



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 13, 2018 Government Records Council Meeting

Keith Werner
Complainant

Complaint No. 2017-51

v.

NJ Department of Corrections
Custodian of Record

At the November 13, 2018 public meeting, the Government Records Council (“Council”) considered the November 7, 2018 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 request items number 1 and 2 are invalid because they fail to seek identifiable government records and constitute an overbroad and unclear request that would require the Custodian to conduct research outside the scope of his duties. 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); and Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 8, 2010). Additionally, the records requested in item number 1 are exempt from access as records “or other communication prepared by, or for, the specific use of a member of the Legislature in the course of the member’s official duties” pursuant to N.J.S.A. 47:1A-1.1. Thus, the Custodian did not unlawfully deny access to the Complainant’s 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 13th Day of November, 2018

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 15, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
November 13, 2018 Council Meeting**

**Keith Werner¹
Complainant**

GRC Complaint No. 2017-51

v.

**New Jersey Department of Corrections²
Custodial Agency**

Records Relevant to Complaint: Copies of the following records:

1. “All policies, guidelines, standard operating procedures, internal memoranda, and correspondence between NJDOC officials and the NJ Legislature with respect to ending the practice of long term segregation at New Jersey State Prison.”
2. “All psychological, psychiatric, neurological studies, data, and/or conclusion in the possession of the NJDOC [and its officials, officers, employees, agents or other acting in therewith] concerning the effects of long term segregation on prisoners.”

Custodian of Record: John Falvey
Request Received by Custodian: February 2, 2017
Response Made by Custodian: February 2, 2017
GRC Complaint Received: March 10, 2017

Background³

Request and Response:

The Complainant submitted an Open Public Records Act (“OPRA”) request dated January 17, 2017, to the Custodian seeking the above-mentioned records. On February 2, 2017, the same day the request was received, the Custodian responded in writing informing the Complainant that the request was invalid because it did not identify the records being sought. The Custodian cited MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005) in support of the denial.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Erica R. Heyer.

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.

Denial of Access Complaint:

On March 10, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that he provided the request to the Custodian on January 17, 2017 and received the Custodian’s written response dated February 2, 2017 on March 3, 2017.

The Complainant stated that the Legislature drafted a bill to end long-term segregation, and subsequently in September 2015, the New Jersey State Prison began releasing hundreds of prisoners incarcerated in long-term segregation to the general population and to out-of-state prisons. The Complainant alleged that the Legislature’s bill was based upon newly discovered medical evidence that isolating humans for lengthy periods can cause brain and/or neurological damage. The Complainant stated that the records he requested “designate with reasonable particularity the precise records I seek.” The Complainant alleged that the “Custodian’s denial is a frivolous pretext to evade providing the documents I am entitled to receive.”

Statement of Information:

On April 7, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on February 2, 2017, and responded in writing on that same date. The Custodian certifies that the Complainant’s request failed to identify a record as required under OPRA.

The Custodian’s Counsel stated that the Appellate Division’s decision in Bent, 381 N.J. Super. 30, 37, held that “[t]o qualify under OPRA then, the request must reasonably identify a record and not generally data, information or statistics.” Counsel also cited MAG, 375 N.J. Super. 534, 549 for determining that “OPRA does not countenance open-ended searches of an agency’s files.” The Custodian’s Counsel argued that the Custodian was therefore correct to deny access because neither request item specifically identified a government record.

Moreover with respect to request item number 1, Counsel argued that it was also properly denied because N.J.S.A. 47:1A-1.1 exempts from access records “ ... prepared by, or for, the specific use of a member of the Legislature in the course of the member’s official duties ... ” Counsel stated that because the Complainant’s request item specifically sought communications with the Legislature, it is exempt.

Analysis

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 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);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).

Moreover, in Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 8, 2010), the Council established criteria deemed necessary under OPRA to request an e-mail communication. For such requests to be valid, they must contain: (1) the content and/or subject of the e-mail(s), (2) the specific date or range of dates during which the e-mail(s) were transmitted, and (3) the identity of the sender and/or the recipient thereof. *See also* Sandoval v. N.J. State Parole Bd., GRC Complaint No. 2006-167 (Interim Order dated March 28, 2007). Thus, the Council has determined that requests seeking correspondence but omitting the specific date or range of dates are invalid. *See* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2009-124 (April 2010). The Council has also applied the criteria set forth in Elcavage to other forms of correspondence, such as letters. *See* Armenti v. Robbinsville Bd. of Educ. (Mercer), GRC Complaint No. 2009-154 (Interim Order dated May 24, 2011).

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

Request Item Number 1

Here, the Complainant's request item number 1 sought "[a]ll policies, guidelines, standard operating procedures, internal memoranda, and correspondence between NJDOC officials and the NJ Legislature with respect to ending the practice of long term segregation at New Jersey State Prison." This request is invalid because the Complainant used a broad generic description of categories to specify the records sought. The Complainant failed to *specifically identify* any of the listed records, provide dates or a date range, and, in the case of correspondence, state the content and/or subject and identify the sender and/or the recipient.⁵ This request would require the Custodian to locate all such listed records and then examine each one to determine if it contained content with respect to ending the practice of long term segregation at the prison. This would require the Custodian to conduct research, which he is not required to do under OPRA. "OPRA ... is not intended as a research tool litigants may use to force government officials to identify and siphon useful information." MAG, *supra* at 546.

Request item number 1 also seeks records that are expressly exempt from access under OPRA. N.J.S.A. 47:1A-1.1 provides in relevant part that:

A government record shall not include the following ... any memorandum, correspondence, notes, report or other communication prepared by, or for, the specific use of a member of the Legislature in the course of the member's official duties, except that this provision shall not apply to an otherwise publicly-accessible report which is required by law to be submitted to the Legislature or its members[.]

In request item number 1 the Complainant sought records or other communications that were prepared by, or for, the specific use of a member of the Legislature. The Complainant in his request did not identify a publicly-accessible report which was required by law to be submitted to the Legislature or its members. As such, the records are exempt from access as records "or other communication prepared by, or for, the specific use of a member of the Legislature in the course of the member's official duties" pursuant to N.J.S.A. 47:1A-1.1.

Request Item Number 2

Although request item number 2 did not seek records prepared by, or for, the Legislature, it is otherwise invalid for the same reasons as request item number 1. The only difference being that the Custodian, after locating the listed records, would have to examine each one to determine if it contained content "concerning the effects of long term segregation on prisoners." Again, this would require the Custodian to conduct research, which he is not required to do under OPRA.

Accordingly, the Complainant's request items number 1 and 2 are invalid because they fail to seek identifiable government records and constitute an overbroad and unclear request that would require the Custodian to conduct research outside the scope of his duties. MAG, 375 N.J. Super. 534, 546; Bent, 381 N.J. Super. 30, 37; N.J. Builders Ass'n, 390 N.J. Super. 166, 180; Schuler,

⁵ The Complainant's designation "correspondence between NJDOC officials and the NJ Legislature" is overly broad and does not identify a sender and/or recipient with any specificity.

GRC 2007-151; and Elcavage, GRC 2009-07. Additionally, the records requested in item number 1 are exempt from access as records “or other communication prepared by, or for, the specific use of a member of the Legislature in the course of the member’s official duties” pursuant to N.J.S.A. 47:1A-1.1. Thus, the Custodian did not unlawfully deny access to the Complainant’s request. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that the Complainant’s request items number 1 and 2 are invalid because they fail to seek identifiable government records and constitute an overbroad and unclear request that would require the Custodian to conduct research outside the scope of his duties. 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); and Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-07 (April 8, 2010). Additionally, the records requested in item number 1 are exempt from access as records “or other communication prepared by, or for, the specific use of a member of the Legislature in the course of the member’s official duties” pursuant to N.J.S.A. 47:1A-1.1. Thus, the Custodian did not unlawfully deny access to the Complainant’s request. N.J.S.A. 47:1A-6

Prepared By: John E. Stewart
Staff Attorney

November 7, 2018