



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

August 11, 2009 Government Records Council Meeting

Carrie A. Syme
Complainant

Complaint No. 2008-51

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 the amended findings and recommendations. The Council, therefore, finds that because the Complainant’s February 25, 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). Please note that if the requestor had submitted a valid OPRA request which named specifically identifiable government records, the GRC’s procedures require that an enforcement proceeding in the New Jersey Superior Court be initiated against the Custodian to force submission of a Statement of Information. No such proceeding is necessary here since the requestor did not submit a valid OPRA request.

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 11th 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**

**Carrie A. Syme¹
Complainant**

GRC Complaint No. 2008-51

v.

**New Jersey Office of the Governor²
Custodian of Records**

Records Relevant to Complaint:

Any and all documents referring or relating to the review or approval of New Jersey Transit's ("NJT") establishment and construction of the Port Imperial Intermodal Ferry Terminal located at Weehawken, New Jersey, including but not limited to:

- 1) documents relating to the availability and provision of funding for the project;
- 2) minutes of any meeting of the NJT board of directors;
- 3) all votes taken by the NJT board of directors;
- 4) any memoranda prepared by any NJT employee or official concerning the Weehawken Ferry Terminal;
- 5) all agreements entered into between NJT and any other party or entity concerning the Weehawken Ferry Terminal;
- 6) all memoranda prepared by any employee of the Office of the Governor who is not employed in the Office of Governor's Counsel;
- 7) any memoranda concerning the approval of the minutes of the NJT board or approval of any actions taken by NKT concerning the Weehawken Ferry Terminal;
- 8) any correspondence from or to any member of the New Jersey State Legislature concerning the Weehawken Ferry Terminal; and
- 9) any correspondence with any member of the public concerning the Weehawken Ferry Terminal.

Request Made: February 25, 2008

Response Made: March 5, 2008

Custodian: Clarke Bruno

GRC Complaint Filed: March 18, 2008

Background

February 25, 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.

¹ No legal representation listed on record.

² No legal representation listed on record.

March 5, 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 one record responsive to the Complainant's OPRA request has been located. The Custodian further states that access to such record is denied because it is exempt from disclosure as advisory, consultative or deliberative ("ACD") material.

March 18, 2008

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

- Complainant's OPRA request dated February 25, 2008
- Letter from the Custodian to the Complainant dated March 5, 2008
- *McGreevey Era E-mails Routinely Destroyed*, Newark Star Ledger, March 10, 2008

The Complainant asserts that she submitted an OPRA request to the Governor's Office via the State's OPRA Central website on February 25, 2008. The Complainant further asserts that, by letter dated March 5, 2008, the Custodian stated that one record responsive to the request had been located, but that access to such record was denied because it is exempt from disclosure as ACD material.

The Complainant asserts that she telephoned the Custodian on March 12. The Complainant further asserts that during the ensuing conversation, the Custodian informed the Complainant that the March 5, 2008 letter was in error and that the Custodian was preparing another letter. The Complainant contends that the Custodian informed her that the second letter would state that in fact, no records responsive to the request had been found. The Complainant contends that the Custodian refused to inform her whether the document referred to in the letter dated March 5, 2008 pertained to the Weehawken Ferry Terminal and further refused to inform her whether electronic archives had been searched in order to find documents responsive to the Complainant's request. The Complainant asserts that to date, the second letter has not arrived. The Complainant further asserts that she has had no further discussions with the Custodian nor anyone else regarding her February 25, 2008 OPRA request.

The Complainant states that it is her understanding that the Governor's Office must approve the meeting minutes of the NJT Board of Directors when taking certain actions, including entering into contracts. The Complainant asserts that NJT has entered into several contracts relating to the Weehawken Ferry Terminal, including a contract granting NY Waterway a 52-year monopoly on the operation of passenger ferries between the Weehawken terminal and terminals in New York City. The Complainant contends that a record of that approval should be found in the files of the Governor's Office. The Complainant states that she has a well-founded belief that records responsive to her OPRA request exist in the files of the Governor's Office, but that she can get no confirmation that the Custodian searched for such records.

The Complainant states that the Governor's Office has admitted that many e-mails were deleted at the end of the McGreevey gubernatorial administration, but that all e-mail traffic can be found on backup systems. The Complainant further states that copies of records responsive to her OPRA request could exist in electronically archived form, but that the Complainant cannot get confirmation that the Custodian searched for such records.

The Complainant states that a record has been found by the Governor's Office that, at least at one time, was believed to be responsive to the OPRA request, but that record is being withheld. The Complainant further states that she can get not confirmation that the record pertains to the Weehawken Ferry Terminal.

The Complainant asserts that the Governor's Office has failed to establish that the record referred to by the Custodian in his letter dated March 5, 2008 is advisory, consultative or deliberative in nature. The Complainant contends that in order to qualify for this exemption under OPRA, a document must be both pre-decisional and "deliberative in nature, containing opinions, recommendations, or advice about agency policies." See Education Law Center v. New Jersey Dep't of Education, 396 N.J. Super. 634, 640-41 (App. Div. 2007). The Complainant states that further, any factual information in an otherwise exempt document must be produced. See Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J. Super. 205, 219-20 (App. Div. 2005). The Complainant asserts that the Governor's Office has failed to provide any information indicating that the record it originally found was wholly "advisory, consultative and deliberative" under the law.

The Complainant states that she is seeking confirmation that the Governor's Office has conducted the appropriate searches to find the documents listed in the Complainant's OPRA request, including all approvals of meeting minutes of the NJT Board of Directors relating to the Weehawken Ferry Terminal, as well as a decision by the GRC that the record referred to by the Custodian in the letter dated March 5, 2008 is responsive to the Complainant's OPRA request and is not entitled to exemption from disclosure.

The Complainant agreed to mediate this complaint.

May 16, 2008

Offer of Mediation sent to the Custodian.

June 6, 2008

The Custodian agrees to mediate this complaint.

July 16, 2008

Case is referred to the Office of Dispute Resolution for mediation.

February 19, 2009

Case is referred back to GRC from the Office of Dispute Resolution for adjudication.

March 25, 2009

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

April 6, 2009

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for a Statement of Information on March 25, 2009 and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

April 6, 2009

E-mail from the Complainant to the GRC. The Complainant notes that the GRC sent a request for an SOI to the Custodian on March 25, 2009 and the Complainant has not yet received same. The Complainant states that she assumes that the Custodian did not submit an SOI. The Complainant asks that the GRC contact her if anything more is required.

April 9, 2009

E-mail from the Custodian to the GRC. The Custodian requests a ten (10) business day extension of time to submit the SOI.

April 9, 2009

E-mail from the GRC to the Custodian. The GRC grants the Custodian’s request for a ten (10) business day extension of time to submit the SOI and notes that the SOI is now due on May 1, 2009.

May 5, 2009

E-mail from the Complainant to the GRC. The Complainant notes that the GRC extended the time period for the Custodian’s submission of the SOI to May 1, 2009, and the Complainant has not yet received same. The Complainant states that she assumes that the Custodian did not submit an SOI. The Complainant asks that the GRC contact her if anything more is required.

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 February 25, 2008, seeking various records from the New Jersey Governor’s Office pertaining to the review or approval of a passenger ferry terminal at Weehawken, New Jersey. The Custodian responded in writing on March 5, 2009, the seventh (7th) business day following receipt thereof, stating that a record responsive to the request had been located but that such record was exempt from disclosure under OPRA as advisory, consultative or deliberative (“ACD”) material. The Complainant asserts that the Custodian has failed to establish that the record meets the required standard for the ACD exemption to disclosure under OPRA.

Although the Custodian failed to submit a Statement of Information in support of his position, it is unnecessary for the Council to determine whether the ACD exemption applies to the record referred to in the Custodian’s letter to the Complainant dated March 5, 2009 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),³ 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.”⁴

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 February 25, 2008 request sought “[a]ny and all documents ... referring or relating to the review and approval of the ... establishment and construction of ... a passenger ferry terminal [located at Weehawken, NJ].” The request then stated such documents were to include, but were not limited to, nine (9) separate types of records such as correspondence, memoranda and minutes, without any reference to or limitation by date. 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 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 February 25, 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

³ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁴ As stated in Bent, *supra*.

N.J. Super. 30 (App. Div. 2005); Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007). Please note that if the requestor had submitted a valid OPRA request which named specifically identifiable government records, the GRC's procedures require that an enforcement proceeding in the New Jersey Superior Court be initiated against the Custodian to force submission of a Statement of Information. No such proceeding is necessary here since the requestor did not submit a valid OPRA request.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant's February 25, 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). Please note that if the requestor had submitted a valid OPRA request which named specifically identifiable government records, the GRC's procedures require that an enforcement proceeding in the New Jersey Superior Court be initiated against the Custodian to force submission of a Statement of Information. No such proceeding is necessary here since the requestor did not submit a valid OPRA request.

Prepared By: Karyn Gordon, Esquire
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

August 4, 2009