



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

December 22, 2009 Government Records Council Meeting

David Nugent
(on behalf of Viking News)
Complainant

Complaint No. 2009-04

v.

Ocean County College
Custodian of Record

At the December 22, 2009 public meeting, the Government Records Council (“Council”) considered the December 9, 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 Complainant’s OPRA request dated October 14, 2008 does not identify with reasonable clarity a specific government record, said 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), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
2. Because the Custodian in this complaint certified that there are no records responsive to the Complainant’s OPRA requests dated November 28, 2008 and December 6, 2008, and there is no credible evidence in the record to refute the Custodian’s certification, the Custodian has carried his burden of proving that the denial of access to said requests was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 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 22nd Day of December, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: January 5, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 22, 2009 Council Meeting**

**David Nugent
(on behalf of Viking News)¹
Complainant**

GRC Complaint No. 2009-04

v.

**Ocean County College²
Custodian of Records**

Records Relevant to Complaint:

- OPRA request dated October 14, 2008:
 1. Names of chairs and members of search committees for the Adelizzi appointment in 2005
 2. Names of chairs and members of search committees for the Mulshine appointments in 2006 and 2007
 3. Names of chairs and members of search committees for the Shaffer appointment as Assistant Director of Student Media in 2008
 4. Names of chairs and members of search committees for the hiring of Shaffer as Assistant Professor of Humanities in 2005 or 2006³
- OPRA request dated November 28, 2008:
 1. Ocean County College's written request to the Division of Archives and Records Management ("DARM") for authorization for early disposal of records from the search process that resulted in the employment in 2005 of Joseph Adelizzi as Director of Student Media and the written authorization from DARM for early disposal or DARM's written denial of the request
 2. Ocean County College's written request to DARM for authorization for early disposal of records from the search process that resulted in the employment in 2006 of Andrea Mulshine as Director of Student Media and the written authorization from DARM for early disposal or DARM's written denial of the request
 3. Ocean County College's written request to DARM for authorization for early disposal of records from the search process that resulted in the employment in 2005 of Gary Shaffer as Assistant Professor of Humanities and the written authorization from DARM for early disposal or DARM's written denial of the request
- OPRA request dated December 6, 2008:

¹ No legal representation listed on record.

² Represented by John C. Sahradnik, Esq., of Berry, Sahradnik, Kotzas & Benson, P.C. (Toms River, NJ).

³ The Complainant requested additional records; however, said records are not the subject of this Denial of Access Complaint.

1. Destruction Request form and Authorization for Records Disposal Form for search documents from 2005 that resulted in the employment of Joseph Adelizzi as Director of Student Media
2. Destruction Request form and Authorization for Records Disposal Form for search documents from 2006 that resulted in the employment of Andrea Mulshine as Director of Student Media
3. Destruction Request form and Authorization for Records Disposal Form for search documents from 2005 that resulted in the employment of Gary Shaffer as Assistant Professor of Humanities

Request Made: October 14, 2008, November 28, 2008 and December 6, 2008

Response Made: November 6, 2008, December 3, 2008 and December 16, 2008

Custodian: George Buchanan

GRC Complaint Filed: December 30, 2008⁴

Background

October 14, 2008

Complainant's first (1st) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

October 15, 2008

Letter from Custodian to Complainant regarding the Complainant's first (1st) OPRA request. The Custodian asks the Complainant to clarify the delivery method preferred to receive the requested records.

October 16, 2008

Letter from Complainant to Custodian regarding the Complainant's first (1st) OPRA request. The Complainant states that his preferred method of delivery is "inner office" mail.

October 21, 2008

Letter from Custodian to Complainant regarding the Complainant's first (1st) OPRA request. The Custodian states that the college does not have an "inner office" mail system. The Custodian asserts that he is not required to deliver records based on unclear information contained on an OPRA request form. Additionally, the Custodian states that he can make the requested records available for inspection free of charge, if the Complainant agrees to such inspection.

October 31, 2008

Letter from Complainant to Custodian regarding the Complainant's first (1st) OPRA request. The Complainant contends that the Custodian's letter dated October 21, 2008 is another tactic to delay providing the requested records. The Complainant states that he plans to pick up the requested records from the Custodian's office. The

⁴The GRC received the Denial of Access Complaint on said date.

Complainant states that he will set up an appointment on November 7, 2008 to pick up the requested records.

November 6, 2008

Custodian's response to the Complainant's first (1st) OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixteenth (16th) business day following receipt of such request. The Custodian states that in compliance with records retention requirements the names of chairs and members of the search committee for the Adelizzi appointment in 2005 are no longer retained. The Custodian also states that in compliance with records retention requirements the names of chairs and members of the search committee for the Mulshine appointment in 2006 are no longer retained. The Custodian provides the names of the search committee for the Mulshine appointment in 2007. Additionally, the Custodian states that there are no records responsive to the Complainant's request for names of chairs and members of the search committee for the Shaffer appointment as Assistant Director of Student Media in 2008 because there was no search committee formed. Further, the Custodian states that in compliance with records retention requirements the names of chairs and members of search committees for the hiring of Shaffer as Assistant Professor of Humanities in 2005 or 2006 are no longer retained.

November 28, 2008

Complainant's second (2nd) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

December 3, 2008

Custodian's response to the Complainant's second (2nd) OPRA request. The Custodian responds in writing on the third (3rd) business day following receipt of such request. The Custodian states that there are no records responsive to the Complainant's OPRA request.

December 6, 2008

Complainant's third (3rd) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

December 16, 2008

Custodian's response to the Complainant's third (3rd) OPRA request. The Custodian responds in writing on the fifth (5th) business day following receipt of such request.⁵ The Custodian states that there are no records responsive to the Complainant's OPRA request.

December 30, 2008

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

- Complainant's first (1st) OPRA request dated October 14, 2008

⁵ The Custodian certified in his Statement of Information that he received said request on December 9, 2008.

- Custodian's response to the Complainant's first (1st) OPRA request dated November 6, 2008
- Complainant's second (2nd) OPRA request dated November 28, 2008
- Custodian's response to the Complainant's second (2nd) OPRA request dated December 3, 2008
- Complainant's third (3rd) OPRA request dated December 6, 2008
- Custodian's response to the Complainant's third (3rd) OPRA request dated December 16, 2008

The Complainant states that as Editor-in-Chief of the Viking News at Ocean County College, he submitted an OPRA request on October 14, 2008. The Complainant states that the Custodian responded in writing on November 6, 2008 and provided the information for the Director of Student Media for 2007, but denied the other portions of the request on the basis that said records were no longer available.

The Complainant states that he contacted the New Jersey Division of Archives and Records Management, Bureau of Records Management, and learned that some records had to be maintained permanently, those that could be destroyed must follow a certain timetable, and that in order to destroy records the college had to file a form requesting permission for such record destruction and receive approval. The Complainant states that he submitted two (2) additional OPRA requests dated November 28, 2008 and December 6, 2008 in which he requested copies of the records destruction request forms. The Complainant states that the Custodian responded on December 3, 2008 and December 16, 2008 indicating that the college does not maintain any of the requested records.

Additionally, the Complainant does not agree to mediate this complaint.

January 15, 2009

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

January 26, 2009

Custodian's SOI with the following attachments:

- Complainant's first (1st) OPRA request dated October 14, 2008
- Letter from Custodian to Complainant dated October 15, 2008
- Letter from Complainant to Custodian dated October 16, 2008
- Letter from Custodian to Complainant dated October 21, 2008
- Letter from Complainant to Custodian dated October 31, 2008
- Custodian's response to the Complainant's first (1st) OPRA request dated November 6, 2008
- Complainant's second (2nd) OPRA request dated November 28, 2008
- Custodian's response to the Complainant's second (2nd) OPRA request dated December 3, 2008
- Complainant's third (3rd) OPRA request dated December 6, 2008
- Custodian's response to the Complainant's third (3rd) OPRA request dated December 16, 2008

The Custodian certifies that he received the Complainant's first (1st) OPRA request on October 14, 2008. The Custodian certifies that he provided the Complainant with a written response on October 15, 2008 in which the Custodian sought clarification of the requested delivery method of the requested records. The Custodian certifies that the Complainant responded on October 16, 2008 and identified his preferred method of delivery as interoffice mail. The Custodian certifies that he responded to the Complainant on October 21, 2008 and advised that interoffice mail was not available and offered on-site inspection instead. The Custodian certifies that the Complainant responded by letter dated October 31, 2008 and indicated that he would come in to pick up copies of the requested records. The Custodian certifies that he provided the Complainant with copies of the records that existed on November 6, 2008 and denied access to those records that did not exist, specifically, the names of the chairs and members of search committees for various positions. The Custodian certifies that the records responsive to the Complainant's request for the names of chairs and search committee members never existed.

Additionally, the Custodian certifies that he received the Complainant's second (2nd) OPRA request on November 28, 2008 in which the Complainant requested copies of the college's request to dispose of the records requested in the Complainant's OPRA request dated October 14, 2008 that do not exist. The Custodian certifies that he provided the Complainant with a written response on December 3, 2008 indicating that no records responsive exist.

Further, the Custodian certifies that he received the Complainant's third (3rd) OPRA request on December 9, 2008 for similar records to those sought in the Complainant's second (2nd) OPRA request. The Custodian certifies that he provided a written response on December 16, 2008 indicating that no records responsive to said request exists.

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.

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.

Complainant’s OPRA request Dated October 14, 2008

The Custodian certified that he received the Complainant’s OPRA request on October 14, 2008. The Custodian certified that he provided the Complainant with a written response on October 15, 2008 in which the Custodian sought clarification of the requested delivery method of the requested records. The Custodian certified that the Complainant responded on October 16, 2008 and identified his preferred method of delivery as interoffice mail. The Custodian certified that he responded to the Complainant on October 21, 2008 and advised that interoffice mail was not available and offered on-site inspection instead. The Custodian certified that the Complainant responded by letter dated October 31, 2008 and indicated that he would come in to pick up copies of the requested records. The Custodian certified that he provided the Complainant with copies of the records that existed on November 6, 2008 and denied access to those records that did not exist, specifically, the names of the chair and search committees for various positions.

However, 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),⁶ 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

⁶ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents.”⁷

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...”

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 this instant complaint, the Complainant’s OPRA request dated October 14, 2008 sought access to names of chairs and members of search committees. A request for names is a request for information and not a request for a specific identifiable government record.

Therefore, because the Complainant’s OPRA request dated October 14, 2008 does not identify with reasonable clarity a specific government record, said request is invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG, supra, Bent, supra, NJ Builders, supra, and Schuler, supra.

Complainant’s OPRA Requests Dated November 28, 2008 and December 6, 2008

The Complainant submitted similar OPRA requests on November 28, 2008 and December 6, 2008 for the Destruction Request form and Authorization for Records Disposal Form that approved the destruction of the records denied in the Complainant’s OPRA request dated October 14, 2008. In response to both of these OPRA requests the Custodian denied access on the basis that no records responsive exist. Further, the Custodian certified that no records responsive exist to either OPRA request.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the GRC held that the Custodian did not unlawfully deny access to the requested record because the Custodian certified that no records responsive existed.

Therefore, because the Custodian in this complaint certified that there are no records responsive to the Complainant’s OPRA requests dated November 28, 2008 and December 6, 2008, and there is no credible evidence in the record to refute the Custodian’s certification, the Custodian has carried his burden of proving that the denial of access to said requests was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, supra.

⁷ As stated in Bent, supra.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant's OPRA request dated October 14, 2008 does not identify with reasonable clarity a specific government record, said 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), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

2. Because the Custodian in this complaint certified that there are no records responsive to the Complainant's OPRA requests dated November 28, 2008 and December 6, 2008, and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has carried his burden of proving that the denial of access to said requests was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

December 9, 2009