



**State of New Jersey**  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

**JON S. CORZINE**  
*Governor*

**CHARLES A. RICHMAN**  
*Acting Commissioner*

**FINAL DECISION**

**August 11, 2009 Government Records Council Meeting**

Laurie J. Sands  
Complainant

Complaint No. 2008-24

v.

New Jersey Office of the Governor  
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council (“Council”) considered the August 4, 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 the Complainant’s January 2, 2008 request failed to specifically name identifiable government records sought and would have required the Custodian to manually search through all of the agency’s files and analyze, compile and collate the information contained therein, it is invalid under OPRA. See New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); 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); Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).

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 11<sup>th</sup> Day of August, 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  
Government Records Council

**Decision Distribution Date: August 17, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
August 11, 2009 Council Meeting**

**Laurie J. Sands<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-24**

v.

**New Jersey Office of the Governor<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

All communications and documents regarding the project Abbey Woods at Delbarton, located at 230 Mendham Road, Morris, New Jersey.

**Request Made:** January 2, 2008

**Response Made:** January 3, 2008

**Custodian:** Clarke Bruno<sup>3</sup>

**GRC Complaint Filed:** February 4, 2008<sup>4</sup>

**Background**

**January 2, 2008**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form submitted via the State of New Jersey OPRA Central website.

**January 3, 2008**

Custodian's<sup>5</sup> response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the first (1<sup>st</sup>) day following receipt of such request. The Custodian states that additional time will be needed to research the request and states that he will contact the Complainant when the materials are available for pickup.

**January 10, 2008**

Letter from the Custodian to the Complainant.<sup>6</sup> The Custodian states that he is following up to his e-mail of January 3, 2008 to the Complainant. The Custodian states that additional research will be required in order to respond to the OPRA request, and

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by DAG Michael J. Schuit, on behalf of the NJ Attorney General.

<sup>3</sup> The Custodian at the time of the OPRA request in this matter was William C. Brown. Mr. Brown left the employment of the Counsel's Office on February 4, 2008.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

<sup>5</sup> William C. Brown, Senior Associate Counsel to the Governor.

<sup>6</sup> The Custodian's January 10, 2008 letter to the Complainant occurred on the sixth (6<sup>th</sup>) business day following receipt of the OPRA request.

further states that he expects to have a response to the Complainant by the following week.

### **January 15, 2008**

Letter from the Custodian to the Complainant. The Custodian states that records responsive to the Complainant's OPRA request are enclosed. The Custodian notes that home addresses, telephone numbers, and e-mail addresses have been redacted from the responsive records being provided in accordance with Executive Order No. 26. The Custodian also notes that a "small subset of internal communications involving advisors to the Governor ... have been withheld as advisory, consultative or deliberative material."

### **February 4, 2008**

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

- Complainant's OPRA request dated January 2, 2008
- E-mail from the Custodian to the Complainant dated January 3, 2008
- Letter from the Custodian to the Complainant dated January 15, 2008

The Complainant asserts that she made an OPRA request of the New Jersey Governor's Office dated January 3, 2008, in which she requested records regarding the project at Abbey Woods at Delbarton. The Complainant states that she received an e-mail from the Custodian acknowledging the OPRA request on the same day the OPRA request was made. The Complainant asserts that on January 24, 2008, she received documents responsive to the request from the Custodian. The Complainant further asserts that in the cover letter accompanying the records responsive, the Custodian stated that "a small subset of internal communications involving advisors to the Governor ... have been withheld as advisory, consultative and deliberative." The Complainant states that the Governor's Office did not have the authority to make decisions regarding the Abbey Woods project and that the Complainant therefore believes that no documents should be shielded from disclosure as a result of the deliberative exemption.<sup>7</sup>

The Complainant contends that in order for an agency to avail itself of the OPRA deliberative material exemption, it must prove that the record is "deliberative in nature, containing opinions, recommendations, or advice about agency policies." See Education Law Center v. New Jersey Department of Education, 396 N.J. Super. 634, 640 (App Div. 2007). The Complainant asserts that the exemption was created to allow government decision makers to freely deliberate, without public scrutiny, prior to rendering decisions; therefore, the exemption can only be used to withhold such deliberative material. The Complainant also asserts that because the deliberative material exemption withholds information from the public, the government entity that invokes the exemption bears the burden of proof. *Id.* at 641.

The Complainant argues that although the standard has been set forth by the New Jersey Legislature and courts, in response to the Complainant's request the Governor's

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<sup>7</sup> The Complainant refers to the applicable exemption as the "deliberative exemption." The GRC understands this to be a reference to the exemption of inter-agency or intra-agency advisory, consultative or deliberative ("ACD") material from the definition of a government record at N.J.S.A. 47:1A-1.1. Laurie J. Sands v. New Jersey Office of the Governor, 2008-24 – Findings and Recommendations of the Executive Director

Office merely stated without explanation that responsive records were being withheld as ACD material. The Complainant states that the decision to deny an amendment to the Water Quality Management Plan for the Abbey Woods project was a decision within the authority of the New Jersey Department of Environmental Protection, and, because of this, the Complainant questions how the Governor's Office could claim the ACD exemption over records regarding this project. The Complainant contends that the Governor's Office must explain why records in its possession would be considered advisory, consultative or deliberative of the Abbey Woods project and if it cannot do so, the Governor's Office must produce the requested records.

The Complainant notes that the deliberative process exemption does not protect factual materials, and therefore any facts contained in the responsive records being withheld must be immediately disclosed. Gannett New Jersey Partners, LP v. County of Middlesex, 370 N.J. Super. 205, 220 (App. Div. 2005).

The Complainant does not agree to mediate this complaint.

**February 4, 2008**

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

**February 8, 2008**

Letter from Deputy Attorney General Michael J. Schuit to the GRC. Via facsimile, DAG Schuit requests a five (5) business day extension of time to file the SOI.

**February 8, 2008**

Letter from the GRC to DAG Schuit. The GRC grants the requested five (5) business day extension of time and notes that the SOI is now due for filing on February 21, 2008.

**February 21, 2008**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated January 2, 2008
- E-mail from the Custodian to the Complainant dated January 3, 2008
- Letter from the Custodian to the Complainant dated January 10, 2008
- Letter from the Custodian to the Complainant dated January 15, 2008

The Custodian certifies that in January 2008 he was employed as a Senior Associate Counsel in the Office of Counsel to the Governor. The Custodian certifies that among other duties, he served as the OPRA Custodian. The Custodian certifies that he received an electronic OPRA request on January 2, 2008 from the Complainant. The Custodian further certifies that he responded to the Complainant by e-mail dated January 3, 2008 and by letter dated January 10, 2008, which letter stated that an additional week would be needed to respond to the OPRA request.

The Custodian certifies that he conducted a diligent search for records responsive to the OPRA request and that this search included identifying individuals within the Office of Communications, Office of Constituent Relations, the Policy Office, the

Counsel's Office, the Governor's Administrative staff, and the Deputy Chiefs of Staff who may have dealt with the issue. The Custodian also certifies that he asked the information technology department to conduct searches for e-mails to or from appropriate staff members referring to "the project Abbey Woods at Delbarton."

The Custodian further certifies that after he received records as a result of these searches, he reviewed the records to determine whether they were responsive to the OPRA request and permitted to be disclosed pursuant to OPRA.

The Custodian certifies that he determined that many of the records contained contact information, including home addresses, telephone numbers and e-mail addresses, for individuals outside the Office of the Governor who were communicating their views to the Governor and that, consistent with Executive Order No. 26, the personal information contained in such records should be redacted to protect the privacy of those individuals. The Custodian certifies that he so apprised the Complainant in the letter dated January 15, 2008 which accompanied various records responsive to the Complainant's OPRA request.

The Custodian also certifies that he determined that four (4) records were not subject to disclosure under OPRA because they contained ACD material not subject to disclosure under statute and executive order. The Custodian certifies that he so apprised the Complainant in the letter dated January 15, 2008 which accompanied various records responsive to the Complainant's OPRA request.

In a legal memorandum accompanying the SOI, Custodian's Counsel argues that the Governor's Office properly withheld four (4) records from disclosure because they constitute ACD material which is exempt from disclosure under OPRA. Custodian's Counsel notes that regardless of which level of government made decisions regarding the Abbey Woods project, the Governor's Office is entitled to receive advice and to consult about the decision. Custodian's Counsel asserts that the records in question represent consultations among the Governor's staff about the project, including issues involving policy and communications. Custodian's Counsel also asserts that the New Jersey State Constitution vests executive power in the Governor to supervise each executive department and its head to ensure "that the laws be faithfully executed." N.J. Const. Art. V, § 1, ¶ 1; § 4, ¶ 2, § 1, ¶ 11. Custodian's Counsel argues that under this constitutional structure, the Governor has the ultimate responsibility for the decisions reached by cabinet officers.

Custodian's Counsel also argues that the personal identifying information of individuals who contacted the Governor's Office regarding the Abbey Woods project were properly redacted under N.J.S.A. 47:1A-1 and Executive Order No. 26. Custodian's Counsel asserts that the redactions provide a reasonable degree of privacy and allow citizens to contact their elected officials without being drawn into litigation about controversial matters.

## 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 ... The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.” (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.

In the matter now before the Council, the Complainant submitted an OPRA request on January 2, 2008, seeking various records from the New Jersey Governor’s Office pertaining to the Abbey Woods project at Delbarton in Morris, New Jersey. The Custodian responded in writing on January 3, 2008, and further responded on January 10, 2008, the sixth (6<sup>th</sup>) business day after receipt of the OPRA request, stating that an additional week would be required to fulfill the OPRA request. On January 15, 2008, the Custodian provided certain records responsive to the OPRA request, but stated that additional responsive records were denied because they were exempt from disclosure under OPRA as ACD material. The Complainant asserts that the Custodian has failed to establish that the records meet the required standard for the ACD exemption to disclosure under OPRA.

It is unnecessary for the Council to determine whether the ACD exemption applies to the records referred to in the Custodian's letter to the Complainant dated January 15, 2008 because the Complainant's request is invalid under OPRA.

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. Wholesale requests for general information to be analyzed, collated and compiled by the responding government entity are not encompassed therein. 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),<sup>8</sup> 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."<sup>9</sup>

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..."

In the matter currently before the Council, the Complainant's January 2, 2008 request sought "[a]ll communications and documents regarding the project – Abbey Woods at Delbarton. The project is located at 230 Mendham Road, Morris, New Jersey..." As in MAG, the Complainant herein "provided neither names nor identifiers other than a broad generic description of a brand or type of" record. MAG, *supra*, at 549. As the Appellate Division determined in MAG, "[s]uch an open-ended demand [would have] required the ... records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein[.]...While OPRA may provide access to governmental records otherwise unavailable, [this] request was not

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<sup>8</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>9</sup> As stated in Bent, *supra*.



a proper one for specific documents within OPRA's reach, but rather a broad-based demand for research and analysis, decidedly outside the statutory ambit.” *Id.* at 449-50. See also Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007)(holding that a Custodian is obligated to search her files to find identifiable government records listed in the Complainant’s OPRA request, but is not required to research files to figure out which records, if any, might be responsive to a broad and unclear OPRA request).

Therefore, because the Complainant’s January 2, 2008 request failed to specifically name identifiable government records sought and would have required the Custodian to manually search through all of the agency’s files and analyze, compile and collate the information contained therein, it is invalid under OPRA. See New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); 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); Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that because the Complainant’s January 2, 2008 request failed to specifically name identifiable government records sought and would have required the Custodian to manually search through all of the agency’s files and analyze, compile and collate the information contained therein, it is invalid under OPRA. See New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); 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); Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).

Prepared By: Karyn Gordon, Esq.  
In House Counsel

Approved By: Catherine Starghill, Esq.  
Executive Director

August 4, 2009