



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

November 4, 2009 Government Records Council Meeting

Justice Rasideen Allah
Complainant

Complaint No. 2008-174

v.

Essex County Prosecutor's Office
Custodian of Record

At the November 4, 2009 public meeting, the Government Records Council ("Council") considered the October 21, 2009 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 OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the Essex County Prosecutor's Office files to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005) and the Council's decision in Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (March 2008).

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 4th Day of November, 2009



Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: November 9, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 4, 2009 Council Meeting**

**Justice Rasideen Allah¹
Complainant**

GRC Complaint No. 2008-174

v.

**Essex County Prosecutor's Office²
Custodian of Records**

Records Relevant to Complaint:

1. All files maintained by the Essex County Prosecutor's Office regarding nine (9) key witnesses who testified in the matter State of New Jersey v. Patrice Philson, County Indictment No. 1155-3-90.
2. All criminal arrest histories and respective complaints and/or indictment numbers for the nine (9) key witnesses.
3. All records pertaining to any and all plea agreements that were offered to the nine (9) key witnesses in regards to Philson and any prior to the above indictment.
4. All records of any and all polygraph tests administered to the nine (9) key witnesses.
5. Any records of all statements and notes taken as part of the investigation in Philson.
6. A complete itemized list of all documents which are contained in the files of the Essex County Prosecutor's Office pertaining to the nine (9) key witnesses.

Request Made: January 4, 2008

Response Made: January 17, 2008

Custodian: Hilary L. Brunell

GRC Complaint Filed: August 6, 2008³

Background

January 4, 2008

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

January 17, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the same business day as receipt of such request.⁴

¹ No legal representation listed on record.

² Represented by Essex County Counsel (Newark, NJ).

³ The GRC received the Denial of Access Complaint on said date.

⁴ The Custodian certified in the Statement of Information that she received the Complainant's OPRA request on January 17, 2008.

The Custodian states that access to the requested records is denied because the records are exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. et seq.

August 6, 2008

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

- Complainant’s letter request dated January 4, 2008.
- Letter from the Custodian to the Complainant dated January 17, 2008.

The Complainant states that he submitted a request to the Essex County Prosecutor’s Office on January 4, 2008. The Complainant states that the Custodian denied access to the requested records on January 17, 2008, stating that the records were exempt from disclosure as criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1. et seq.

The Complainant asserts that he does not agree with the Custodian’s denial of access. The Complainant also contends that he disagrees with the Custodian’s blanket denial of all the records requested because the Complainant does not consider every record requested to be part of a criminal investigation.

The Complainant agrees to mediate this complaint.

September 17, 2008

Offer of Mediation sent to the Custodian.

September 18, 2008

The Custodian agrees to mediate this complaint.

September 29, 2008

Complaint referred to mediation.

March 30, 2009

Complaint referred back from mediation.

April 23, 2009

Letter from the GRC to the Complainant. The GRC informs the Complainant that he has the opportunity to amend this Denial of Access Complaint prior to the GRC’s request for the Statement of Information from the Custodian. The GRC states that the Complainant’s response is due by close of business on May 1, 2009.⁵

⁵ The Complainant responded on April 29, 2009 attaching a letter to the Mediator dated February 20, 2009. However, the provisions of N.J.S.A. 2A:23C-1, et seq., clearly identify any correspondence occurring in mediation as privileged and restrict consideration of such during the GRC’s adjudication of a complaint. The statute does allow for use of correspondence only when all parties and the mediator waive the privilege; however, there is no evidence in the record that such waiver has occurred. Therefore, the GRC declines to consider the Complainant’s February 20, 2009 correspondence. See Leak v. Union County Prosecutor’s Office, GRC Complaint No. 2007-148 (May 2009).

May 11, 2009

Request for the Statement of Information (“SOI”) sent to the Custodian.

May 11, 2009

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until May 27, 2009 to submit the SOI. The Custodian states that the indictment file requested by the Complainant is in archives and may take several business days to retrieve. Additionally, the Custodian states that she will be out of the office until May 19, 2009.

May 12, 2009

E-mail from the GRC to the Custodian. The GRC grants an extension of time until May 27, 2009 to submit the SOI.

May 28, 2009

Custodian’s SOI. The Custodian submits an SOI that fails to address the instant complaint but instead addresses a separate request made by another requestor.

June 1, 2009

E-mail from the GRC to the Custodian. The GRC states that, per a telephone conversation earlier in the day, the GRC is attaching the Complainant’s Denial of Access Complaint for the Custodian’s review because the SOI addressed an OPRA request not relevant to the instant complaint.

The GRC requests that the Custodian provide a revised SOI by close of business on June 5, 2009.

June 2, 2009

Custodian’s SOI attaching the Complainant’s letter request dated January 4, 2008.

The Custodian certifies that her search for the requested records included searching Promis/Gavel, which located multiple entries for the nine (9) key witnesses provided by the Complainant.⁶ Additionally, the Custodian certifies that she reviewed Prosecutor File No. 90002195, which contains the Complainant’s indictment records. The Custodian certifies that an inquiry of the Homicide Unit rendered no separate homicide file.

The Custodian also certifies that no records responsive were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”).

The Custodian certifies that she received the Complainant’s OPRA request on January 17, 2008 and responded in writing immediately stating that the request was denied because criminal investigatory records are exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1.

⁶ Promis/Gavel is an automated criminal case tracking system available to the Criminal Justice community, Federal, State and local agencies. See, <http://www.judiciary.state.nj.us/criminal/crpgmgl.htm>.
Justice Rasideen Allah v. Essex County Prosecutor’s Office, 2008-174 – Findings and Recommendations of the Executive Director

Additionally, the Custodian contends that the Complainant's OPRA request Item No. 1 does not constitute a valid OPRA request pursuant to Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005) (holding that a proper request under OPRA must identify with reasonable clarity those documents being sought). Further, the Custodian argues that the Complainant failed to provide sufficient information to identify specific files. The Custodian states that prosecutor's files can be identified by defendant name but there are often multiple files with the same name. The Custodian asserts that in such a case where multiple files exist, additional information would be needed to identify the file such as the State Bureau of Investigation ("SBI") number or date of birth.

The Custodian states that a preliminary search for records under the nine (9) key witnesses identified in the Complainant's request yielded numerous multiple files. The Custodian contends that without additional specific information from the Complainant, the Custodian is not able to determine which of these files relate to the Complainant's OPRA request. See MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005)(holding that OPRA 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).

Additionally, the Custodian contends that request Items No. 2 through No. 6. sought five categories of records: criminal arrest histories, records of plea offers, polygraph tests, statements and notes taken as part of the investigation for Indictment No. 1155-3-90 and an itemized list of all documents in the files of the Essex County Prosecutor pertaining to the nine (9) key witnesses. The Custodian contends that her response is as follows:

Complainant's request Item No. 2:

The Custodian asserts that she cannot provide the Complainant with criminal arrest histories because access to criminal record information in the possession of the Essex County Prosecutor's Office is restricted by law pursuant to *N.J.A.C. 13:59-1.2.*, *N.J.A.C. 13:59-1.4.*, *N.J.A.C. 13:59-2.1.* and *N.J.A.C. 13:59-2.4.*

Complainant's request Item No. 3:

The Custodian asserts that the Complainant's request for "any and all plea offers" made to the nine (9) key witnesses was denied because the information, if it existed, would be part of a criminal investigatory file and is, therefore, not a government record pursuant to N.J.S.A. 47:1A-1.1. Additionally, the Custodian contends that the Complainant's request is overly broad pursuant to Bent, *supra*. The Custodian further asserts that OPRA does not require the disclosure of advisory, consultative or deliberative ("ACD") material pursuant to N.J.S.A. 47:1A-1.1.

Complainant's request Item No. 4:

The Custodian certifies that Prosecutor File No. 90002195 does not contain any polygraph records. Further, the Custodian argues that she is unable to determine whether

any other file relating to the nine (9) key witnesses might contain polygraph records because the Complainant's request fails to provide sufficient information to identify specific files. The Custodian argues that records relating to the administration of polygraph tests, if they existed, would be part of the criminal investigatory file and therefore not a government record pursuant to N.J.S.A. 47:1A-1.1.

Complainant's request Item No. 5:

The Custodian states that Prosecutor File No. 90002195 does not contain any statements or notes "taken as part of the investigation of this matter." Further, the Custodian contends that such statements, if they existed, would have been exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Complainant's request Item No. 6:

The Custodian contends that the Complainant's request to provide an itemized list of all documents contained in the files of the nine (9) key witnesses fails to identify specific files and records. Additionally, the Custodian asserts that the Essex County Prosecutor's Office does not maintain written inventories of the contents of individual files and is not required to create a record in order to satisfy the Complainant's request pursuant to MAG, supra and Bent, supra.

Analysis

Whether the Complainant's request for records is a valid request under OPRA?

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.

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 Complainant’s request sought “all ... criminal arrest records, ...files [and] records” pertaining to nine (9) key witnesses who testified in the matter State of New Jersey v. Patrice Philson, County Indictment No. 1155-3-90. The Complainant’s request did not identify specific government records sought but instead set forth the types of subject matter sought by the Complainant.

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 (March 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 (October 2005)⁷, 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.”⁸

Additionally, in New Jersey Builders Association v. New Jersey Council on 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 (February 2009) 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

(App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005).”

In Feiler-Jampel v. Somerset County Prosecutor’s Office, GRC Complaint No. 2007-190 (March 2008), the Complainant requested “[a]ny and all documents and evidence” relating to an investigation being conducted by the Somerset County Prosecutor’s Office. The GRC reasoned that while the Complainant’s request was for an entire investigation file identified by number and containing numerous individual records, the Complainant failed to identify specific government records. The GRC held that:

“because the records requested comprise an entire SCPO file, the request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the SCPO files to locate records potentially responsive to the Complainant’s request pursuant to the Superior Court’s decisions in MAG, *supra* and Bent, *supra* and the Council’s decisions in Asarnow, *supra* and Morgano, *supra*.”

In the matter currently before the Council, the Complainant’s request for “any records” regarding various Essex County Prosecutor’s Office files and records relating to nine (9) key witnesses fails to identify specific records and is a blanket request for information rather than a request for specific government records. Therefore, because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the Essex County Prosecutor’s Office files to locate records potentially responsive to the Complainant’s request pursuant to the Superior Court’s decisions in MAG, *supra* and Bent, *supra* and the Council’s decision in Feiler-Jampel, *supra*.

Additionally, the GRC declines to address whether the records requested are considered criminal investigatory in nature because the Complainant’s request for various files and records maintained by the Essex County Prosecutor’s Office for nine (9) key witnesses is invalid under OPRA.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the Essex County Prosecutor’s Office files to locate records potentially responsive to the Complainant’s request pursuant to the Superior Court’s decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005) and the Council’s decision in Feiler-Jampel v. Somerset County Prosecutor’s Office, GRC Complaint No. 2007-190 (March 2008).

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

October 21, 2009