



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

July 30, 2008 Government Records Council Meeting

David Mylowe
Complainant

Complaint No. 2007-218

v.

NJ Higher Education Assistance Authority
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 because the Complainant’s OPRA request is overly broad and does not specify particular identifiable government records, the 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) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005).

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 1, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**David Mylowe¹
Complainant**

GRC Complaint No. 2007-218

v.

**NJ Higher Education Assistance Authority²
Custodian of Records**

Records Relevant to Complaint:

1. Names, dates, and titles of employees who have been reprimanded, suspended, or given any type of disciplinary action in regard to the failure to provide the Personnel Office an official doctor's note substantiating that the employee was sick and/or under a doctor's care and unable to work "last-minute, unscheduled overtime at the end of the employee's regularly scheduled working hours."
2. Names, dates and titles of employees who were officially reprimanded, suspended, or given any type of disciplinary action in an instance where the employee indicated (s)he was unable to work "last-minute, unscheduled overtime" for "any possible reason" and/or all such instances where the employee gave "no reason whatsoever" for his or her unwillingness to perform such last-minute, unscheduled overtime work.

Request Made: August 27, 2007

Response Made: August 30, 2007

Custodian: Robin B. Johnson, Director of Legal and Governmental Affairs

GRC Complaint Filed: September 14, 2007

Background

August 27, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above.³

August 30, 2007

Custodian's response to the OPRA request. Marnie Grodman, Esq., the Assistant Director of Legal & Governmental Affairs, responds in writing to the Complainant's OPRA request on the second (2nd) business day following receipt of such request. The

¹ No legal representation listed on record.

² Represented by DAG Suzanna Polhamus, on behalf of the NJ Attorney General.

³ The Complainant failed to attach a copy of his OPRA request to the Denial of Access Complaint. However, the Complainant certifies in the Denial of Access Complaint that he attached the list of requested documents "to the proper forms."

Custodian states that access to the requested documents is denied because they are personnel documents and pursuant to N.J.S.A. 47:1A-10 are not considered a government record. The Custodian further states that pursuant to Executive Order 26 (McGreevey 2002), documents containing information concerning an individual's medical history, diagnosis, treatment or evaluation are not considered to be government records subject to public access.

October 2, 2007

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

- List of Requested Documents.
- Letter from the Custodian to the Complainant dated August 30, 2007.

Complainant makes no assertions in support of his application.

October 11, 2007

Offer of Mediation sent to both parties. Neither party responded to the offer of mediation.

October 26, 2007

Request for the Statement of Information sent to the Custodian.

November 8, 2007

Custodian's Statement of Information ("SOF") attaching a letter from the Custodian to the Complainant dated August 30, 2007.

The Custodian asserts that the Complainant seeks disciplinary action and confidential records which are part of an employee's personnel record and exempt from public disclosure except for limited, specific information⁴ pursuant to N.J.S.A. 47:1A-10 and Executive Orders 11 and 26. The Custodian further asserts that the Complainant seeks medical records of employees which are also exempt from disclosure pursuant to Executive Order 26 and N.J.S.A. 47:1A-1, which declares that a public agency must safeguard against public access personal information in which a citizen has a reasonable expectation of privacy. The Custodian also avers that the Freedom of Information Act ("FOIA") applies to the requested records.

The Custodian's Counsel argues that according to statute, Executive Orders, and case law, the Custodian is prohibited from releasing the records which contain the information requested by Complainant. In addition, Counsel cites Trenton Times Corp. v. Bd. of Ed. of Trenton, 138 N.J. Super. 357 (App. Div. 1976) and Collins v. Camden Cty. Health Dept., 200 N.J. Super. 281 (Law Div. 1984) (personnel information is not "intended for public consumption" and should not be in the "public domain" except for the limited specific information which is an "insignificant invasion of privacy") in

⁴ "[A]n individual's name, title, position, salary, payroll record, length of service, date of separation, and the reason therefor, and the amount and type of any pension received shall be a government record..."

N.J.S.A. 47: 1A-10.

support of these contentions. Further, Counsel asserts that the GRC has previously upheld an agency's denial of a request for information contained in an employee's personnel records. McCalley v. Rowan University, GRC Complaint No. 2003-90, (February, 2004). Additionally, Custodian's Counsel contends that disciplinary and medical records contain information in which state employees have a privacy interest that precludes disclosure pursuant to N.J.S.A. 47:1A-1 and Executive Order 11. Finally, the Custodian's Counsel asserts that medical information is exempt from public access under Executive Order No. 26, 4(b)(1). The Custodian's Counsel contends that in Loigman v. Department of Treasury, GRC Complaint No. 2004-45 (July, 2004), the GRC upheld an agency's denial of access to an employee's medical records.

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 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.

Further, OPRA declares that:

"Notwithstanding the provisions of [OPRA] or any other law to the contrary, *the personnel...records of any individual* in the possession of a public agency, *...shall not be considered a government record and shall not be made available for public access, except that...* an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record..." (Emphasis added.) N.J.S.A. 47:1A-10.

OPRA also states that:

“[t]he provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.” (Emphasis added). N.J.S.A. 47:1A-9.a.

Executive Order No. 26 states in pertinent part that:

“[t]he following records shall not be considered to be government records subject to public access pursuant to [OPRA]... Information concerning individuals as follows: Information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation...” (Emphasis added). Executive Order No. 26 paragraph 4.b.1. (McGreevey 2002).

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.

The Custodian responded in writing to the Complainant’s OPRA request within the statutorily mandated seven (7) business days set forth in N.J.S.A. 47:1A-5.i. The Custodian indicated the specific legal basis for denying access as required by N.J.S.A. 47:1A-5.g. The Custodian denied access to the requested records on the basis that said records are personnel documents. In addition, the Custodian asserted that documents which contain a person’s medical information are not considered to be government records subject to public access.

In this case, the Complainant seeks “names, dates, and titles of employees” that have been subject to certain types of disciplinary action. The Custodian’s assertion that records of disciplinary actions and records containing medical information are exempt from disclosure under OPRA is only partially accurate since no medical information is actually requested. The Custodian is correct in asserting that personnel records containing disciplinary information are exempt pursuant to N.J.S.A. 47:1A-10.

However, the Complainant’s OPRA request seeks data or information rather than an identifiable government record. The Complainant’s OPRA request is therefore not valid because it seeks data or information not a specific government record.

The New Jersey Superior Court has held that “[w]hile 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.” (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),⁵ 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."⁶

Additionally, in New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court 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 court also quoted N.J.S.A. 47:1A-5.g. in that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." The court further stated that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to...generate new records..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008) the Council held that "[b]ecause the Complainant's OPRA requests # 2-5 are not requests for identifiable government records, the requests are 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 (March 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005)."

The Complainant's August 27, 2007 OPRA request seeks "names, dates, and titles" of employees in the New Jersey Higher Education Assistance Authority who have been subject to disciplinary action for a variety of actions. Although the Custodian's asserted basis for denying access to the requested records was partially inaccurate, the Complainant's OPRA request is in fact invalid because the request fails to specify particular identifiable government records. As such, the Complainant's OPRA request is overly broad and does not specify particular identifiable government records.

Therefore, because Complainant's OPRA request is overly broad and does not specify particular identifiable government records, the request is invalid and the Custodian has not unlawfully denied access to the requested records pursuant to Mag. supra, NJ Builders, supra, and Bent, supra.

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

⁶ As stated in Bent, supra.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant's OPRA request is overly broad and does not specify particular identifiable government records, the 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) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005).

Prepared By:

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Approved By:

Catherine Starghill, Esq.
Executive Director

July 23, 2008