



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

June 29, 2010 Government Records Council Meeting

Rosamond Ryan
Complainant

Complaint No. 2009-268

v.

NJ Department of Environmental Protection
Custodian of Record

At the June 29, 2010 public meeting, the Government Records Council (“Council”) considered the June 22, 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 all permits or regulatory decision documents concerning threatened or endangered species throughout the State fails to specifically identify government records sought and fails to specifically identify a type of threatened species, date range, and/or specific location in the State, the request is invalid under OPRA. *See* 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); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

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 June, 2010



Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: July 13, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 29, 2010 Council Meeting**

**Rosamond Ryan¹
Complainant**

GRC Complaint No. 2009-268

v.

**NJ Department of Environmental Protection²
Custodian of Records**

Records Relevant to Complaint:

All permits or regulatory decision documents where there is a regulatory buffer surrounding an active, inactive, or abandoned nesting site for threatened or endangered species throughout New Jersey.

Request Made: September 8, 2009

Response Made: September 15, 2009

Custodian: Matthew J. Coefer

GRC Complaint Filed: September 29, 2009⁴

Background

September 8, 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.

September 15, 2009

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that access to the requested records is denied because the Custodian does not have to create a record that does not exist, pursuant to MAG Entertainment v. Div of Alcoholic Beverage Control 375 N.J. Super. 537 (App. Div. 2005), and because the request is overly broad and unspecific to records being sought pursuant to N.J.S.A. 47:1A-5, N.J.S.A. 47:1A-9 and Gannett N.J. Partners v. Middlesex, 379 N.J. Super. 205 (App. Div. July 2005). The Custodian directs the Complainant to www.nj.gov/dep/gis/newmapping which might have some information the Complainant

¹ No legal representation listed on record.

² Represented by DAG Randall Pease, on behalf of the NJ Attorney General.

³ The Custodian received the Complainant's OPRA Request on September 8, 2009

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

is seeking. The Custodian also states that questions may be referred to Mr. Dave Jenkins, Chief of Endangered and Nongame Species Program.

September 29, 2009

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

- Complainant’s OPRA request, undated
- Electronic records request receipt from NJ Department of Environmental Protection (NJDEP) to the Complainant dated September 8, 2009
- Custodian’s response to the OPRA request dated September 15, 2009

The Complainant contends that to deny information based upon the fact that it is too difficult to gather information is unfair to the public.

The Complainant agrees to mediate this complaint.

October 23, 2009

Offer of Mediation sent to Custodian.

October 30, 2009

The Custodian declines to mediate this Complaint.

November 5, 2009³

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request, undated
- Custodian’s response to the OPRA request dated September 15, 2009

The Custodian certifies that upon receipt of the Complainant’s OPRA request, the Custodian sent the request to the Land Use Management Program and the Natural and Historical Resources Program. The Custodian further certifies that the respective Assistant Commissioner’s records custodians in each division reviewed the request and concluded that the request was too broad and that none of their database systems were capable of creating a report for the entire universe of permits where buffers were established for plant or animal species.

The Custodian further certifies that Custodian Sandra Remboske of the Office of Record Access contacted the Complainant on September 11, 2009 and stated that the request was too broad and asked if the search could be narrowed down. The Custodian asserts that the Complainant stated that she would review the request and contact the Custodian.

The Custodian also certifies that the Complainant contacted Ms. Remboske on September 14, 2009 and inquired if the search could be conducted if it was narrowed

³ The evidence of record is unclear when the request for the Statement of Information was sent to the Custodian.

down to a certain species, for example, bald eagles. The Custodian certifies that the NJDEP evaluated the request with the Program Areas and concluded that the request was still too broad to process based on NJDEP's systems and capabilities.

The Custodian asserts that the Complainant's request is overly broad and fails to identify specific government records sought. The Custodian contends that the request seeks every permit or regulatory decision made concerning any type of threatened or endangered species where a regulatory buffer surrounding any type of nesting site was established for any time period. The Custodian further contends that the narrowing down of the request to a specific species did not provide any additional clarity for the NJDEP to process the request because the request was still too broad and unspecific to any records. The Custodian states that the NJDEP would have to research all the nesting sites in the State for any type of species regardless of time frame, then would have to correlate that data to regulatory buffers, then further identify all the regulatory decisions concerning that particular nesting site or buffers.

In addition, the Custodian asserts that he does not have to create or provide government records that do not exist. The Custodian certifies that NJDEP does not have records that identify permits where buffers were established for any specific plant or animal species. Lastly, the Custodian states that the NJDEP attempted to work with the Complainant but could not process the request because of the broad information sought. The Custodian certifies that he did provide a web address and a contact person to the Complainant to assist the Complainant in obtaining the information.

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 all permits or regulatory decision documents in which the NJDEP established a regulatory buffer surrounding an active, inactive, or abandoned nesting site for threatened or endangered species throughout the State. The Custodian responded timely and in writing, denying the request because the Custodian does not have to create a record that does not exist and because the request is overly broad and unspecific to records being sought.

The Complainant’s September 8, 2009 request is invalid under OPRA because it fails to specify identifiable government records, and is overly broad and would require the Custodian to conduct research. 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),⁴ 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.”⁵

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

⁴ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁵ As stated in Bent, *supra*.

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 Complainant's request for all permits or regulatory decision documents concerning threatened or endangered species throughout the State fails to specifically identify particular government records sought. Furthermore, the request does not specifically identify a species, time frame, or identify a location in the State. Moreover, when Ms. Remboske asked the Complainant to narrow-down her search, the Complainant inquired if the request could be processed when identifying a specific species, such as bald eagles; however, the Custodian certified that the NJDEP determined that the request would still be too broad because of the database systems' inability to generate such reports.

Because the Complainant's request for all permits or regulatory decision documents concerning threatened or endangered species throughout the State fails to specifically identify government records sought and fails to specifically identify a type of threatened species, date range, and/or specific location in the State, the request is invalid under OPRA. See 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); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant's request for all permits or regulatory decision documents concerning threatened or endangered species throughout the State fails to specifically identify government records sought and fails to specifically identify a type of threatened species, date range, and/or specific location in the State, the request is invalid under OPRA. See 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); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

June 22, 2010