



State of New Jersey
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

August 25, 2020 Government Records Council Meeting

David Weiner
Complainant
v.
County of Essex
Custodian of Record

Complaint No. 2019-01

At the August 25, 2020 public meeting, the Government Records Council (“Council”) considered the August 18, 2020 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 seeking “names, titles, and Department/Division” of employees convicted of, or pleading guilty to, a third- or fourth-degree crime is invalid because it required research. The Custodian had no legal duty to research her files, or cause research, to locate records potentially responsive to the request. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 549 (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); 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 to the subject 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 25th Day of August 2020

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 27, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 25, 2020 Council Meeting**

**David Weiner¹
Complainant**

GRC Complaint No. 2019-1

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint: Copies of “any documents delineating the name, title, and Department/Division” of all County of Essex (“County”) employees who have been convicted of, or plead guilty to, crimes of the third or fourth degree and those specific crimes.

Custodian of Record: Valentina Smoot Palchetti
Request Received by Custodian: December 12, 2018
Response Made by Custodian: December 20, 2018
GRC Complaint Received: January 3, 2019

Background³

Request and Response:

On December 12, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 20, 2018, the Custodian responded in writing denying the subject OPRA request on two (2) bases. The Custodian first stated that the request was invalid because it required research. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 549 (App. Div. 2005). The Custodian noted that the County did not maintain an electronic database capable of siphoning the requested information; thus, she would be required to search every employee’s personnel file for criminal history records involving third- and fourth-degree crimes. The Custodian next stated that the request was denied under the personnel exemption because employee criminal histories are not disclosable under OPRA. N.J.S.A. 47:1A-10.

Denial of Access Complaint:

On January 3, 2019, the Complainant filed a Denial of Access Complaint with the

¹ No legal representation listed on record.

² Represented by Courtney Gaccione, Esq. (Newark, NJ).

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.

Government Records Council (“GRC”). The Complainant contended that the Custodian’s denial of access was unlawful but provided no additional arguments in support of his position.

Statement of Information:⁴

On May 14, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 12, 2018. The Custodian certified that her search included contacting Human Resources (“HR”), who searched their electronic and paper files for a list responsive to the subject OPRA request. The Custodian affirmed that HR did not locate a responsive list; thus, it searched a random employee’s file and determined that the information sought was kept in the form of New Jersey State Police (“NJSP”) background checks. The Custodian certified that she responded in writing on December 20, 2018 denying the request as invalid and under the personnel record exemption. N.J.S.A. 47:1A-10.

The Custodian contended that the Complainant’s OPRA request was invalid because it required research and the creation of a government record. MAG, 375 N.J. Super. 534. The Custodia noted that she would have to search through approximately 3,500 employee folders and determine on a case-by-case basis if the background check fell within the request criteria. The Custodian argued that the GRC previously held that an agency was not required to create a list if none already existed at the time of an OPRA request. See Matthews v. City of Atlantic City (Atlantic), GRC Complaint No. 2008-123 (February 2009).

The Custodian further argued that any records potentially responsive to the subject OPRA request were exempt from disclosure under the personnel exemption. N.J.S.A. 47:1A-10. The Custodian argued that this provision contains multiple exceptions for information requiring disclosure. The Custodian argued that background checks or their results are not part of the excepted information.

The Custodian also added that N.J.A.C. 13:29-1.2 provides that background checks are confidential and can only be disclosed if a requestor meets the requirements set forth therein. The Custodian further averred that even if a requestor meets the requirements contained in N.J.A.C. 13:59-1.2, then he/she is required to request background checks directly from the NJSP. The Custodian thus contended that the Complainant here was not entitled to background checks, which can only be disclosed by NJSP.

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.*

⁴ On January 25, 2019, this complaint was referred to mediation. On April 25, 2019, this complaint was referred back to the GRC for adjudication.

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. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005),⁵ N.J. Builders Ass’n. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 178-179 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

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.*) because it fails to identify specific records, thus requiring a custodian to conduct research. MAG, 375 N.J. Super. 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 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

⁵ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

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.]

Further, 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. 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, 236-237 (App. Div. 2015), the court’s rational of what amounted to research supports the Council’s decision in Valdes. There, the court reasoned that the plaintiff’s request:

. . . would 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 237. See also Carter v. N.J. Dep't of Cmty. Affairs, Div. of Local Gov't Serv., 2019 N.J. Super. Unpub LEXIS 2510 (App. Div. Dec. 10, 2019) (affirming Carter, GRC Complaint No. 2016-262 (August 2018)).]

However, in Danis v. Garfield Bd. of Educ. (Bergen), GRC Complaint No. 2009-156 *et seq.* (Interim Order dated June 29, 2010), the Council determined in part that “name, title, position, salary, payroll record and length of service” is information which is specifically considered to be a government record under N.J.S.A. 47:1A-10. The Council thus held that the complainant’s March 25, 2009, request for “[t]he name, position, salary, payroll record and length of service for every Board/District employee who was employed in whole or part from January 1, 2008, to March 24, 2009” was a valid request pursuant to OPRA. Id. at 5.

Further, the question of research is approached differently when the information sought is electronically stored information. In Paff v. Twp. of Galloway, 229 N.J. 340 (2017), the New Jersey Supreme Court determined that an agency’s electronically stored information is a “government record” under OPRA, unless otherwise exempt. The Court thus reversed and remanded, holding that basic e-mail information stored electronically is a “government record” under OPRA, unless an exemption applies to that information. The Court reasoned that:

A document is nothing more than a compilation of information -- discrete facts and data. By OPRA’s language, information in electronic form, even if part of a larger document, is itself a government record. Thus, electronically stored information extracted from an email is not the creation of a new record or new information; it is a government record.

....

With respect to electronically stored information by a municipality or other public entity, we reject the Appellate Division's statement that “OPRA only allows requests for records, not requests for information.” Paff, 444 N.J. Super. at 503, (quoting [Bent, 381 N.J. Super. at 37]). That position cannot be squared with OPRA's plain language or its objectives in dealing with electronically stored information.

[Id. at 353, 356.]

Paff squares with the Council’s past decisions on the issue of coalescing information from electronic systems to the extent that responsive information within those systems existed. See Zahler v. Ocean Cnty. Coll., GRC Complaint No. 2013-266 (Interim Order dated July 29, 2014). However, the Council has also found that a custodian was not required “to create a list compatible” to an OPRA request by entering new information not already included in a database. Matthews, GRC 2008-123 at 6.

The request at issue here sought “names, titles, and Department/Division” of employees convicted of, pleading guilty to, third- and fourth-degree crimes. The Custodian responded denying the request as invalid and under the personnel exemption. MAG, 375 N.J. Super. at 546; N.J.S.A.

47:1A-10. This complaint ensued, wherein the Custodian submitted an SOI maintaining her position that the subject request was invalid, among other bases for the denial, because it required research. The Custodian argued that she was not required to commit research in order to produce responsive records. The Custodian further detailed the necessary research, noting that she would have to review every criminal history checks in each of the 3,500 employee files and determine whether same fell within the request criteria.

In reviewing the subject request, all arguments provided by the parties, and the case law relevant to invalid requests requiring research, the GRC is satisfied that the Custodian lawfully determined that the request was invalid. The GRC notes that the Complainant sought information identified as a “government record” under OPRA in accordance with OPRA. Danis, GRC 2009-156, *et seq.* However, the presence of identifiable “government records” within the subject request does not end the inquiry.

Instead, the GRC must also look to that process for locating responsive records that the Custodian detailed in the SOI. Those steps included reviewing the criminal background checks of 3,500 employees to determine whether they were convicted of or plead guilty to a crime. The Custodian would then have to determine whether those identified employee acts were considered crimes of the third- or fourth-degree. Such actions are clearly like both the process the GRC determined to be research in Valdes, as well as the process that the Lagerkvist court considered to be research. Further, the Custodian has certified that no viable database containing the responsive information exists; thus, Paff, 229 N.J. 340 does not apply here.

Accordingly, the Complainant’s request seeking “names, titles, and Department/Division” of employees convicted of, or pleading guilty to, a third- or fourth-degree crime is invalid because it required research. The Custodian had no legal duty to research her files, or cause research, to locate records potentially responsive to the request. 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 236-237; Schuler, GRC 2007-151; Donato, GRC 2005-182; Valdes, GRC 2011-147, *et seq.* Thus, the Custodian lawfully denied access to the subject request. N.J.S.A. 47:1A-6.

Finally, the GRC notes that even if the subject request were valid, precedential case law favors non-disclosure of personnel records that would otherwise provide information not subject to disclosure under N.J.S.A. 47:1A-10. *See e.g.* Libertarians for Transparent Gov’t v. N.J. State Police, 2019 N.J. Super. Unpub. LEXIS 1156 (App. Div. 2019); Guerrero v. Cnty. of Hudson, GRC Complaint No. 2010-216 (December 2011).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant’s request seeking “names, titles, and Department/Division” of employees convicted of, or pleading guilty to, a third- or fourth-degree crime is invalid because it required research. The Custodian had no legal duty to research her files, or cause research, to locate records potentially responsive to the request. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 549 (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); 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 to the subject request. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso
Executive Director

August 18, 2020