



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 30, 2019 Government Records Council Meeting

Luis F. Rodriguez
Complainant
v.
Kean University
Custodian of Record

Complaint No. 2017-133

At the July 30, 2019 public meeting, the Government Records Council (“Council”) considered the July 23, 2019 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 April 25, 2017 OPRA request is invalid because it would require the Custodian to conduct research to determine the identity of the requested record captured in a photograph. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-237 (App. Div. 2015); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007). Thus, the Custodian lawfully denied access. 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 30th Day of July 2019

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: August 2, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
July 30, 2019 Council Meeting**

**Luis F. Rodriguez¹
Complainant**

GRC Complaint No. 2017-133

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: “I request a copy of the document (circled in yellow highlight) either given to or given by Phil Connelly [“Mr. Connelly”] by the representative from the Global Professional Testing Center in the [photograph] dated 19th July 2016 and copied below.”

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: April 25, 2017
Response Made by Custodian: May 4, 2017
GRC Complaint Received: June 9, 2017

Background³

Request and Response:

On April 25, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. Later that day the Complainant submitted three (3) follow-up e-mails to the Custodian to assist with locating responsive records. On May 4, 2017, the Custodian responded in writing stating that the request did not identify specific government records. The Custodian added that OPRA does not request a public agency to create records that do not exist, respond to requests for information, or to conduct research on behalf of the requestor. N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div.), certif. denied, 190 N.J. 394 (2007). The Custodian also stated that 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. Bent v. Stafford Police Dep’t, 389 N.J. Super. 30, 37 (App. Div. 2005).⁴

¹ Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC (Clinton, NJ).

² Represented by Deputy Attorney General Nicole Castiglione.

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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

⁴ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Complaint No. 2004-78 (October 2004).

Denial of Access Complaint:

On June 9, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian improperly denied his request, stating that the original request and follow-up e-mails showed an identifiable document. The Complainant argued that his request met the requirements outlined in Verry v. Borough of South Brooks (Somerset), GRC Complaint No. 2013-43, *et seq.* (Interim Order dated September 24, 2013), where the Council held that “a valid OPRA request requires a search, not research. An OPRA request is thus only valid if the subject of the request can be readily identifiable based on the request.”

The Complainant asserted that the Custodian only needed to reach out to the Kean University (“Kean”) employees who had knowledge of the requested document and then obtain it. The Complainant contended that those actions constituted a search, and not research. The Complainant therefore concluded that the Custodian violated OPRA by denying his request.

Statement of Information:

On July 10, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on April 25, 2017 and responded on May 4, 2017.

The Custodian maintained that the request did not specifically identify a government record. The Custodian asserted that despite receiving the follow-up e-mails from the Complainant, the requested document remained unidentifiable, and therefore denied the request.

The Custodian contended that the Complainant’s OPRA request required research and did not identify the record sought with enough specificity. The Custodian asserted that requestors must identify records “with reasonable clarity.” Bent, 381 N.J. Super. at 37. See also Lagerkvist v. Office of the Governor of N.J., 443 N.J. Super. 230 (App. Div. 2015). The Custodian argued that the Complainant’s request comprised only a photograph of Mr. Connelly shaking hands with an unidentified individual on July 19, 2016. The Custodian asserted that the follow-up e-mails failed to identify the requested record, but instead attempted to aid in identifying the unknown individual and Kean employees who may have had knowledge of the document.

The Custodian asserted that fulfilling the request would have converted her into a researcher. The Custodian argued that she would have to identify the individuals in the photographs and contact them to determine whether they had any knowledge of the document pictured in the original photograph. The Custodian asserted that if one of the individuals knew what the document was, she would have to conduct further research to locate and obtain a copy. The Custodian argued that if she were to obtain a copy of the document, she would then have to evaluate the record and determine whether it is a true copy of what was depicted in the photograph. The Custodian contended that these actions go beyond the obligations of a custodian under OPRA, as she was not required to conduct research. Lagerkvist, 443 N.J. Super. at 237.

Additional Submissions

On July 12, 2017, the Complainant submitted a response to the Custodian's SOI. The Complainant argued that the photographs he provided clearly identified employees at Kean, as well as the individual shaking hands with Mr. Connelly in the first photograph. The Complainant also noted that the date of the event during which the photograph was taken was clear. The Complainant asserted that the Custodian could have easily identified the document by reaching out to the employees. The Complainant argued that the Custodian would not have been required to read several documents to determine whether it was the subject of his request.

The Complainant added that all OPRA requests involving a large public agency would require its custodian to conduct a search to locate the relevant documents, and therefore shouldn't be considered research. The Complainant asserted that by failing to take any action to contact those with knowledge of the document, the Custodian violated OPRA.

Analysis

Validity of 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, 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. (emphasis added). Bent, 381 N.J. Super. at 37; N.J. Builders Ass’n, 390 N.J. Super. at 180; Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

In Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 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 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.” (Footnotes omitted.)

[Id.]

The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad (“any and all,” requests seeking “records” generically, etc.) requires a custodian to conduct research. MAG, 375 N.J. Super. at 534; Donato, GRC 2005-182. The second is those requests seeking information or asking questions. See e.g. Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is either not on an official OPRA request form or does not invoke OPRA. See e.g. Naples v. N.J. Motor Vehicle Comm’n, GRC Complaint No. 2008-97 (December 2008).

In Lagerkvist, 443 N.J. Super. at 237-37, the court reasoned that the plaintiff’s request:

[W]ould have had to make a preliminary determination as to which travel records correlated to the governor and to his senior officials, past and present, over a span of years. The custodian would then have had to attempt to single out those which were third-party funded events. Next, he would have had to collect all documents corresponding to those events and search to ensure he had accumulated everything, including both paper and electronic correspondence. OPRA does not convert a custodian into a researcher.

In the current matter, the Complainant sought a document being held by a Kean employee and another individual in a photograph taken on July 19, 2016. Based upon the record, the GRC is satisfied that the Custodian lawfully determined that the Complainant’s request was invalid. The Complainant’s request failed to identify the requested document, but instead shifted that burden to the Custodian. The Complainant’s original e-mail and subsequent follow-ups did not aid in identifying the document, but instead identified other employees who may know about the

document. As outlined in the SOI, the Custodian would have to contact those employees and then rely on their recollection to identify the document in question. That the Complainant believes that reaching out to these employees would not be difficult is inapposite; the Custodian is being charged with engaging in research to determine the identity of the requested record before beginning the actual search.

Accordingly, the Complainant's April 25, 2017 OPRA request is invalid because it would require the Custodian to conduct research to determine the identity of the requested record captured in a photograph. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; N.J. Builders, 390 N.J. Super. at 180; Latgerkvist, 443 N.J. Super. at 236-37; Schuler, GRC 2007-151; Donato, GRC 2005-182. Thus, the Custodian lawfully denied access. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that the Complainant's April 25, 2017 OPRA request is invalid because it would require the Custodian to conduct research to determine the identity of the requested record captured in a photograph. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Ass'n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-237 (App. Div. 2015); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007). Thus, the Custodian lawfully denied access. N.J.S.A. 47:1A-6.

Prepared By: Samuel A. Rosado
Staff Attorney

July 23, 2019