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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

FINAL DECISION

January 26, 2010 Government Records Council Meeting

Robert A. Verry
Complainant
v.
Borough of South Bound Brook (Somerset)
Custodian of Record

Complaint No. 2009-93

At the January 26, 2010 public meeting, the Government Records Council ("Council") considered the January 19, 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 OPRA request seeks information rather than a specifically identifiable government record, the request is invalid pursuant to New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (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) and 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 26th Day of January, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynne A. Lack, Secretary
Government Records Council

Decision Distribution Date: January 29, 2010

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
January 26, 2010 Council Meeting

Robert A. Verry[1] **GRC Complaint No. 2009-93**
Complainant

v.

Borough of South Bound Brook (Somerset)[2]
Custodian of Records

Records Relevant to Complaint: The Custodian's hours worked each workday and total hours worked each workweek for every position held between January 1, 2009 up to and including February 28, 2009.

Request Made: February 28, 2009
Response Made: March 11, 2009
Custodian: Donald E. Kazar
GRC Complaint Filed: March 12, 2009[3]

Background

February 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.

March 11, 2009

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.[4] The Custodian states that the requested records are available for inspection in the Borough Clerk's Office. The Custodian states that office hours are Monday through Friday, 9:00 am to 4:00 pm with lunch hour from 1:00 pm to 2:00 pm. The Custodian states that the Complainant can see Mrs. Lih for inspection.

March 12, 2009

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's OPRA request dated February 28, 2009.

[1] No legal representation listed on record.
[2] Represented by William T. Cooper III, Esq. (Somerville, NJ).
[3] The GRC received the Denial of Access Complaint on said date.
[4] The Custodian sent his response to the Complainant via e-mail at 11:29 pm on March 11, 2009.

The Complainant states that he submitted an OPRA request to the Custodian via e-mail on February 28, 2009. The Complainant states that he received no response to date.

The Complainant asserts that the Custodian is knowingly and willfully refusing to provide access to the records requested.

The Complainant does not agree to mediate this complaint.

March 12, 2009

E-mail from the Complainant to the GRC. The Complainant states that he received belated responses from the Custodian to several requests not relevant to the instant complaint. The Complainant states that none of these responses were to the request at issue in the instant complaint.

March 12, 2009

E-mail from the Custodian to the Complainant. The Custodian states that his response to the Complainant's request was included with responses to several other requests.

March 12, 2009

E-mail from the Custodian to the GRC. The Custodian states that he believes that his response to the Complainant's request was timely. The Custodian states that he was under the impression that the statutorily mandated seven (7) business day time frame does not begin to run until after the first full business day after receipt of an OPRA request.

The Custodian states that if he received the Complainant's request on March 2, 2009 that the time frame to respond would begin on March 3, 2009 and end at 11:59 pm on March 11, 2009.

March 12, 2009

E-mail from the Custodian to the Complainant attaching the Custodian's March 11, 2009 response e-mail. The Custodian states that the below e-mail represents the Custodian's response sent to the Complainant on March 11, 2009.

March 12, 2009

E-mail from the Complainant to the Custodian. The Complainant states that he has not received a response to his request relevant to the instant complaint. The Complainant states that the Custodian's attachment does not represent a response to his OPRA request.

March 12, 2009

E-mail from the Custodian to the Complainant. The Custodian states that he reviewed the response sent to the Complainant on March 11, 2009 and found that the response to the Complainant's request was erroneously labeled as being responsive to another OPRA request not relevant to the instant complaint. The Custodian states that

the response should have been labeled as "2008-2009" because it was in response to the Complainant's request relevant to the instant complaint.[5]

The Custodian advises that his response to the instant request is the same as the erroneously labeled letter and that access to the requested records responsive is available. The Custodian asks whether the Complainant wants the Custodian to amend his letter to reflect his response to the request for 2009 work hours.

March 31, 2009

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

April 2, 2009

E-mail from the Complainant to the Custodian attaching a letter from the Custodian to the Complainant dated March 11, 2009. The Complainant requests that the Custodian clarify the attached document so as to avoid any confusion on behalf of the Complainant.

April 2, 2009

E-mail from the Custodian to the Complainant. The Custodian states that the letter was corrected to reflect the Custodian's response to the Complainant's request for 2009 work hours. Further, the Custodian requests that the Complainant state whether the Complainant will come in and inspect the records or if copies should be made.

April 7, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated February 28, 2009.
- Letter from the Custodian to the Complainant dated March 11, 2009.
- E-mail from the Complainant to the Custodian dated March 12, 2009.
- E-mail from the Custodian to the GRC dated March 12, 2009.
- E-mail from the Custodian to the Complainant dated March 12, 2009 (with attachments)
- E-mail from the Complainant to the Custodian dated March 12, 2009.
- E-mail from the Custodian to the Complainant dated March 12, 2009.
- E-mail from the Complainant to the Custodian dated April 2, 2009.
- E-mail from the Custodian to the Complainant dated April 2, 2009.

The Custodian certifies that his search for the requested records involved locating the records in the Clerk's Office. The Custodian also certifies that the no records responsive 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").

[5] The Custodian forwarded the response for the request relevant to this complaint as part of a larger response to ten (10) individual OPRA requests.

The Custodian certifies that he received the Complainant's OPRA request on March 2, 2009. The Custodian certifies that he responded to the Complainant's request on March 11, 2009 stating that the requested records are available for inspection.

The Custodian certifies that following the Complainant's assertion that he never received a response to the request for 2009 work hours, the Custodian reviewed his response and found that the letter was erroneously labeled. The Custodian certifies that he advised the Complainant of the error, corrected the letter and forwarded it to the Complainant on March 12, 2009.

The Custodian asserts that he believes his response was timely pursuant to OPRA because he responded within the statutorily mandated seven (7) business day time frame.

May 4, 2009

The Complainant's response to the Custodian's SOI with the following attachments:

- Corrected letter from the Custodian to the Complainant dated March 11, 2009.
- Calendar entries dated January 5, 2009 to March 1, 2009.

The Complainant states that the Custodian responded in writing on March 11, 2009 granting access to inspect his work hours from January 1, 2009 to February 28, 2009. The Complainant further avers that the Custodian confirmed a second time on April 2, 2009 that the records being requested by the Complainant existed. However, the Complainant asserts that he inspected said records on April 23, 2009; the Complainant further asserts that none of said records represented hours worked prior to January 11, 2009.

The Complainant asserts that it is his position that the Custodian continues to knowingly and willfully refuse to provide access to the requested records.

May 4, 2009

E-mail from the Custodian to the GRC. The Custodian asserts that the Complainant was provided with a calendar showing from January 5, 2009 through March 1, 2009. The Custodian asserts that he is not required to keep hours in his position as Borough Clerk and that the records provided to the Complainant are kept for the Custodian's reference. The Custodian asserts that he provided the record that existed pursuant to the intent of OPRA.[6]

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

[6] 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.

"…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.

In the instant matter before the Council, the Complainant requested "[t]he Custodian's hours worked each workday and total hours worked each workweek for every position held between January 1, 2009 and including February 28, 2009." The Custodian responded timely in writing on March 11, 2009, providing access to records, which are hours recorded on a Microsoft Outlook® calendar. However, the Complainant's OPRA request is invalid because it is a request for information and not a request for specific identifiable government records.

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). As the court noted in invalidating MAG's request under OPRA:

"Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search

> through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted." *Id.* at 549.

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.*

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 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 enumerated the responsibilities of a custodian and a requestor as follows:

> "OPRA identifies the responsibilities of the requestor and the agency relevant to the prompt access the law is designed to provide. The custodian, who is the person designated by the director of the agency, N.J.S.A. 47:1A-1.1, must adopt forms for requests, locate and redact documents, isolate exempt documents, assess fees and means of production, identify requests that require "extraordinary expenditure of time and effort" and warrant assessment of a "service charge," and, when unable to comply with a request, "indicate the specific basis." N.J.S.A. 47:1A-5(a)-(j). *The requestor must* pay the costs of reproduction and *submit the request with information that is essential to permit the custodian to comply with its obligations.* N.J.S.A. 47:1A-5(f), (g), *(i).* Research is not among the custodian's responsibilities." (Emphasis added), NJ Builders, 390 N.J.Super. at 177.

Moreover, 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

[7] Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).
[8] As stated in Bent, *supra*.

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)."

In the instant complaint, the Complainant's request for "hours worked" by the Custodian seeks information and fails to specify identifiable government records. As such, the Complainant's request is invalid under OPRA. New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (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) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Therefore, because the Complainant's OPRA request seeks information rather than a specifically identifiable government record, the request is invalid pursuant to New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (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) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Further, the GRC notes that although the Complainant's request for information is invalid under OPRA, the Custodian still undertook the task of providing the Complainant with a record that identified hours worked for the time period contained within the Complainant's request.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant's OPRA request seeks information rather than a specifically identifiable government record, the request is invalid pursuant to New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (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) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Prepared By: Frank F. Caruso
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

January 19, 2010