



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

September 24, 2013 Government Records Council Meeting

David Roundtree
Complainant

Complaint No. 2013-38

v.

NJ Department of Banking & Insurance
Custodian of Record

At the September 24, 2103 public meeting, the Government Records Council (“Council”) considered the September 17, 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. The Custodian did not unlawfully deny access to the Complainant’s OPRA request item No. 1 because the requested records are exempt from disclosure. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); N.J.S.A. 17:33A-11. *See also* Probe v. Dep’t of Law & Public Safety, Div. of Criminal Justice, GRC Complaint No. 2003-63 (March 2004). The Council need not address the Custodian’s additional arguments as the responsive records are deemed to be exempt from disclosure.
2. The Complainant’s request item Nos. 2 and 3 are invalid because they sought information and failed to provide ample identifiers necessary for the Custodian to locate any responsive records. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ 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); 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 24th Day of September, 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: September 26, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 24, 2013 Council Meeting**

**David Roundtree¹
Complainant**

GRC Complaint No. 2013-38

v.

**New Jersey Department of Banking & Insurance²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

1. All documents pertaining to [the Complainant], Concentra, and Allstate, New Jersey Department of Banking and Insurance (“DOBI”)’ letters to attorneys and any letter “you and your agency” have in the file doing “your brief” investigation that would also include e-mails pertaining to any discussion with [the Complainant’s] name in it.
2. If there was anyone whom “you spoke with over at” DOBI, please list names and the dates and times of any conversation.
3. Policy guidelines of laws in which “you” are governed and the steps “your” agency is to follow in the State.

Custodian of Record: Christina Holden

Request Received by Custodian: January 15, 2013

Response Made by Custodian: January 25, 2013

GRC Complaint Received: January 31, 2013

Background³

Request and Response:

On January 9, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 25, 2013, the Custodian responded in writing denying access as follows:

1. Records relating to the subject of an insurance fraud investigation are exempt from disclosure under the Insurance Fraud Protection Act (“IFPA”). N.J.S.A. 17:33A-11. DOBI can neither confirm nor deny the presence of an investigation.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Eleanor Heck.

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.

2. Certain non-privileged and/or confidential records responsive to the request have been made available to the Complainant in response to Government Records Request No. C46807 and will not be provided a second time.
3. Investigation files in any matter pending investigation, or in a completed investigation in which no formal disciplinary action was taken are exempt from disclosure. N.J.A.C. 11:17-2.15(b)(6). DOBI can neither confirm nor deny the presence of an investigation.
4. Files and/or records requested are exempt as deliberative records or under attorney-client privilege. N.J.S.A. 47:1A-1.1.

On January 27, 2013, the Custodian responded disputing the Custodian's denial of access and advising that he would file a Denial of Access Complaint in five (5) days if the Custodian did not disclose the responsive records. The Custodian responded advising that there is no change in her response.

Denial of Access Complaint:

On January 31, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant disputes the Custodian's denial of access to his DOBI file. The Complainant contends he was told by employees in DOBI he would receive the records once the investigation was completed. The Complainant contends that he attached several records from the file to prove that the responsive records are not exempt and should be disclosed to him.

Statement of Information:

On April 5, 2013, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that DOBI received the Complainant's OPRA request on January 15, 2013. The Custodian certifies that the previous Custodian reached out to personnel with knowledge of the Complainant's file and was informed that the records were either in fraud or investigation files that were closed with no action taken. The Custodian certifies that the previous Custodian was also informed that the Complainant previously received all non-exempt records.⁴ The Custodian certifies that DOBI responded in writing on January 25, 2013, denying access to the Complainant's OPRA request.

The Custodian contends that DOBI lawfully denied access to the responsive records under the IFPA, which provides that "papers, documents reports, or evidence ..." related to an investigation are exempt from "... public inspection except as specifically provided in this act." N.J.S.A. 17:33A-11a. The Custodian asserts that the IFPA does not provide for the disclosure of such records. The Custodian further argues that the records are exempt to the extent that they are part of a completed investigation file in which no formal disciplinary action was taken. N.J.S.A. 47:1A-9; N.J.A.C. 11:17-2.15(b)(6). The Custodian further asserts that DOBI is not required to provide the Complainant records already in his possession. Bart v. City of Passaic Hous. Auth., 403 N.J. Super. 609, 618 (App. Div. 2008)(*certif. denied*, 198 N.J. 316 (2009)).

⁴ Attached to the SOI is a privilege log containing 64 records either redacted or withheld in their entirety.

The Custodian asserts that because even the existence of fraud and investigative files is confidential, no records were listed in response to the Complainant's OPRA request, cannot be identified in the SOI and are not included in the privilege log attached to the SOI. The Custodian asserts that the Complainant's attempt to obtain the records to prove his argument does not outweigh the important policy reasons for the statutory and regulatory provisions that exempt disclosure.

Additional Submissions:

On April 15, 2013, the Complainant disputes the denial of access, contending that DOBI is exempting access to the records to hide the fact that the investigation was fraudulent.

Analysis⁵

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.

OPRA provides that its provisions "... shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute ... regulation promulgated under the authority of any statute or Executive Order of the Governor ..." N.J.S.A. 47:1A-9(a). Additionally, N.J.S.A. 17:33A-11 provides that "[p]apers, documents, reports, or evidence relative to the subject of an investigation under this act shall not be subject to public inspection ..." The GRC notes that the statute contains limited exceptions, but none are applicable to the facts here.

Regarding OPRA request item No. 1, the GRC is satisfied that the Custodian's denial of access was lawful. Specifically, the Complainant indicated in the Denial of Access Complaint and subsequent submission dated April 15, 2013, that an investigation was conducted. The plain language of N.J.S.A. 17:33A-11 clearly exempts any records pertaining to that investigation. Additionally, no evidence in the record establishes that the limited exceptions contained in the provision apply.

Thus, the Custodian did not unlawfully deny access to the Complainant's OPRA request item No. 1 because the requested records are exempt from disclosure. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); N.J.S.A. 17:33A-11. *See also* Probe v. Dep't of Law & Public Safety, Div. of Criminal Justice, GRC Complaint No. 2003-63 (March 2004). The Council need not address the Custodian's additional arguments as the responsive records are deemed to be exempt from disclosure.

⁵ 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.

Validity of OPRA request

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 Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005)(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 (emphasis added).

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);⁶ NJ Builders Assoc. v. NJ 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).

Additionally, in LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the complainant requested the number of Jamesburg residents that hold library cards. The GRC deemed that the complainant’s request was a request for information, holding that “... because request Item No. 2 of the Complainant’s June 25, 2008 OPRA request seeks information rather than an identifiable government record, the request is invalid pursuant to [MAG] ...” Id. at 6. *See also* Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009). Additionally, in Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009), the complainant’s September 13, 2007 OPRA request asked five (5) questions. The Council determined that the request was an invalid request failing to identify government records.

⁶ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

Here, the Complainant's request item Nos. 2 and 3 sought "names and the dates and times" as well as "policy guidelines of laws" governing an unknown person. The Complainant's request items on their face seek information and lack sufficient information allowing the Custodian to identify and provide any responsive records. Bent, 381 N.J. Super. at 37 (holding that a proper request under OPRA must identify *with reasonable clarity* those documents that are desired).

Therefore, the Complainant's request item Nos. 2 and 3 are invalid because they sought information and failed to provide ample identifiers necessary for the Custodian to locate any responsive records. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; NJ Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151; LaMantia, GRC 2008-140.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not unlawfully deny access to the Complainant's OPRA request item No. 1 because the requested records are exempt from disclosure. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); N.J.S.A. 17:33A-11. *See also* Probe v. Dep't of Law & Public Safety, Div. of Criminal Justice, GRC Complaint No. 2003-63 (March 2004). The Council need not address the Custodian's additional arguments as the responsive records are deemed to be exempt from disclosure.
2. The Complainant's request item Nos. 2 and 3 are invalid because they sought information and failed to provide ample identifiers necessary for the Custodian to locate any responsive records. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); NJ Builders Assoc. v. NJ 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); LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009).

Prepared By: Frank F. Caruso
Senior Case Manager

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

September 17, 2013