



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

August 28, 2012 Government Records Council Meeting

Stuart L. Sumner
Complainant

Complaint No. 2011-53

v.

Borough of Cliffside Park (Bergen)
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 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 OPRA request for “any documents that provide the monetary out-of-court settlement amount including insurance payments made by the Borough with regards to the matter between Ms. Flanagan and the Borough” failed to specifically identify a government record sought and, therefore the Complainant’s request is invalid under OPRA pursuant 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. 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Ashton v. Maurice River Township (Cumberland), GRC Complaint No. 2008-159 (November 2009); and Dittrich v. Township of Weehawken (Hudson), GRC Complaint No. 2011-68 (June 2012).

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 28th Day of August, 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 30, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 28, 2012 Council Meeting**

**Stuart L. Sumner¹
Complainant**

GRC Complaint No. 2011-53

v.

**Borough of Cliffside Park (Bergen)²
Custodian of Records**

Records Relevant to Complaint: Any documents that provide the monetary out-of-court settlement amount including insurance payments made by the Borough of Cliffside Park (“Borough”) with regards to the matter between Ms. Jackie Lynn Flanagan (“Ms. Flanagan”) and the Borough.³

Request Made: February 14, 2011

Response Made: February 15, 2011

Custodian: Sercan Zoklu

GRC Complaint Filed: February 28, 2011⁴

Background

February 14, 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. The Complainant indicates that his preferred method of delivery is U.S. Mail.

February 15, 2011

Custodian Counsel’s response to the OPRA request. Counsel responds in writing via letter to the Complainant’s OPRA request the following business day as receipt of such request. Counsel states that pursuant to New Jersey statutes and relevant case law, personnel matters are not disclosable without the written authorization of the employee, Ms. Flanagan.⁵

February 28, 2011

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

¹ No legal representation listed on record.

² Represented by Christine Gillen, Esq., of Diktas, Schandler, and Gillen, Attorneys at Law (Cliffside Park, NJ).

³ The Complainant states that this settlement was made out of court.

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

⁵ Custodian’s Counsel does not identify a government record in response to the Complainant’s request.

- Complainant's OPRA request dated February 14, 2011
- Letter from the Custodian to the Complainant dated February 15, 2011

The Complainant states that he filed an OPRA request for "any documents that provide the monetary out-of-court settlement amount including insurance payments made by the Borough with regards to the matter between Ms. Flanagan and the Borough." The Complainant also states that his OPRA request sought any payment of the Borough's insurance liability. The Complainant further states that the Custodian denied his OPRA request because the settlement was a personnel matter and the records are not disclosable without the written authorization of Ms. Flanagan.

The Complainant asserts that as a taxpayer, he has a right to any and all facts and information regarding the disbursement of public funds and the performance of duties by public employees. The Complainant also asserts that if taxpayer money was spent to compensate another citizen, he has a right to know the amount in damages.

The Complainant agrees to mediate this complaint.

March 4, 2011

Offer of Mediation sent to the Custodian.

March 10, 2011

The Custodian agrees to mediate this complaint.

March 10, 2011

Complaint is referred to mediation.

April 8, 2011

Complaint is referred back to the GRC for adjudication.

April 11, 2011

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

April 12, 2011

Letter from the Custodian to the Complainant attaching Resolution No. 2011-33. The Custodian states that the Complainant's OPRA request is a request for information and fails to specifically identify a government record. The Custodian additionally states that OPRA does not require a custodian to respond to a request seeking information or statistics. The Custodian states that OPRA also does not require custodians to conduct research among Borough records.

The Custodian also states that although the Complainant's request failed to identify a government record sought, the Borough identified Council Resolution 2011-33 as a record responsive to the Complainant's OPRA request. The Custodian further states that he sought and obtained the consent of Ms. Flanagan to release this record to the Complainant.

April 18, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension until April 25, 2011 to complete the SOI.

April 18, 2011

E-mail from the GRC to Custodian's Counsel. The GRC grants Counsel's request for an extension until April 25, 2011 to complete the SOI.

April 19, 2011

Letter from the Complainant to the Custodian. The Complainant states that he is in receipt of the Custodian's letter dated April 12, 2011. The Complainant also states that he will not withdraw his Denial of Access Complaint with the GRC. The Complainant further states that the Custodian provided the Complainant a copy of Resolution 2011-33 which specifically identifies the responsive record as the "Release and Settlement Agreement." The Complainant states that his request is only for those pages that identify: 1) monetary amounts agreed to be paid from public funds; 2) monetary amounts agreed to be paid from Borough insurance policies; 3) monetary amounts agreed to be paid from any source(s) other than the above; and 4) Borough employees accused of illegal or unethical or improper acts.

The Complainant states that he is very sensitive to the need to withhold information when its release could threaten public safety or national security. The Complainant also states that this is not the case here, but rather the Borough is preventing the release of these records for political reasons.

April 25, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated February 14, 2011
- Letter from the Custodian to the Complainant dated February 15, 2011
- Letter from the Custodian to the Complainant dated April 12, 2011 (with attachments).

The Custodian certifies that the resolution provided in response to the Complainant's OPRA request must be permanently maintained in accordance with the Records Destruction Schedule established and approved by Records Management Services.⁶

The Custodian certifies that he received the Complainant's OPRA request on February 14, 2011 which sought "any documents that provide the monetary out-of-court settlement amount including insurance payments made by the Borough with regards to the matter between Ms. Flanagan and the Borough." The Custodian argues that the Complainant's OPRA request failed to identify a particular government record. The Custodian certifies that OPRA is not intended to serve as a research tool by which government officials may be compelled to identify and siphon information pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super.

⁶ The Custodian did not certify to the search undertaken to locate the records responsive.
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534 (App. Div. 2005). The Custodian also certifies that a custodian is not required to conduct open-ended searches or to analyze, compile and collate the information contained in the agency's files in an effort to locate information responsive to a request. *Id.* at 549. The Custodian further certifies that a request that does not provide the requisite specificity is deemed complex and falls outside the scope of OPRA. See New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007).

The Custodian argues that the Complainant's OPRA request failed to specifically identify a government record, but instead requested information. The Custodian certifies that the requested information is contained in Ms. Flanagan's personnel file because the information sought is associated with an employment issue. The Custodian also certifies that the contents of a personnel file are exempt from disclosure pursuant to N.J.S.A. 47:1A-10. The Custodian further certifies that the information requested was also contained in Council Resolution 2011-33. The Custodian certifies that he provided a copy of this resolution to the Complainant on April 12, 2011. The Custodian argues that although OPRA does not require a custodian to respond to requests for information or that fail to adequately identify a government record, the Custodian identified Council Resolution 2011-33 as a record containing the information sought.

The Custodian argues that for these reasons, he did not unlawfully deny access to the records responsive to the Complainant's OPRA request. The Custodian requests the Council find that despite the absence of a legal requirement to do so, the Custodian made a good faith effort by identifying a government record containing the information sought and upon such identification produced said record and thus, formulated a reasonable solution that accommodated the interests between the Complainant and the Borough.

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’s request is invalid under OPRA because it fails to specifically identify a government record 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),⁷ 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.”⁸

⁷ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁸ 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:

- 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 [Items No.] 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 Ashton v. Maurice River Township (Cumberland), GRC Complaint No. 2008-159 (November 2009), the relevant part of the complaint's request sought "1) copies of any written document...regarding the operations of any business of [Jack's Garage in Port Elizabeth, New Jersey]...and 2) records as described in Item No. 1 above regarding the housing of crab pots and fishing equipment on the Robinson property without permits." The Council held that "a document is not an identifiable government record but is rather a generic term that encompasses a diverse class of records." The Council also held that that the complainant's request failed to specifically identify a government record sought.

In Dittrich v. Township of Weehawken (Hudson), GRC Complaint No. 2011-68 (June 2012), the complainant sought a list of property owners who sent letters regarding registration with the Rent Control Board. The custodian provided the complainant with eight (8) pages of record responsive to his request. The complainant later informed the custodian the records provided were not the records responsive to the request. The Council ruled that "the [c]omplainant failed to submit the request with information that is essential to permit the custodian to comply with its obligations...the [c]omplainant's request is invalid under OPRA..."

In the matter before the Council, the Complainant's OPRA request sought a copy of "any documents that provide the monetary out-of-court settlement amount including insurance payments made by the Borough with regards to the matter between Ms. Flanagan and the Borough." The Custodian provided the Complainant with a copy of Resolution 2011-33 on April 12, 2011. The Custodian certified in the SOI that although the Complainant's request failed to specifically identify a government record sought, the Borough identified Resolution 2011-33 as a record responsive to the request because the information requested was contained in this record. The Complainant informed the Custodian via letter dated April 19, 2011 that Resolution 2011-33 identifies the responsive record as the "Release and Settlement Agreement."

Similar to Ashton, *supra*, the Complainant's requested any "documents" regarding an out-of-court settlement between Ms. Flanagan and the Borough. The term "documents" does not specifically identify a government record; rather it is a generic term encompassing all government records. Further, the instant complaint is similar to Dittrich, *supra*, because the Custodian identified Resolution 2011-33 as responsive to the Complainant's request. However, the Complainant failed to provide the Custodian with enough information in the request for records to adequately search for the specific government record sought.

Thus, the Complainant's OPRA request for "any documents that provide the monetary out-of-court settlement amount including insurance payments made by the

Borough with regards to the matter between Ms. Flanagan and the Borough” failed to specifically identify a government record sought and, therefore the Complainant’s request is invalid under OPRA pursuant 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. 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Ashton v. Maurice River Township (Cumberland), GRC Complaint No. 2008-159 (November 2009); and Dittrich v. Township of Weehawken (Hudson), GRC Complaint No. 2011-68 (June 2012).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant’s OPRA request for “any documents that provide the monetary out-of-court settlement amount including insurance payments made by the Borough with regards to the matter between Ms. Flanagan and the Borough” failed to specifically identify a government record sought and, therefore the Complainant’s request is invalid under OPRA pursuant 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. 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Ashton v. Maurice River Township (Cumberland), GRC Complaint No. 2008-159 (November 2009); and Dittrich v. Township of Weehawken (Hudson), GRC Complaint No. 2011-68 (June 2012).

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

Approved By: Karyn Gordon, Esq.
Acting Executive Director

August 21, 2012