



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

JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

FINAL DECISION

April 29, 2009 Government Records Council Meeting

David Herron
Complainant

Complaint No. 2008-46

v.

Township of Montclair (Essex)
Custodian of Record

At the April 29, 2009 public meeting, the Government Records Council (“Council”) considered the April 22, 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:

1. Because the Custodian failed to attempt a reasonable accommodation of the Complainant’s OPRA request before denying access to the requested records on the basis that the request would substantially disrupt the Township’s operations, the Custodian’s response is insufficient under OPRA pursuant to N.J.S.A. 47:1A-5.g.
2. Because the Complainant’s request does not specify an identifiable government record and would require the Custodian to conduct research and create a new record, the Complainant’s OPRA request is invalid pursuant to MAG Entertainment LLC. V. Div. 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).
3. Although the Custodian failed to provide the correct lawful basis for denying the Complainant access to the records requested in the timely response, the Custodian’s denial of access was lawful because the Complainant’s request was not for identifiable government records. 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 29th Day of April, 2009

Robin Berg Tabakin, Chairwoman
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: May 4, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 29, 2009 Council Meeting**

**David Herron¹
Complainant**

GRC Complaint No. 2008-46

v.

**Township of Montclair²
Custodian of Records**

Records Relevant to Complaint:

- 1) A list of the total number of juveniles arrested in the last 12 months organized by race, gender, and offense.
- 2) A list of the total number of juveniles sent to Essex County Youth Facility organized by race, gender, and offense.

Request Made: February 26, 2008

Response Made: March 6, 2008

Custodian: Linda Wanat

GRC Complaint Filed: March 17, 2008³

Background

February 26, 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.

March 6, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request. The Custodian states that 178 juveniles were arrested in Montclair and 32 were sent to the Essex County Youth Facility during the year 2007. The Custodian further states that she would have to research every report to find the race, gender, and offense of each juvenile. The Custodian further states that under N.J.S.A. 47:1A-5.g. access to the requested record is denied because researching and aggregating the information requested by the Complainant would be substantially disruptive to the operation of the agency.

¹ No legal representation listed on record.

² Represented by Alan Trembulak, Esq. (Montclair, NJ).

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

March 17, 2008

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

- Complainant’s OPRA request dated February 26, 2008
- Letter from the Custodian to the Complainant dated March 6, 2008

The Complainant asserts that he was unlawfully denied access to the records requested. The Complainant did not agree to mediate this complaint.

March 24, 2008

Request for the Statement of Information sent to the Custodian.

April 9, 2008⁴

Custodian’s Statement of Information (“SOI”). The Custodian certifies that there are no records responsive to the Complainant’s OPRA request. The Custodian also states that the Complainant’s OPRA request requires the Police Department to analyze and collate information derived from unspecified and unidentified government records. The Custodian asserts that there is no denial of access because the Complainant’s OPRA request failed to identify a particular record.

The Custodian asserts that the Complainant’s OPRA request was invalid and properly denied. The Custodian argues that because the Complainant’s OPRA request sought specific facts rather than records, the Custodian properly denied access pursuant to Bent v. Township of Stafford 381 N.J. Super. 30, 37 (App. Div. 2005), Mag v. State ABC Board, 375 N.J. Super. 534, 549 (App. Div. 2005), and Mason v. Hoboken, A-0508-06T5 (App. Div. 2008). The Custodian further argues that the Complainant did not specify any identifiable government record, but rather attempted to utilize OPRA as a research tool.

Analysis

Whether the Custodian unlawfully denied access to the requested record?

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*

⁴ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.
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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 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 also provides that:

“[a] request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian...If 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.” N.J.S.A. 47:1A-5.g.

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 Custodian responded to the Complainant in writing on the sixth (6th) business day after receipt of the OPRA request. The Custodian denied the Complainant access to the requested records stating that fulfilling the request would substantially disrupt the operation of the agency. However, the Custodian has failed to show that she attempted to reach a reasonable accommodation regarding the request with Complainant.

Although OPRA permits a custodian to deny access to a records request on the basis that fulfilling the request would substantially disrupt agency operations, OPRA requires that the custodian must first attempt to reach a reasonable accommodation of the request with the requestor before denying access. N.J.S.A. 47:1A-5. See Robert J. Vessio v. NJ Department of Community Affairs, 2007-63 (May 2007)(holding that the

custodian must attempt to reach a reasonable accommodation before denying access based on substantial disruption of agency operation).

The Custodian in the current case has alleged that fulfilling the Complainant's OPRA request would substantially disrupt the operation of the agency. However, the Custodian did not establish that she made an attempt to reach a reasonable accommodation of the request with the Complainant as is required by N.J.S.A. 47:1A-5.g.

Therefore, because the Custodian failed to attempt a reasonable accommodation of the Complainant's OPRA request before denying access to the requested records on the basis that the request would substantially disrupt the Township's operations, the Custodian's response is insufficient under OPRA pursuant to N.J.S.A. 47:1A-5.g.

Nevertheless, the Complainant's OPRA request is invalid because it requests information concerning the gender, race, offense, and facility of detention of juveniles arrested in 2007 rather than an identifiable 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 (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)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

The Complainant's OPRA request did not specify an identifiable government record but instead sought information. The Complainant's OPRA request would require the Custodian to create a record specific to the Complainant's request. The Complainant's OPRA request would require the Custodian to conduct research and collate data according to the Complainant's specification. OPRA does not require custodians to conduct research or create new documents to satisfy an OPRA request. MAG, supra. OPRA requires a custodian to make available identifiable governments records. Bent, supra.

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

⁶ As stated in Bent.

Because the Complainant's request does not specify identifiable government records and would require the Custodian to conduct research and create a new record, the Complainant's OPRA request is invalid pursuant to MAG Entertainment LLC. V. Div. 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).

Although the Custodian failed to provide the correct lawful basis for denying the Complainant access to the records requested in the timely response, the Custodian's denial of access was lawful because the Complainant's request was not for identifiable government records. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to attempt a reasonable accommodation of the Complainant's OPRA request before denying access to the requested records on the basis that the request would substantially disrupt the Township's operations, the Custodian's response is insufficient under OPRA pursuant to N.J.S.A. 47:1A-5.g.
2. Because the Complainant's request does not specify an identifiable government record and would require the Custodian to conduct research and create a new record, the Complainant's OPRA request is invalid pursuant to MAG Entertainment LLC. V. Div. 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).
3. Although the Custodian failed to provide the correct lawful basis for denying the Complainant access to the records requested in the timely response, the Custodian's denial of access was lawful because the Complainant's request was not for identifiable government records. N.J.S.A. 47:1A-6.

Prepared By: Sherin Keys, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 22, 2009