



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

May 28, 2013 Government Records Council Meeting

William R. Dusenberry  
Complainant

Complaint No. 2012-82

v.

New Jersey City University Foundation  
Custodian of Record

At the May 28, 2013 public meeting, the Government Records Council (“Council”) considered the May 21, 2013 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:

1. Although the NJCU Foundation is a 501(c)(3) nonprofit organization, the Foundation was created as an instrumentality of NJCU to support the University’s development, and thus is a public agency for the purposes of OPRA. See N.J.S.A. 47:1A-1.1 and Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, 207 N.J. 489 (2011).
2. The Complainant’s OPRA requests are overly broad because they fail to identify specific government records sought, and are thus invalid under OPRA. See 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. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). See LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (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 28<sup>th</sup> Day of May, 2013

Robin Berg Tabakin, Esq., Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: June 5, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
May 28, 2013 Council Meeting**

**William R. Dusenberry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-82**

v.

**New Jersey City University Foundation<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of the following records regarding the New Jersey City University's ("NJCU") 80<sup>th</sup> Anniversary Gala in October 2010.

1. Any and all e-mails, telephone records, memoranda, facsimiles and letters between the NJCU Foundation and the Executive Committee
2. All correspondence between the NJCU Foundation and the NJCU President
3. All correspondence between NJCU Foundation and NJCU Board of Trustees
4. All e-mails between the Gala Committee Chairman, Clay Constantinou from former NJCU Foundation Executive Director Ms. Osseiran-Hanna.
5. All e-mails between Executive Director Mr. William Fellenberg to NJCU OPRA Officer Alfred Ramey
6. Do you have any knowledge about how the NJCU's 80<sup>th</sup> Anniversary Gala "Honoree" was selected or by whom this "honoree" was selected and if any other "honoree candidates" were considered?<sup>3</sup>

**Request Made:** September 19, 2011

**Response Made:** November 23, 2011

**GRC Complaint Filed:** March 28, 2012<sup>4</sup>

**Background**<sup>5</sup>

**Request and Response:**

On September 19, 2011, the Complainant filed his Open Public Records Act ("OPRA") request seeking the records and information listed above. On November 23, 2011, the forty-fifth

---

<sup>1</sup> No legal representation listed on record.

<sup>2</sup> William Fellenberg, Custodian of Records. No legal representation listed on record.

<sup>3</sup> The Complainant states in his OPRA request that he understands that the Custodian is not required under the OPRA statute to provide answers to questions.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

<sup>5</sup> The parties may have submitted additional correspondence, or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

(45<sup>th</sup>) business day following receipt of such request the Custodian denied the Complainant's request as overly broad, vague and burdensome to comply with. The Custodian states that OPRA is not intended as a research tool to force government officials to identify and siphon useful information and thus a request must reasonably identify specific records sought. The Custodian also states that there are no records responsive to request Item No. 1 because no Executive Committee by the name of Gala Committee exists. The Custodian further states that any telephone records in response to request Item No. 1 that might exist are exempt under OPRA. The Custodian additionally states that after a thorough search no records to request Items No. 2 and 3 exist. The Custodian states that the Complainant's request Item No. 4 is specific and is reviewing the Foundation's files to recover such e-mails. The Custodian also states that any e-mails not exempt from disclosure will be provided upon payment of the statutory copying charge of \$0.05 per page. The Custodian further states that the Complainant's request Item No. 5 is vague in terms of the subject matter and time period to which the e-mails were sent. Lastly, the Custodian states that OPRA does not require a response to the Complainant's question for Item No. 6.

#### Denial of Access Complaint:

On March 28, 2012, the Complainant filed his Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant states that he filed his OPRA request on September 19, 2011. The Complainant also states that someone was involved when selecting the NJCU Gala honoree. The Complainant further states that NJCU refuses to make that information available, even though he filed an appropriate OPRA request.<sup>6</sup>

#### Statement of Information:

On May 25, 2012, the Custodian filed the Statement of Information ("SOI"). The Custodian argues that the Complainant's request was overly broad and vague. The Custodian certifies that the NJCU Foundation is a 501(c)(3) nonprofit organization and thus not subject to OPRA requests. The Custodian certifies that the Foundation was originally founded as the Jersey City State College Development Fund, Inc., ("Development Fund") in 1977 and became the NJCU Foundation, Inc. in 1998 to reflect the University's new name and status.<sup>7</sup> The Custodian also certifies that Ms. Khatmen Osserian-Hanna, former Executive Director of the NJCU Foundation, sent a letter to the Complainant on March 29, 2011, stating that the NJCU Foundation is not subject to OPRA requests.<sup>8</sup> The Custodian further certifies that he reiterated this position to the Complainant via e-mail on April 13, 2011.<sup>9</sup>

The Custodian argues that although he believes that the NJCU Foundation is not subject to OPRA requests, the NJCU Foundation has responded to some of the Complainant's OPRA

---

<sup>6</sup> The Complainant and the Custodian agreed to mediate this complaint. However, this complaint was referred back to the GRC for adjudication on May 10, 2012, to determine whether the NJCU Foundation is considered a public agency under OPRA.

<sup>7</sup> The Custodian includes a copy of the Foundation's Certificate of Incorporation establishing it as an independent 501(c)(3) organization, separate from NJCU.

<sup>8</sup> The Custodian includes a copy of Ms. Osserian-Hanna's letter to the Complainant dated March 29, 2011.

<sup>9</sup> The Custodian includes a copy of his e-mail to the Complainant dated April 13, 2011.

requests as a courtesy. Lastly, the Custodian requests that the GRC find that NJCU Foundation is not a public agency subject to OPRA.

### Analysis<sup>10</sup>

#### Public Agency

OPRA defines a public agency as:

“...[a]ny of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority, commission, instrumentality or agency. The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.” N.J.S.A. 47:1A-1.1.

Most definitions of “public agency” under New Jersey statutes and the Administrative Code resemble that contained in OPRA. However, the Open Public Meetings Act (“OPMA”) contains a definition of a “public body” which requires that an entity, “... (1) consist of ‘two or more persons’ and (2) be ‘collectively empowered as a voting body’ (3) ‘to perform a public governmental function affecting the rights, duties, obligations, privileges, benefits or other legal relations of any person or collectively authorized to spend public funds.’ N.J.S.A. 10:4-8a.” The Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 368 N.J. Super. 425 (App. Div. 2004).

In Lafayette Yard, the Appellate Division held that Lafayette Yard was both a “public body” subject to the open meetings requirements of the Open Public Meetings Act, N.J.S.A. 10:4-1 et seq., and a “public agency” required under OPRA, and ordered disclosure of records to plaintiff.

In so doing, the Court noted the definition of a “public agency” in OPRA at N.J.S.A. 47:1A-1.1. and held that:

- (1) a private, non-profit corporation created for the express purpose of redeveloping property donated to it by the City of Trenton,
- (2) having a Board of Trustees appointed by the Mayor and City Council,
- (3) with the mandated reversion of the donated property after the completion of the project and repayment of the debt,

---

<sup>10</sup> There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

- (4) having corporate bylaws requiring the distribution of all assets to the city upon the dissolution or liquidation of the corporation,
- (5) having a Disposition Agreement with the city that designates the city as the “agency” and the corporation as the “redeveloper” pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 to -49, and
- (6) having the authority to issue tax-exempt bonds for the financing of the project

qualified the corporation as a ‘public body’ under OPMA. The [C]ourt further held that the corporation was ‘an ‘instrumentality’ created by the City and a ‘public agency’ under the OPRA for essentially the same reasons that it is a ‘public body’ under the OPMA.’” *Id.* at 442.

The decision of the Superior Court that Lafayette Yard qualified as a “public body” was affirmed by the New Jersey Supreme Court (The Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 183 N.J. 519 (2005)). *See also* Snyder v. American Association of Blood Banks, 144 N.J. 269 (1996)(finding that the legislature did not create or authorize the AABB to perform a specific governmental purpose); Williams v. National Car Rental System, Inc., 225 N.J. Super. 164 (1988)(finding that the broad powers conferred upon the Port Authority leave no doubt that it is a public authority or public agency); Blazer Corporation v. NJ Sports and Exposition Authority, 195 N.J. Super. 542 (1984)(citing Wade v. N.J. Turnpike Authority, 132 N.J. Super. 92 (Law Div. 1975), (“The Court noted the official comment to N.J.S.A. 59:1-3: ‘The definition of ‘Public Entity’ provided in this section is intended to be all inclusive and to apply uniformly throughout the State of New Jersey to all entities exercising governmental functions.’”)).

More recently, in Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, 207 N.J. 489 (2011), the Supreme Court reviewed the Appellate Division’s holding that the New Jersey State League of Municipalities (“League”) is not a public agency under OPRA. 413 N.J. Super. 423. The Court acknowledged that although the Appellate Division relied on its previous holding in Lafayette Yard, it erred in “... importing into OPRA’s definition of ‘public agency’ the definition of a ‘public body’ found in [OPMA] ... [t]he language defining a ‘public body’ ... under OPRA [is] distinctly different.” *Id.* at 504-505. The Court thus held that a creation test, as opposed to a governmental function test, controlled in determining whether an entity was a public agency for purposes of OPRA. Specifically, the Court held that:

“In Lafayette Yard, we remained faithful to the text of [OPRA] and determined that, in essence, the nonprofit corporation (an ‘instrumentality’) was *created* by a public subdivision therefore making it a ‘public agency.’ *See id.* at 535-36 ... The creation test, not the governmental-function test, controlled. Our decision in this case, finding that the [League] is a ‘public agency,’ is wholly consistent with ... Lafayette Yard.” *Id.* at 507.

Thus, the GRC must apply the creation test in determining whether the NJCU Foundation is a “public agency” under OPRA.

The Custodian asserted in the SOI that the NJCU Foundation is a 501(c)(3) nonprofit organization. The Custodian also asserted that because the NJCU Foundation is a nonprofit organization, it is not subject to OPRA requests. The Custodian certifies that the nonprofit was founded as the Development Fund in 1977.<sup>11</sup> The Custodian included the Certificate of Incorporation and by-laws as part of his SOI. The Certificate of Incorporation states that the NJCU Foundation purpose is: “a) to encourage and support the development and growth of [NJCU] in way for which State funds may not be made available [and] b) to raise...by subscription, gift...a fund with which to support said development...” The Certificate of Incorporation also states that the NJCU’s Foundation place of incorporation is the Jersey City State College, Jersey City, New Jersey.<sup>12</sup>

Moreover, the by-laws state that the nature of the NJCU Foundation shall be “a wholly non-profit organization, organized for educational purposes...” The by-laws also state the NJCU Foundation’s purpose is to “assist in developing and increasing the facilities and resources of Jersey City State College for broader educational opportunities and service to its students and alumni and to the citizens of the State of New Jersey...” Further, the by-laws state that the affairs of the NJCU Foundation shall be managed by a Board of Directors, from various segments of the community... “three (3) of the Directors...shall be elected by the Board of Directors of the Jersey City State College Alumni Association; fourteen (14) shall be elected by the Board of Directors of the Development Fund from nominees proposed by a nominating committee appointed by the Chairman of the Board, with the Board’s approval; *three (3) of the Directors shall represent the College Administration and these three (3) shall be the President, the Vice President for Administration and Finance, and the Director of Development and College Relations*” (emphasis added). Lastly, the by-laws state that the Director of Development and College Relations of [NJCU] shall be the Executive Director of the Development Fund and...the chief executive officer of the Development Fund.”

An analysis using the creation test in Fair Share Housing Center, *supra*, establishes that the NJCU Foundation is a public agency. More specifically, the Custodian submitted the Certificate of Incorporation which states that its purpose is to support the development and growth of NJCU while having its place of incorporation at NJCU. Further, the by-laws specifically designate three (3) University Administrators from NJCU as Directors. In addition, the by-laws state that the Director of Development and College Relations shall also be the executive director and the chief executive officer of the NJCU Foundation. Although the NJCU Foundation is a 501(c)(3) nonprofit organization, the Foundation was created as an instrumentality of NJCU to support the University’s development, and thus is a public agency for the purposes of OPRA. See N.J.S.A. 47:1A-1.1 and Fair Share Housing Center, *supra*.

### **Broad and Unclear**

---

<sup>11</sup> The Custodian includes the New Jersey Department of State, Division of Commercial Recording, Certificate of Amendment to the Certificate of Incorporation filed July 30, 1998 that changed the name from Jersey City State College Development Fund, Inc. to the New Jersey City University Foundation, Inc.

<sup>12</sup> Jersey City State College is now known as Jersey City University.

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 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:

“[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.* 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),<sup>13</sup> 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.”<sup>14</sup>

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

---

<sup>13</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>14</sup> As stated in Bent, *supra*.



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.

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, *supra* and Bent, *supra*.

Moreover, in Elcavage v. Township of West Milford (Passaic), GRC Complaint Nos. 2009-07 and 2009-08 (March 2010), the Council examined what constitutes a valid OPRA request for e-mails. The Council determined that:

***“In accord with MAG, supra, in order to specifically identify an e-mail, OPRA requests 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 or e-mails were transmitted, and (3) a valid e-mail request must identify the sender and/or recipient thereof.”*** (Emphasis in original). *Id.*

The Complainant’s request for Items No. 2 and No. 3 fail to specifically identify what types of correspondence the Complainant seeks. The Complainant also fails to identify names or dates to help the Custodian identify records. The requests would require the Custodian to conduct research to determine if the records are responsive to the NJCU’s 80<sup>th</sup> Anniversary Gala. Further, the Complainant’s request for e-mails in request Items No. 1, No. 4, and No. 5 does not specify a date or range of dates during which the e-mails were transmitted. The Complainant’s request Item No. 6 asks a question and seeks information rather than specifically identifying a government record.

The Complainant’s OPRA requests are overly broad because they fail to identify specific government records sought, and are thus invalid under OPRA. See MAG, supra and Bent, supra, and New Jersey Builders Association, supra Schuler, supra. See LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009).

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Although the NJCU Foundation is a 501(c)(3) nonprofit organization, the Foundation was created as an instrumentality of NJCU to support the University’s development, and thus is a public agency for the purposes of OPRA. See N.J.S.A. 47:1A-1.1 and Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, 207 N.J. 489 (2011).
2. The Complainant’s OPRA requests are overly broad because they fail to identify specific government records sought, and are thus invalid under OPRA. See 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. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). See LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009).

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

Approved By: Brandon D. Minde, Esq.  
Executive Director

May 21, 2013