



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

FINAL DECISION

April 28, 2010 Government Records Council Meeting

Robert A. Verry
Complainant

Complaint No. 2009-124

v.

Borough of South Bound Brook (Somerset)
Custodian of Record

At the April 28, 2010 public meeting, the Government Records Council (“Council”) considered the April 21, 2010 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 request for every e-mail and America Online Instant Messenger message sent to or sent from MayorSBB@aol.com during the week of July 24, 2005 fails to seek specific identifiable government records because no content and/or subject is included, the Complainant’s request is overly broad and is therefore invalid under OPRA pursuant to 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), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), and the Council’s decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Accordingly, the Custodian has not unlawfully denied the Complainant access to said records. N.J.S.A. 47:1A-6. *See Sandoval v. NJ State Parole Board*, GRC Complaint No. 2006-167 (October 2008) and Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (March 2010).

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 28th Day of April, 2010

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: April 30, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 28, 2010 Council Meeting**

**Robert A. Verry¹
Complainant**

GRC Complaint No. 2009-124

v.

**Borough of South Bound Brook (Somerset)²
Custodian of Records**

Records Relevant to Complaint: On-site inspection of:

1. Every e-mail sent to or from MayorSBB@aol.com during the week of July 24, 2005.
2. Every America Online Instant Messenger (“AIM”) message sent to or from MayorSBB@aol.com during the week of July 24, 2005.

Request Made: March 28, 2009

Response Made: April 1, 2009

Custodian: Donald E. Kazar

GRC Complaint Filed: April 17, 2009³

Background

March 28, 2009

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.

April 1, 2009

Custodian Counsel’s response to the OPRA request. On behalf of the Custodian, Counsel responds in writing to the Complainant’s OPRA request on the second (2nd) business day following receipt of such request. Counsel states that the Borough is unable to comply with the Complainant’s request because it fails to identify specific government records and is overly broad. Counsel states that OPRA does not allow for open-ended searches of a public agency’s files.

Additionally, Counsel states that the e-mail account identified by the Complainant is a private e-mail account to which the Custodian has no access.

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by William T. Cooper III, Esq. (Somerville, NJ).

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

April 17, 2009

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

- Complainant’s OPRA request dated March 28, 2009.
- Letter from the Custodian’s Counsel to the Complainant dated April 1, 2009.

The Complainant states that he submitted an OPRA request to the Custodian on March 28, 2009. The Complainant states the Custodian’s Counsel responded in writing on April 1, 2009, stating that the Complainant’s request is overly broad and fails to identify a specific government record. Moreover, the Complainant states that Counsel advised that the Custodian did not have access to the e-mail account identified in the Complainant’s request because it is a private address.

The Complainant argues that his request was a valid OPRA request. The Complainant states that the GRC’s OPRA Alert, Volume No. 1 (July 2008) states that “[i]f the requestor identifies a type of government record (i.e. resolutions or minutes) and states a specific time frame—such request [is] valid.” The Complainant states that his OPRA request contained a specific type of government record (e-mails sent and received and AIM messages sent and received) during a specific time period (the week of July 24, 2005).

Further, the Complainant argues that e-mails and messages sent and received from MayorSBB@aol.com are government records. The Complainant again refers to the GRC’s OPRA Alert, Volume No. 1 (July 2008):

“[u]nder OPRA, a government record is any record that has been made, maintained, kept on file or received in the course of government business. This broad definition includes all the records in every government office, *including* e-mails on personal computers via personal e-mail accounts in which a government employee engages in government business. *See Meyers v. Borough of Fairlawn*, GRC Complaint No. 2005-127 (May 2006).”

The Complainant contends that the Custodian knows that this is a proper request under OPRA. The Complainant asserts that based on the foregoing reasons, the Complainant believes the Custodian’s response is a knowing and willful violation of OPRA.

The Complainant does not agree to mediate this complaint.

May 11, 2009

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

May 12, 2009

Letter from the Complainant's Counsel to the GRC.⁴ Counsel argues that the Custodian's denial of the records requested by the Complainant is without any legal basis. Counsel asserts that the Complainant identified a specific category of records that are readily identifiable according to date and individual. Counsel avers that the GRC has previously held that requests for records that fall within a narrow date range are not "vague" or "overly broad." See O'Shea v. Township of Stillwater (Sussex), GRC Complaint No. 2007-253 (August 2009), Paff v. Borough of Roselle (Union), GRC Complaint No. 2007-255 (June 2008) and Donato v. Jersey City Police Department, GRC Complaint No. 2005-251 (April 2007).

Counsel asserts that based on the foregoing, the GRC should find in favor of the Complainant.⁵

May 18, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated March 28, 2009.
- Letter from the Custodian's Counsel to the Complainant dated April 1, 2009.

The Custodian certifies that the last date upon which records that may have been responsive to the request 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").⁶

The Custodian certifies that he received the Complainant's OPRA request on March 28, 2009. The Custodian certifies that Counsel responded in writing on the Custodian's behalf on April 1, 2009 denying access to the Complainant's request because the request was invalid under OPRA and stating that the Custodian had no access to the e-mail account identified by the Complainant.

Moreover, the Custodian's Counsel asserts that in addition to the Borough's position that it is only required to disclose identifiable government records, the Borough also is not required to respond to open ended, blanket requests. Counsel contends that the Complainant's request at issue in the instant complaint is therefore invalid under OPRA.

Further, Counsel argues that the request sought records from a private e-mail account to which the Custodian had no access. Counsel asserts that the Borough maintains no documents which are responsive to the Complainant's request.

⁴ Counsel requests that the attached letter be considered an amendment to the Complainant's Denial of Access Complaint pursuant to *N.J.A.C. 5:105-2.3(h)(1)*, which allows a complainant to amend a Denial of Access Complaint within thirty (30) days of filing of same.

⁵ The Complainant's Counsel did not request prevailing party attorney's fees.

⁶ The Custodian did not certify to the search undertaken to locate any records responsive the Complainant's request.

February 18, 2010

E-mail from the GRC to the Custodian. The GRC states that it needs additional information. The GRC states that the Custodian's Counsel asserts in the SOI that no records responsive to the Complainant's OPRA request for e-mails and AIM messages exist. The GRC requests that the Custodian certify to the following:

1. Specifically describe the search undertaken to locate any records responsive to the Complainant's request.
2. Whether any records responsive to the Complainant's request were located through this search?

The GRC requests that the Custodian submit the requested legal certification by February 19, 2010.

February 18, 2010

Custodian's legal certification. The Custodian certifies that upon review of the Complainant's request, he found that it identified a private e-mail account because the Borough does not use e-mail services from America Online ("AOL"). The Custodian certifies that the e-mail account was personally utilized by former mayor Jo-Anne Schubert ("Ms. Schubert"). The Custodian certifies that he was unable to obtain any records responsive to the Complainant's request because the e-mail account identified was not maintained by the Borough.

The Custodian certifies that he contacted Ms. Schubert and was advised that she no longer uses that account and believes it was cancelled some time in 2005, although Ms. Schubert admitted she was unsure exactly when the account was cancelled.

April 14, 2010

Letter from the Complainant's Counsel to the GRC attaching the Complainant's legal certification dated February 19, 2010.

The Complainant certifies that Ms. Schubert used MayorSBB@aol.com the week of July 24, 2005 for official Borough business. The Complainant certifies that on August 28, 2009, the screen name "mayorsbb" signed onto AIM on or about 8:30am. The Complainant certifies that based on the foregoing, the account in question was active about four (4) years after Ms. Schubert advised the Custodian that she believed the account was cancelled.

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.

The Complainant’s request sought “[e]very e-mail sent and received the week of July 24, 2005 from MayorSBB@aol.com” and “[e]very America Online Instant Message (“AIM”) sent and received the week of July 24, 2005 from MayorSBB@aol.com.” The Custodian’s Counsel responded in writing on behalf of the Custodian on April 1, 2009 stating that the Complainant’s request does not identify any government records; rather, the request is overly broad and is therefore 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 ...* 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),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

⁷ 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.”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).”

The test under MAG then, is whether a requested record is a *specifically identifiable* government record. If so, the record is disclosable, barring any exemptions to disclosure contained in OPRA. The GRC established the criteria deemed necessary to specifically identify an e-mail communication in Sandoval v. NJ State Parole Board, GRC Complaint No. 2006-167 (October 2008). In Sandoval, the Complainant requested “e-mail...between [two individuals] from April 1, 2005 through June 23, 2006 [using seventeen (17) different keywords].” The Custodian denied the request, claiming that it was overly broad. The Council determined:

“The Complainant in the complaint now before the GRC requested specific e-mails *by recipient, by date range and by content*. Based on that information, the Custodian has identified [numerous] e-mails which fit the specific recipient and date range criteria Complainant requested.” (Emphasis added.) *Id.*

The GRC recently undertook the task of expanding on Sandoval in Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (March 2010). In that complaint, the Complainant requested electronic copies of all e-mails from Bettina Bieri’s township account from January 1, 2008 to June 17, 2008. The GRC stated in its analysis that in expanding on Sandoval:

“... an OPRA request for an e-mail or e-mails shall therefore focus upon the following four (4) characteristics:

⁸ As stated in Bent, *supra*.

- Content and/or subject
- Specific date or range of dates
- Sender
- Recipient

In accord with MAG, supra, and its progeny, in order to specifically identify an e-mail, OPRA requests must contain (1) the content and/or subject of the e-mail and (2) the specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted. Additionally, a valid e-mail request must identify the sender and/or the recipient thereof.”

The GRC found that, based on the above standard, the Complainant’s request to be invalid because it failed to identify the content and/or subject of the e-mails sought.

In the matter currently before the Council, the Complainant identified the e-mails and AIM messages sought by date range as well as by sender and/or recipient. The Complainant failed, however, to specify the content and/or subject of the e-mails and AIM messages sought. As such, the Complainant’s request failed to seek specifically identifiable e-mail and AIM message records. Without specific reference to the content and/or subject of the e-mails and AIM messages sought, the Custodian would be required to conduct research to identify records responsive to the request; custodians are not required to conduct research in order to respond to requests under OPRA. MAG, supra.

Accordingly, because the Complainant’s request for every e-mail and AIM message sent to or sent from MayorSBB@aol.com during the week of July 24, 2005 fails to seek specific identifiable government records because no content and/or subject was included, the Complainant’s request is overly broad and is therefore invalid under OPRA pursuant to MAG, supra, Bent, supra, New Jersey Builders, supra, and the Council’s decision in Schuler, supra. Accordingly, the Custodian has not unlawfully denied the Complainant access to said records. N.J.S.A. 47:1A-6. See Sandoval, supra, and Elcavage, supra.⁹

The GRC notes that the Complainant submitted a certification dated February 19, 2010 to the GRC on April 14, 2010; however, the allegations therein are moot because the request herein is invalid under OPRA.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant’s request for every e-mail and America Online Instant Messenger message sent to or sent from MayorSBB@aol.com during the week of July 24, 2005 fails to seek specific identifiable government records because no content and/or subject is

⁹ The GRC declines to address whether any records responsive to the Complainant’s OPRA request exist because the request is not valid under OPRA.

included , the Complainant's request is overly broad and is therefore invalid under OPRA pursuant to 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), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Accordingly, the Custodian has not unlawfully denied the Complainant access to said records. N.J.S.A. 47:1A-6. See Sandoval v. NJ State Parole Board, GRC Complaint No. 2006-167 (October 2008) and Elcavage v. West Milford Township (Passaic), GRC Complaint No. 2009-07 (March 2010).

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 21, 2010