



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

May 21, 2019 Government Records Council Meeting

Brian J. Duffield, Esq.
Complainant

Complaint No. 2017-68

v.

Township of Deptford (Gloucester)
Custodian of Record

At the May 21, 2019 public meeting, the Government Records Council (“Council”) considered the May 14, 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 March 13, 2017 OPRA request is invalid because it would require the Custodian to conduct research to determine which, or whether any, of the meeting minutes referenced the topics identified by the Complainant. 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 Assoc. 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); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint Nos. 2011-147, 2011-157, 2011-172, and 2011-181 (July 2012). 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 21st Day of May 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: May 22, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
May 21, 2019 Council Meeting**

**Brian J. Duffield, Esq.¹
Complainant**

GRC Complaint No. 2017-68

v.

**Township of Deptford (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. All Mayor and Council Minutes wherein the litigation entitled "The Township of Deptford v. The Borough of Wenonah", bearing Docket No. GLO-L-190-17", was discussed between October 1, 2016 – March 10, 2017;
2. All Mayor and Council Minutes between October 1, 2016 – March 10, 2017 relating to "speed humps" located on Maple Street in Wenonah, New Jersey;
3. All Mayor and Council Minutes between January 1, 2014 – December 31, 2014 relating to litigation entitled "The Township of Deptford v. The Borough of Wenonah", bearing Docket No. GLO-C-13-14"; and
4. All Mayor and Council Minutes between January 1, 2014 – December 31, 2014 relating to "speed humps" located on Maple Street in Wenonah, New Jersey.³

Custodian of Record: Dina L. Zawadski

Request Received by Custodian: March 13, 2017

Response Made by Custodian: March 22, 2017

GRC Complaint Received: April 3, 2017

Background⁴

Request and Response:

On March 13, 2017 the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On March 22, 2017, Custodian's

¹ No legal representation listed on record.

² Represented by Timothy M. O'Donnell, Esq., of Long, Marmero & Associates, LLP (Woodberry, NJ).

³ The Complainant requested additional records not at issue in the instant complaint.

⁴ 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.

Counsel (“Counsel”), on behalf of the Custodian, responded in writing asserting that the requested items were invalid as they would require the Custodian to conduct research. The Custodian also directed to the Township of Deptford (“Township”) website for electronic access to the Mayor and Council meeting minutes.

Denial of Access Complaint:

On March 22, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant first asserted that Counsel was not authorized to deny access to the OPRA request, as he was not the designated Custodian under N.J.S.A. 47:1A-1.1.

Next, the Complainant asserted that the request items sought were “Mayor and Council Minutes” relating to specific litigation during specific dates. The Complainant also stated that the request identified specific subject matter at a specific location. The Complainant contended that the requested records do not require the Custodian to conduct research as it defined specific documents within a specific time frame and for a specific subject matter. The Complainant argued that the Township’s denial of his OPRA request was contrary to public policy.

Statement of Information:

On April 11, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on March 13, 2017. The Custodian also certified that her search comprised of a review of records within the possession of the Township and Counsel. The Custodian certified that Counsel responded in writing on her behalf on March 22, 2017, denying access to the request items as invalid.

Under Item No. 12 of the SOI, Counsel asserted that on February 8, 2017, a civil complaint was filed in the litigation entitled Township of Deptford v. Borough of Wenonah, Docket No. GLO-L-190-17, and was served on the Borough of Wenonah (“Borough”) on February 27, 2017. Counsel then stated that the Complainant, with knowledge of the litigation and acting as representative of the Borough, filed the OPRA request at issue. Counsel asserted that the Complainant filed the OPRA request with the purpose of harassing the Custodian, circumventing the discovery process, and inappropriately communicating directly with the Custodian.

Counsel contended that because the OPRA request was related to the aforementioned litigation, he responded to the OPRA request directly. Counsel asserted that the Complainant’s direct communication with the Custodian through his OPRA request ran afoul of his ethical responsibilities as a member of the New Jersey Bar.

Counsel also argued that the Complainant’s OPRA request was an attempt at getting around the discovery process in the pending litigation. Counsel noted that OPRA was not intended as a research tool to require custodians to identify and analyze information that may be useful in collateral litigation. MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005). Thus, Counsel asserted that his response was appropriate, while the Complainant’s OPRA request was inappropriate.

Regarding the request itself, Counsel asserted that the items were overly broad and/or unclear and would require the Custodian to conduct research. Counsel contended that the Custodian or someone assigned by the Township would have to locate and review each set of meeting minutes during the dates in question to determine whether the topics identified were discussed. Counsel argued that OPRA does not require custodians to conduct research among its records for requestors, therefore the Complainant's claims are without merit.

Additional Submissions:

On April 17, 2017, the Complainant submitted a response to the Custodian's SOI. The Complainant asserted that MAG did not prohibit him from seeking the requested records via OPRA. The Complainant noted that in MAG, the court held that:

New Jersey provides access to public records in three distinct ways, through the citizen's common law right of access, OPRA, and the discovery procedures applicable to civil disputes. Bergen Cnty. Improvement Auth. v. North Jersey Media Group, Inc., 370 N.J. Super. 504, 515, (App. Div.), certif. denied, 182 N.J. 143 (2004). Records that are not available under one approach may be available through another. For example, in Bergen Cnty. Improvement Auth., supra, we recognized that the common law definition of "public records" was broader than OPRA's definition of "government records," and therefore, a litigant might be able to obtain documents through the common law that it could not obtain through OPRA. 370 N.J. Super. at 510. Likewise, in Mid-Atlantic Recycling Technologies, Inc. v. City of Vineland, 222 F.R.D. 81, 85 (D.N.J. 2004), the court held that federal discovery rules governing plaintiff's civil lawsuit against municipal defendants did not preclude plaintiff from requesting documents under OPRA even though plaintiff might obtain documents from defendants more quickly through OPRA and the documents might be otherwise unobtainable under the federal rules.

[375 N.J. Super. at 543-44.]

Additionally, the Complainant asserted that Counsel's suggestion that the requests were overly broad and/or unclear was misguided. The Complainant also argued that the existence of pending litigation between the Township and the Borough did not absolve the Custodian of her obligation to comply with 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 v. Twp. of Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005), 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, 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).

Regarding requests requiring research, the distinction between search and research can be fact-sensitive at times. That is, there are instances where the very specificity of a request requires only a search, as would the case would be with OPRA requests for communications properly containing all three (3) criteria set forth in Elcavage v. West Milford Twp. (Passaic), GRC Complaint No. 2009-7 (April 2010). To that end, the Council has provided guidance on how requests containing the Elcavage criteria do not require research:

[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. Whether a subject can be readily identifiable will need to be made on a case-by-case basis. When it comes to e-mails or documents stored on a computer, a simple keyword search may be sufficient to identify any records that may be responsive to a request. As to correspondence, a custodian may be required to search an appropriate file relevant to the subject. In both cases, e-mails and correspondence, a completed “subject” or “regarding” line may be sufficient to determine whether the record relates to the described subject. Again, what will be sufficient to determine a proper search will depend on how detailed the OPRA request is, and will differ on a case-by-case basis. What a custodian is not required to do, however, is to actually read through numerous e-mails and correspondence to determine if same is responsive: in other words, conduct research.

[Verry v. Borough of South Bound Brook (Somerset), GRC Complaint Nos. 2013-43 and 2013-53 (Interim Order dated September 24, 2013).]

Conversely, there are instances where a request can be specific enough to induce research, thus rendering it invalid. For instance, in Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint Nos. 2011-147, 2011-157, 2011-172, and 2011-181 (July 2012), the complainant submitted four (4) OPRA requests seeking copies of meeting minutes containing motions to approve other minutes. The Council, citing Taylor v. Cherry Hill Bd. of Educ. (Camden), GRC Complaint No. 2008-258 (August 2009) and Ray v. Freedom Academy Charter Sch. (Camden), GRC Complaint No. 2009-185 (August 2010), determined that the requests were overly broad:

[S]aid requests do not specify the date or time frame of the minutes sought. Rather, the requests seek those minutes at which the UCBOE motioned to approve meeting minutes for four (4) other meetings. Similar to the facts of both Taylor and Ray, the requests herein *seek minutes that refer to a topic and would require the Custodian to research the UCBOE’s meeting minutes in order to locate the particular sets of minutes that are responsive to the Complainant’s requests . . .* because the

Complainant's four (4) requests for minutes "that include a motion made by the Union City Board of Education to approve the minutes" from other meetings fail to identify the specific dates of the minutes sought and would require the Custodian to conduct research in order to locate the responsive records, the Complainant's requests are invalid under OPRA.

[Valdes, GRC 2011-147 *et seq.* (emphasis added) (citing N.J. Builders Ass'n, 390 N.J. Super. at 180; Bent, 381 N.J. Super. at 30 (App. Div. 2005); MAG, 375 N.J. Super. at 546; Schuler, GRC 2007-151; Donato, GRC 2005-182. See also Valdes v. Gov't Records Council, GRC Complaint No. 2013-278 (September 2014).]

In Lagerkvist v. Office of the Governor, 443 N.J. Super. 230 (App. Div. 2015), the court's rationale of what amounted to research supports the Council's decision in Valdes. There, 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,

[Id. at 236-37.]

Here, the GRC is satisfied that the Custodian lawfully determined that the Complainant's request was invalid. Specifically, the items here match the requests at issue in Valdes, GRC 2011-147, *et seq.* in that the custodian there would have been required to research sets of minutes to find those inclusive of a particular subject. Likewise, the Custodian in the current matter would be required to analyze each set of minutes within the identified period to determine whether they refer to the subject matter referenced by the Complainant. Such action clearly parallels both the process the GRC determined to be research in Valdes, as well as the process that the Lagerkvist court considered to be research.

Accordingly, the Complainant's March 13, 2017 OPRA request is invalid because it would require the Custodian to conduct research to determine which, or whether any, of the meeting minutes referenced the topics identified by the Complainant. MAG, 375 N.J. Super. at 546; Bent, 381 N.J. Super. at 37; N.J. Builders, 390 N.J. Super. at 180; Lagerkvist, 443 N.J. Super. at 236-37; Schuler, GRC 2007-151; Donato, GRC 2005-182; Valdes, GRC 2011-147, *et seq.* 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 March 13, 2017 OPRA request is invalid because it would require the Custodian to conduct research to determine which, or whether any, of the meeting minutes referenced the topics identified by the

Complainant. 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 Assoc. 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); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint Nos. 2011-147, 2011-157, 2011-172, and 2011-181 (July 2012). Thus, the Custodian lawfully denied access. N.J.S.A. 47:1A-6.

Prepared By: Samuel A. Rosado
Staff Attorney

May 14, 2019