientific evidence in whatever form it is in and the evidence must prove that ballistic analysis links the three crimes. The Complainant requests that the Custodian e-mail him the requested evidence, but states that he would also accept delivery of the records via US Mail.

September 12, 2011

Custodian's response to the OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the first (1st) business day following receipt of such request. The Custodian states that access to the requested record is denied because the request is overbroad and lacks specificity. In addition, the Custodian maintains that the request appears to seek criminal investigatory records that are exempt from public inspection pursuant to Janeczko v. NJ Department of Law and Public Safety, No. 2002-79 and 2002-80 (June 2004).

¹ No legal representation listed on record.

² Represented by Cary Shill, Esq., Chief Assistant Prosecutor (Mays Landing, NJ).

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

September 21, 2011

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

- Complainant’s OPRA request dated September 9, 2011
- Letter from the Custodian to the Complainant dated September 12, 2011

The Complainant states that the purpose of OPRA is to provide public access to government records. The Complainant argues that the purpose of the criminal investigatory exemption of OPRA is to prevent criminals from using OPRA to escape justice. The Complainant alleges that the Custodian is using OPRA to cover up incompetence and misconduct.⁵

The Complainant agrees to mediate this complaint.

October 27, 2011

Offer of Mediation sent to the Custodian.

November 1, 2011

The Custodian declines mediation.

November 2, 2011

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

November 9, 2011

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated September 9, 2011
- Letter from the Custodian to the Complainant dated September 12, 2011

The Custodian certifies that none of the requested records have been destroyed, and that because the Complainant has not sufficiently specified what evidence he seeks, the Custodian can only assure that evidence must be retained indefinitely.

The Custodian argues that criminal evidence is considered criminal investigatory records exempt from disclosure under OPRA pursuant to Janeczko, supra, and Brewer v. NJ Department of Law and Public Safety, Division of NJ State Police, GRC Complaint No. 2006-204 (October 2007). In addition, the Custodian maintains that N.J.S.A. 47:1A-9.a., in conjunction with Executive Order No. 123 (Gov. Kean, 1983), exempts fingerprint cards, plates, photographs, and similar criminal investigatory records from access under OPRA.

⁴ The Complainant attaches additional documentation that is not relevant to the adjudication of this complaint.

⁵ The Complainant makes additional arguments and allegations that are outside the scope of the jurisdiction of the GRC and the relief available to those who file a Denial of Access Complaint with the GRC.

The Custodian further argues that the Complainant has failed to specify an identifiable record, and accordingly, has submitted an invalid OPRA request. The Custodian asserts that the Complainant has failed to specify what medium the evidence he seeks is in and asks the Custodian to make a determination of what evidence pertains to his request.

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.

Moreover, OPRA provides that:

“Immediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” N.J.S.A. 47:1A-5.e.

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.

In the instant matter, the Complainant requested the “scientific evidence that proves that the shootings of Alfred Carmichael, Albert Compton, and Albert Gracco in Atlantic City, NJ are linked together.” Such a request fails to identify a government record with reasonable specificity, and therefore constitutes an invalid request.

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.

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

⁷ As stated in Bent, *supra*.

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.

In the instant matter, the Complainant’s request does not seek a specifically identifiable record. Instead, the Complainant merely asks for scientific evidence that proves his presumption that certain crimes are linked together. Such a request fails to specify an identifiable government record sought. Additionally, the fulfillment of such a request would require the Custodian to conduct research outside the scope of the duties prescribed to custodians under OPRA. Accordingly, the Complainant’s request is invalid under OPRA.

Therefore, the Complainant’s request is invalid under OPRA because it fails to specify 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). Although the Custodian asserted that access to the requested records was denied because said records constitute OPRA exempt criminal investigatory records, the invalidity of the Complainant’s request preempts the need for such analysis.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant’s request is invalid under OPRA because it fails to specify 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). Although the Custodian asserted that access to the requested records was denied because said records constitute OPRA exempt criminal investigatory records, the invalidity of the Complainant’s request preempts the need for such analysis.

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

November 20, 2012⁸

⁸ 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.
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