



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

October 29, 2013 Government Records Council Meeting

Edward C. Eastman
Complainant

Complaint No. 2013-113

v.

NJ Department of Environmental Protection
Custodian of Record

At the October 29, 2013 public meeting, the Government Records Council (“Council”) considered the October 22, 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 the Complainant requested an “[i]ndex to waterfront development permits from 1973 to the present,” but the Custodian has certified that no such record exists. While records of various WFD permits may exist in different forms and in different storage mediums, OPRA does not require a custodian to analyze such records in order to create a new document in response to a complainant’s request. See MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 537, 549 (N.J. App. Div. 2005); Gill v. Salem County, GRC Complaint No. 2005-185 (February 2006). Therefore, the Custodian has borne his burden of proving that no unlawful denial of access occurred. See N.J.S.A. 47:1A-6.

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 October, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 29, 2013 Council Meeting**

**Edward C. Eastman¹
Complainant**

GRC Complaint No. 2013-113

v.

**New Jersey Department of Environmental Protection²
Custodial Agency**

Records Relevant to Complaint: The Complainant requested an “[i]ndex to waterfront development permits (“WFD permits”) from 1973 to the present.”

Custodian of Record: Matthew J. Coefer

Request Received by Custodian: April 19, 2013

Response Made by Custodian: April 19, 2013

GRC Complaint Received: April 19, 2013

Background³

Request and Response:

On April 19, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 19, 2013, the Custodian responded in writing denying the Complainant’s request as overbroad and improper. Specifically, the Custodian noted that:

Government agencies are required to disclose only identifiable government records that are specifically described in the request. OPRA does not countenance open-ended searches of agency files or permits (*sic*) a blanket request for every document an agency has on file on a topic.

(citations omitted).

¹ No legal representation listed on record.

² The Custodian is represented by Deputy Attorney General Ryan Benson.

³ 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.

Denial of Access Complaint:

On April 19, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts only that the Custodian denied the request based on the “Addendum Disposition Notes on the first page of the Record Request Response Form” as quoted above.

Statement of Information:

On May 9, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he both received and responded to the Complainant’s OPRA request on April 19, 2013. The Custodian additionally certifies that an investigation determined that the New Jersey Department of Environmental Protection (“DEP”) does not maintain an index or any other listing of issued WFD permits. The Custodian further certifies that, because the requested record does not exist, no government records were withheld from the Complainant.

The Custodian contends that while “the request is overbroad and devoid of information,” an agency is also not required to provide a record that does not exist or create a record in response to a request. The Custodian certifies that WFD permits have been issued in conjunction with various grants, licenses, and other permits as a single instrument and by multiple entities. The Custodian certifies that no WFD permit index exists because of this variability, and because the archival systems used for WFD permits since the 1970s have made maintaining such an index nearly impossible. The Custodian further certifies that the DEP has considered creating an index but concluded that such an effort would be overly burdensome.

The Custodian states that, in the initial response to the Complainant, “the record custodian incorrectly cited over-breadth as the reason for denial.” The Custodian further states that because the Complainant requested “a singular index listing WFD permits,” the denial should have stated that:

NJDEP does not maintain an index or listing of all waterfront development permits. Please note that a State agency need not provide a record that does not exist and need not create a record in response to requests.

(citing MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 537 (App. Div. 2005).

The Custodian certifies that the DEP issued a revised Government Records Request Form to the Complainant on May 9, 2013 containing this altered explanation as to why no WFD permit index was disclosed.

Analysis⁴

Unlawful Denial of Access

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 Appellate Division has held that:

While 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.

MAG, 375 N.J. Super. at 546 (emphasis added).

The Court reasoned that:

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.” Id. at 549 (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);⁵ N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). OPRA does not obligate a records custodian to create a document in response to a document request. *See* Gill v. Salem County,

⁴ 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.

⁵ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

GRC Complaint No. 2005-185 (February 2006) (finding request for list of all employees paid by county invalid because fulfilling request required creation of new document based on existing data).

Here, the Complainant requested an “[i]ndex to waterfront development permits from 1973 to the present,” but the Custodian has certified that no such record exists. While records of various WFD permits may exist in different forms and in different storage mediums, OPRA does not require a custodian to analyze such records in order to create a new document in response to a complainant’s request. *See* MAG, 375 N.J. Super. at 549; Gill, GRC 2005-185. Therefore, the Custodian has borne his burden of proving that no unlawful denial of access occurred. *See* N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant requested an “[i]ndex to waterfront development permits from 1973 to the present,” but the Custodian has certified that no such record exists. While records of various WFD permits may exist in different forms and in different storage mediums, OPRA does not require a custodian to analyze such records in order to create a new document in response to a complainant’s request. *See* MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 537, 549 (N.J. App. Div. 2005); Gill v. Salem County, GRC Complaint No. 2005-185 (February 2006). Therefore, the Custodian has borne his burden of proving that no unlawful denial of access occurred. *See* N.J.S.A. 47:1A-6.

Prepared By: Robert T. Sharkey
Staff Attorney

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

October 22, 2013

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: November 1, 2013