



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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COMMISSIONER LUCILLE DAVY
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CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

July 30, 2008 Government Records Council Meeting

Janet Pizar
Complainant

Complaint No. 2006-196

v.

Township of Millburn
Custodian of Record

At the July 30, 2008 public meeting, the Government Records Council (“Council”) considered the July 23, 2008 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:

1. The Custodian’s failure to grant access, deny access, seek clarification or request an extension of time in writing within the statutorily mandated seven (7) business days results in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Complainant’s OPRA request is not a request for specific identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request, the Complainant’s request is invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007). As such, it is not required to determine whether the records identified by the Custodian constitute attorney-client privilege or advisory, consultative or deliberative material.

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, 2008

Robin Berg Tabakin, Chairman
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: August 4, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 30, 2008 Council Meeting**

**Janet Pizar¹
Complainant**

GRC Complaint No. 2006-196

v.

**Township of Millburn²
Custodian of Records**

Records Relevant to Complaint: All items and communications with the Township Attorney regarding “net & bolt” from January 1, 2005 to May 1, 2006.³

Request Made: September 5, 2006

Response Made: September 21, 2006

Custodian: Joanne M. Monarque⁴

GRC Complaint Filed: November 8, 2006

Background

September 5, 2006

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above in a letter to the Custodian.

September 21, 2006

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the eleventh (11th) business day following receipt of such request. The Custodian states that access to the requested records is denied because said records fall under OPRA’s attorney-client privilege exemption.

November 8, 2006

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:

- Complainant’s OPRA request dated September 5, 2006
- Custodian’s response to the OPRA request dated September 21, 2006⁵

¹ Represented by Bruce Afran, Esq. (no additional information on file).

² Represented by Anton Lendor, Esq., of Maraziti Falcon & Healey, L.L.P. (Short Hills, NJ).

³ The Complainant requested additional records, however, said records are not the subject of this complaint.

⁴ The Custodian at the time of the Complainant’s request was Timothy P. Gordon.

⁵ The Complainant attached additional records to her Denial of Access Complaint; however, said records are not relevant to the adjudication of this complaint.

The Complainant states that she submitted her OPRA request on September 5, 2006. The Complainant states that the Custodian provided a written response to her request dated September 21, 2006 in which the Custodian denied access to the requested records on the basis that said records are exempt as attorney-client privilege. The Complainant requests that the Council conduct an *in camera* review of the requested records.

November 27, 2006

Offer of Mediation sent to both parties.

November 30, 2006

Complainant's signed Agreement to Mediate.

December 5, 2006

Custodian's signed Agreement to Mediate.

December 6, 2006

Complaint referred to mediation.

May 16, 2008

Complaint referred back to the GRC for adjudication.

May 23, 2008

Letter from GRC to Complainant. The GRC requests that the Complainant amend her Denial of Access Complaint, if needed, in the event that some issues were resolved during the mediation process which no longer require adjudication.⁶

June 3, 2008

Request for the Statement of Information sent to the Custodian.

June 5, 2008

E-mail from GRC to Custodian's Counsel. The GRC grants a five (5) business day extension of time for the Custodian to submit his completed Statement of Information.⁷

June 16, 2008

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated September 5, 2006
- Custodian's response to the OPRA request dated September 21, 2006
- Letter from Custodian's Counsel to the GRC dated June 16, 2008

The Custodian certifies that she received the Complainant's OPRA request on or about September 6, 2006. The Custodian certifies that she provided the Complainant with a written response to her OPRA request on or about September 21, 2006 in which the Custodian denied access to the requested records because said records are exempt

⁶ The Complainant did not respond to the GRC's request.

⁷ In response to Counsel's verbal request.

from disclosure pursuant to the attorney-client privilege. The Custodian also certifies that her search for the requested records included a review of the attorney's files. Additionally, the Custodian certifies that no records responsive to the Complainant's request were destroyed.

Further, the Custodian certifies that the following records are responsive to the Complainant's request but were withheld from disclosure because said records constitute attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1:

1. Memorandum concerning draft of White Buffalo, Inc., seeking revisions and comments regarding same
2. Internal memorandum regarding circulating draft copies of the Millburn Deer Management Contract
3. Cover memorandum regarding revisions to Deer Management Contract as requested by the Township Committee
4. Memorandum seeking legal advice from Township Counsel
5. Memorandum giving legal advice regarding the Deer Management Contract as requested by the Township.

The Custodian also certifies that working drafts of agreements were withheld from disclosure because said agreements constitute advisory, consultative or deliberative material which is exempt pursuant to N.J.S.A. 47:1A-1.1.

June 16, 2008

Letter from Custodian's Counsel to the GRC. Counsel states that during mediation, the Custodian provided the Complainant with redacted copies of deliberative drafts of the Deer Management Agreement. Counsel states that despite the Township's good faith effort to provide the Complainant with records responsive, this complaint has been referred back to the GRC for adjudication.

Counsel asserts that OPRA does not abrogate the long-standing principle of the attorney-client privilege. Counsel states that OPRA specifically exempts records within the attorney-client privilege pursuant to N.J.S.A. 47:1A-1.1. Counsel also states that in Paff v. Perth Amboy (2006),⁸ an unpublished Appellate Division decision, the court determined that the attorney-client privilege applies to public bodies and their attorneys. Thus, Counsel asserts that pursuant to Paff, the records responsive to the Complainant's request are exempt pursuant to the attorney-client privilege.

Further, Counsel contends that the drafts of the Deer Management Agreement which were provided to the Complainant in redacted form are exempt from disclosure pursuant to the deliberative process exemption under OPRA. Counsel states that in Gannett New Jersey Partners v. LP of County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005), the court held that "...if a document contains both deliberative and factual materials, the deliberative materials must be redacted and the factual materials disclosed." Additionally, Counsel states that the court established key factors to

⁸ Custodian's Counsel failed to provide a citation for this case. The GRC was unable to locate the case on Westlaw.

determine whether certain information is considered deliberative under the inter-agency or intra-agency advisory, consultative or deliberative material exemption pursuant to N.J.S.A. 47:1A-1.1. Counsel states that the court found that two (2) conditions must be satisfied: 1) the document must be pre-decisional, meaning it was generated before the adoption of an agency's policy or decision; and 2) it must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. Thus, Counsel asserts that pursuant to Gannett, supra, the redacted drafts of the Deer Management Agreement which were provided to the Complainant during mediation were acceptable under the deliberative process privilege. As such, Counsel contends that this complaint should be dismissed.

June 19, 2008

Complainant's response to the Custodian's SOI. The Complainant requests that the GRC conduct an *in camera* review of the records responsive to verify the Custodian's attorney-client privilege assertion.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

"[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ... N.J.S.A. 47:1A-5.g.

OPRA further provides that:

"[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian

fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ... (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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.

Additionally, OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, the custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁹ The custodian’s failure to respond in writing to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the complainant’s OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In this complaint the Custodian certified that she received the Complainant’s OPRA request on or about September 6, 2006. The Custodian also certified that she provided a written response to the Complainant on or about September 21, 2006, approximately eleven (11) business days following receipt of such request, in which the Custodian denied access on the basis that the records responsive are exempt under OPRA as attorney-client privileged information.

Therefore, the Custodian’s failure to grant access, deny access, seek clarification or request an extension of time in writing within the statutorily mandated seven (7) business days results in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley, supra.

However, the Complainant in this matter requested all items and communications with the Township Attorney regarding “net & bolt” from January 1, 2005 to May 1, 2006. The New Jersey Superior Court has held that “[w]hile OPRA provides an alternative

⁹ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

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.*" (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005). 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." (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005)¹⁰, the Superior Court references Mag in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, 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."¹¹

Additionally, the court in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) cited Mag by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..."

The Complainant in this matter failed to identify specific, identifiable government records. While the Complainant does specify that she is requesting communications with the Township attorney regarding a particular subject matter within a particular time period, the Complainant does not identify any other party or parties to such communications. The Custodian would therefore be required to research her files to locate any and all "communications" which contain the subject matter sought by the Complainant. Additionally, the Complainant does not specify what "items" she refers to in her request. Thus, even though the Custodian provided some records to the Complainant during mediation and identified others which the Custodian withheld from disclosure, the Custodian was not obligated to conduct research in response to the Complainant's request.

Therefore, because the Complainant's OPRA request is not a request for specific identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request, the Complainant's request is invalid and the Custodian has not unlawfully denied access to the requested records pursuant to Mag, *supra*, Bent, *supra* and NJ Builders, *supra*. As such, it is not required to determine whether the records identified by the Custodian constitute attorney-client privilege or advisory, consultative or deliberative material.

¹⁰ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹¹ As stated in Bent.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to grant access, deny access, seek clarification or request an extension of time in writing within the statutorily mandated seven (7) business days results in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

2. Because the Complainant's OPRA request is not a request for specific identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request, the Complainant's request is invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007). As such, it is not required to determine whether the records identified by the Custodian constitute attorney-client privilege or advisory, consultative or deliberative material.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

July 23, 2008