



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

Christine Gillespie
Complainant

Complaint No. 2013-84

v.

NJ Department of Labor and
Workforce Development
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:

1. The Custodian denied access to the Complainant’s request based on OPRA’s personnel records exemption. *See N.J.S.A. 47:1A-10*. The Council has narrowed this exemption and required disclosure of similar payroll records of employee leave. *See Alison McManus v. W. Milford Twp. (Passaic)*, GRC Complaint No. 2008-129 (April 2009); *Laure Zucker v. Bergen Cnty. Improvement Auth.*, GRC Complaint No. 2008-68 (December 2008). In the instant case, however, the Custodian is not obligated to disclose records that have not clearly been identified, and therefore need not rely on *N.J.S.A. 47:1A-10* to lawfully deny the Complainant’s request.
2. The Complainant’s request for the dates of a workers’ compensation judge’s leave of absence and “a copy . . . any other record recording [the judge’s] leave of absence including any and all E-Mails requesting and granting such leave of absence” fails to identify with reasonable clarity those records that were desired. *See MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control*, 375 *N.J. Super.* 534, 546-49 (App. Div. 2005); *Joseph A. Elcavage v. W. Milford Twp.*, GRC Complaint No. 2009-07 (April 2010). As a custodian is required to disclose only identifiable government records, rather than perform research to respond to general requests for information, the Custodian here did not unlawfully deny access to the Complainant under *N.J.S.A. 47:1A-6*. *See MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control*, 375 *N.J. Super.* 534, 546 (App. Div. 2005); *Burnett v. Cnty. of Gloucester*, 415 *N.J. Super.* 508 (App. Div. 2010); *Alison McManus v. W. Milford Twnp. (Passaic)*, GRC Complaint No. 2008-129 (April 2009); *Laure Zucker v. Bergen County Improvement Authority*, GRC Complaint No. 2008-68 (December 2008).



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

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

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Christine Gillespie¹
Complainant**

GRC Complaint No. 2013-84

v.

**New Jersey Department of Labor and Workforce Development²
Custodial Agency**

Records Relevant to Complaint: The Complainant seeks:

1. “[A] copy of the dates of the medical leave which [a workers’ compensation judge] claimed he was on for several months in 2008.”
2. “If there is a record recording [the judge’s] leave of absence . . . a copy of said record and any other record recording [the judge’s] leave of absence including any and all E-Mails requesting and granting such leave of absence.”

Custodian of Record: Ellen Spurlock

Request Received by Custodian: January 16, 2013

Response Made by Custodian: January 18, 2013 and March 4, 2013

GRC Complaint Received: March 12, 2013

Background³

Request and Response:

On January 16, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Department of Labor and Workforce Development’s (the “Department”) Division of Workers’ Compensation (the “Division”) seeking the above-mentioned records.

On January 18, 2013, two (2) business days later, an administrator at the Division responded in writing that the Division does not maintain employee records after an employee has left. The Division administrator, Christopher Leavey, stated that he would forward the Complainant’s document request to the Department’s Office of Human Resources (“HR”), which acts as the custodian of personnel records for all Department employees.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Donna Arons.

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.

On March 4, 2013, thirty-one (31) days after the initial request, the HR Custodian, Ellen Spurlock, wrote to the Complainant as a follow-up to a recent phone conversation between them. The Custodian stated that she had contacted the Division administrator to ask that he send both the Complainant's original request and his response. The Custodian further stated that HR had no record of receiving the Complainant's original letter. The Custodian then denied the Complainant's request based on the OPRA exemption for personnel records. See N.J.S.A. 47:1A-10.

Denial of Access Complaint:

On March 12, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserts that she was told by the Custodian that attendance records for workers' compensation judges do not have to be released.

Statement of Information:

On May 14, 2013, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that she received the Complainant's OPRA request on January 16, 2013. The Custodian additionally certifies that responses were made to the Complainant's request on January 18, 2013 and March 4, 2013.

The Custodian states that the records responsive to the Complainant's request are leave documents in the personnel file of a workers' compensation judge. The Custodian contends that such records are exempt from disclosure under N.J.S.A. 47:1A-10.

Analysis⁴

Unlawful Denial of Access

Personnel Records Exempted

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 additionally states that:

[n]otwithstanding the provisions of [OPRA] . . . the personnel . . . records of any individual in the possession of a public agency . . . shall not be considered a government record and shall not be made available for public access, except that an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor . . .

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.

N.J.S.A. 47:1A-10.

While “payroll record” is not defined in OPRA, the GRC has relied in the past on a New Jersey Department of Labor regulation which enumerates the items that constitute such a record:

Every employing unit having workers in employment . . . shall keep payroll records which shall show, for each pay period:

1. The beginning and ending dates;
2. The full name of each employee and the day or days in each calendar week on which services for remuneration are performed;
3. The total amount of remuneration paid to each employee showing separately cash, including commissions and bonuses; the cash value of all compensation in any medium other than cash; gratuities received regularly in the course of employment if reported by the employee, or if not so reported, the minimum wage rate prescribed under applicable laws of this State or of the United States or the amount of remuneration actually received by the employee from his employing unit, whichever is the higher; and service charges collected by the employer and distributed to workers in lieu of gratuities and tips;
4. The total amount of all remuneration paid to all employees;
5. The number of weeks worked.

N.J.A.C. 12:16-2.1(a).

In applying this definition to the exemption set forth in N.J.S.A. 47:1A-10, the GRC has found that a leave request form “documents an employee’s absence from work and the reason for that absence. In essence, the leave form is an attendance record.” Alison McManus v. West Milford Twp. (Passaic), GRC Complaint No. 2008-129 (April 2009). As such, leave request forms are attendance records and, therefore, a type of payroll record that must be disclosed under OPRA. *See id.* Similarly, the GRC has found that a request for an employee’s time records for particular years and an employee’s attendance sheet also fit within the definition of “payroll records” for the sake of OPRA. *See Laure Zucker v. Bergen Cnty. Improvement Auth.*, GRC Complaint No. 2008-68 (December 2008).

Here, the Custodian denied access to the Complainant’s request based on OPRA’s personnel records exemption. *See N.J.S.A. 47:1A-10*. The GRC has narrowed this exemption and required disclosure of similar payroll records of employee leave. *See McManus*, GRC 2008-129; *Zucker*, GRC 2008-68. In the instant case, however, the Custodian is not obligated to disclose records that have not clearly been identified, and therefore need not rely on N.J.S.A. 47:1A-10 to lawfully deny the Complainant’s request.

Overly Broad & Unclear Requests

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 Alcoholic Beverage Control, 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);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 (Hunterdon), GRC Complaint No. 2007-151 (February 2009).

Moreover, the GRC established criteria deemed necessary to specifically identify an e-mail communication in Joseph A. Elcavage v. W. Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 2010). The Council determined that:

In accord with MAG, supra, and its progeny, 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 was transmitted or the e-mails were transmitted, and (3) a valid e-mail request must identify the sender and/or the recipient thereof.

Id. at 5 (emphasis in original).

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

The Appellate Division addressed this issue in Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). In Burnett, the plaintiff appealed from an order of summary judgment entered against him in his suit to compel production by Gloucester County of documents requested pursuant to OPRA, consisting of “[a]ny and all *settlements, releases or similar documents* entered into, approved or accepted from 1/1/2006 to present.” Id. at 508. (emphasis added). The Appellate Division determined that the request sought a specific type of document, although it did not specify a particular case to which such document pertained, and was therefore not overly broad. Id. at 515-16. Similarly, in Zucker, the GRC mandated disclosure of an individual’s time records from a delineated period but upheld the denial of access to a request for “the attendance sheet” of an individual because the custodian could not “with any degree of accuracy identify the specific record desired.” See Zucker, GRC 2008-68; see also McManus, GRC 2008-129 (finding unlawful denial of access to specific leave request forms submitted between particular dates).

Here, the Complainant first seeks “a copy of the dates of the medical leave which [a workers’ compensation judge] claimed he was on for several months in 2008.” This is a request for information, rather than a valid request for a specifically identifiable government record. See MAG, 375 N.J. Super. at 547. The Complainant’s additional request for any documents or e-mails recording the judge’s leave or request for leave provides no identifiers other than a broad, generic description of the information sought, nor does the Complainant specify the recipients or date range for her requested e-mails. See id. at 549; Elcavage, GRC 2009-07. Unlike the complainants in Burnett or McManus, the request made here is overly broad because it does not allow the Custodian to identify “with any degree of accuracy . . . the specific record desired.” See Zucker, GRC 2008-68.

Therefore, the Complainant’s request for the dates of a workers’ compensation judge’s leave of absence and “a copy . . . any other record recording [the judge’s] leave of absence including any and all E-Mails requesting and granting such leave of absence” fails to identify with reasonable clarity those records that were desired. See MAG, 375 N.J. Super. at 546-49; Elcavage, GRC 2009-07. As a custodian is required to disclose only identifiable government records, rather than perform research to respond to general requests for information, the Custodian here did not unlawfully deny access to the Complainant under N.J.S.A. 47:1A-6. See MAG, 375 N.J. Super. at 546-59; Burnett, 415 N.J. Super. at 508; McManus, GRC 2008-129 Zucker, GRC 2008-68.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian denied access to the Complainant’s request based on OPRA’s personnel records exemption. See N.J.S.A. 47:1A-10. The Council has narrowed this exemption and required disclosure of similar payroll records of employee leave. See Alison McManus v. W. Milford Twp. (Passaic), GRC Complaint No. 2008-129 (April 2009); Laure Zucker v. Bergen Cnty. Improvement Auth., GRC Complaint No. 2008-68 (December 2008). In the instant case, however, the Custodian is not obligated to

disclose records that have not clearly been identified, and therefore need not rely on N.J.S.A. 47:1A-10 to lawfully deny the Complainant's request.

2. The Complainant's request for the dates of a workers' compensation judge's leave of absence and "a copy . . . any other record recording [the judge's] leave of absence including any and all E-Mails requesting and granting such leave of absence" fails to identify with reasonable clarity those records that were desired. *See* MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546-49 (App. Div. 2005); Joseph A. Elcavage v. W. Milford Twp., GRC Complaint No. 2009-07 (April 2010). As a custodian is required to disclose only identifiable government records, rather than perform research to respond to general requests for information, the Custodian here did not unlawfully deny access to the Complainant under N.J.S.A. 47:1A-6. *See* MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Burnett v. Cnty. of Gloucester, 415 N.J. Super. 508 (App. Div. 2010); Alison McManus v. W. Milford Twnp. (Passaic), GRC Complaint No. 2008-129 (April 2009); Laure Zucker v. Bergen County Improvement Authority, GRC Complaint No. 2008-68 (December 2008).

Prepared By: Robert T. Sharkey
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Approved By: Brandon D. Minde, Esq.
Executive Director

October 22, 2013