



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

June 28, 2016 Government Records Council Meeting

Joyce Fern
Complainant

v.

NJ Department of Environmental Protection
Custodian of Record

Complaint No. 2015-215

At the June 28, 2016 public meeting, the Government Records Council (“Council”) considered the June 21, 2016 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 May 14, 2015 request is invalid because it would require the Custodian to conduct research in order to determine which records were responsive. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (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); Asarnow v. Dep’t of Labor, GRC Complaint No. 2006-24 (May 2006). *See also* Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). The Custodian has therefore lawfully denied access to this request. 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 28th Day of June, 2016

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 30, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 28, 2016 Council Meeting**

**Joyce Fern¹
Complainant**

GRC Complaint No. 2015-215

v.

**NJ Department of Environmental Protection²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “Clean Closure/No Further Action” (“NFA”) letter issued to the Borough of Pompton Lakes’ (“Borough”) homeowners from 1981 through the date of the request.

Custodian of Record: Matthew J. Coefer
Request Received by Custodian: May 14, 2015
Response Made by Custodian: May 22, 2015
GRC Complaint Received: July 16, 2015

Background³

Request and Response:

On May 14, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On May 22, 2015, the Custodian responded in writing, denying the OPRA request as overly broad and invalid because it required research. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005).

Denial of Access Complaint:

On July 16, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that she owns a home on the “DuPont Plume” and that she was previously sent a letter that her home was safe to occupy. However, the Custodian stated that shortly thereafter, DuPont advised her that her house had a “vapor intrusion.” The Complainant contended that she was entitled to receive the responsive letters.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Nicolas Seminoff.

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.

Statement of Information:

On August 6, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on May 14, 2015. The Custodian certified that Priya Sundaram reviewed the request and directed it to the New Jersey Department of Environmental Protection (“DEP”) Site Remediation Program (“SRP”). The Custodian certified that Sharon Ricciardi, Assistant Commissioner, reviewed the request and determined that the request did not adequately identify specific properties within the Borough. The Custodian further noted that Ms. Ricciardi was unable to distinguish residential properties from other types of properties. The Custodian certified that, based on his and Ms. Ricciardi’s review, he responded in writing on May 22, 2015, denying the Complainant’s OPRA request as overly broad. MAG, 375 N.J. Super. 534.

The Custodian contended that the subject OPRA request was invalid because it would have required DEP to conduct research. MAG, 375 N.J. Super. 534; Asarnow v. Dep’t of Labor, GRC Complaint No. 2006-24 (May 2006)(holding that a request seeking “all delinquent notices” for a thirteen (13) month period was invalid). The Custodian argued that OPRA does not require custodians to conduct research: the instant request was a blanket request for Clean Closure/NFA letters issues to Borough residents from 1981 to present. The Custodian asserted that the request did not allow DEP to perform a reasonable search; rather, DEP would have had to research the nature of numerous files, correlate data to narrow that number, and then review the remaining files to identify any responsive records.

Specifically, the Custodian asserted that the SRP would have to identify all remedial cases within the Borough for a 34-year period by creating and/or running existing reports of several DEP systems. The Custodian asserted that SRP would then have to review the results and attempt to differentiate residential properties from commercial or industrial properties. The Custodian noted that, while SRP could use certain filters, same could not be generic and would not capture remedial cases occurring prior to inception of the database. The Custodian averred that, in these cases, SRP would need review each record to find residential identifiers such as “Street Address” or “Property.” The Custodian asserted that this method could have a higher success rate, but SRP would have to retrieve and review the suspected residential files to confirm their findings.

The Custodian further argued that, once SRP conducted the above research, it would still need to review the status of each file to determine if the remediation was closed. The Custodian asserted that SRP could run queries in a database but that SRP would have to review the physical files for cases from the 1980s and 1990s. The Custodian asserted that DEP would be poised to search for Clean Closure/NFA letters at this point

Analysis

Validity of Request

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 (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);⁴ 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).

In Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007), the Council held that pursuant to MAG, a custodian is obligated to search his or her files to find identifiable government records listed in a requestor’s OPRA request. The complainant in Donato requested all motor vehicle accident reports from September 5, 2005, to September 15, 2005. The custodian sought clarification of said request on the basis that it was not specific enough. The Council stated that:

Pursuant to [MAG], the Custodian is obligated to search her files to find the

⁴ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

identifiable government records listed in the Complainant's OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to research her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word search is defined as "to go or look through carefully in order to find something missing or lost." The word research, on the other hand, means "a close and careful study to find new facts or information."

Id. at 4-5 (footnotes omitted).

Additionally, in Asarnow, GRC 2006-24, the complainant sought (among other records), "[a]ll 'Delinquent Reports' notices sent to employees in Monmouth and Essex County during the period of 12/13/05 thru 1/13/06 inclusive of . . ." several pieces of information. The custodian initially denied access to that request item, deeming it invalid in accordance with MAG and Bent. The Council agreed, holding that:

[T]he Complainant's request in this case was overbroad and unclear based on the fact that the Custodian would seemingly have to do research to find documents "inclusive and containing the name and address of employer, date notice sent, and years claimed delinquent and payments owed," as well as, "only the first 250 reports for each county starting with employers whose name begin with the letter "A".

Id. at

In the instant complaint, the Complainant sought access to Clean Closure/NFA letters issued to homeowners in the Borough from 1981 to the date of the request, or approximately 34 years. As part of the SOI, the Custodian detailed the steps necessary to attempt to locate the responsive records and argued that same was akin to research. In the SOI, the Custodian provided a thorough explanation detailing the required research. Therein, he affirmed that SRP needed to run and review reports for Borough remediation projects primarily to determine whether they were residential properties. Thereafter, SRP would still have to review files to determine whether they were actually residences. SRP had to perform all of this work before it even began to determine whether applicable remediations were completed, at which point it could possibly locate responsive letters.

The GRC is satisfied that the facts of this complaint are more indicative of research, as defined in Donato, GRC 2005-182, than was the case in Asarnow, GRC 2006-64. Specifically, in Asarnow, the request would have required the custodian to research various records to locate those including the information sought. Here, the Complainant sought a single type of record, which is different from the request in Asarnow. However, the Custodian was required to perform similar research to locate records, if not more intensive than did the Asarnow custodian. For these reasons, the Complainant's OPRA request is invalid because it would require the Custodian to conduct research.

Accordingly, the Complainant's May 14, 2015 request is invalid because it would require the Custodian to conduct research in order to determine which records were responsive. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; NJ Builders, 390 N.J. Super. at 180; Asarnow, GRC 2006-24. *See also* Donato, GRC 2005-182. The Custodian has therefore lawfully denied access to this request. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant's May 14, 2015 request is invalid because it would require the Custodian to conduct research in order to determine which records were responsive. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (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); Asarnow v. Dep't of Labor, GRC Complaint No. 2006-24 (May 2006). *See also* Donato v. Twp. of Union, GRC Complaint No. 2005-182 (January 2007). The Custodian has therefore lawfully denied access to this request. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso
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June 21, 2016