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

LORI GRIFA
Commissioner

FINAL DECISION

May 24, 2011 Government Records Council Meeting

Eric D. Seaman
Complainant
v.
Borough of Atlantic Highlands Police Department
(Monmouth)
Custodian of Record

Complaint No. 2010-103

At the May 24, 2011 public meeting, the Government Records Council ("Council") considered the April 20, 2011 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. The Complainant's request to the police department seeks "all documents involved in case # 09-5419." This request fails to specify identifiable government records sought; moreover, the request would require the Custodian to research all of his files to locate those records containing the requested subject matter, *i.e.*, pertaining in any way to this particular investigation. As such, the request is overly broad and is therefore invalid under OPRA. 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).

2. The Complainant's request seeks criminal investigatory records which are exempt from the definition of a government record in OPRA; as such, the Custodian has borne his burden of proof that the denial of access was lawful. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); and Gatson v. Borough of Cliffside Park Police Dep.'t. (Bergen), 2009-239 (October 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 24th Day of May, 2011

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: June 1, 2011

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
May 24, 2011 Council Meeting

Eric D. Seaman[1] **GRC Complaint No. 2010-103**
Complainant

v.

Borough of Atlantic Highlands Police Department (Monmouth)[2]
Custodian of Records

Records Relevant to Complaint: Copies of:

1. All documents involved in case # 09-5419 regarding three (3) e-mails between Complainant and his attorney, Ray Stein, Esq., that were received by Lt. Michael Lee at his Atlantic Highlands Police Department e-mail address on February 26, 2009; or
2. A detailed summary explaining the known facts of the case, the assumptions, and the specific reasons why it was found that no crime was committed and no charges would be filed.

Request Made: May 2, 2010
Response Made: May 5, 2010
Custodian: Cindy Bruntz
GRC Complaint Filed: May 18, 2010[3]

Background

May 2, 2010

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.

May 5, 2010

Custodian's response to the OPRA request. The Custodian certifies that she received the Complainant's request on May 2, 2010.[4] The Custodian responds in writing to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. The Custodian states that access to the requested records is denied because the Complainant is requesting criminal investigatory records and because these records are also related to domestic concerns that fall under the exemptions to disclosure outlined in N.J.S.A.

[1] No legal representation listed on record.
[2] Represented by Benard M. Reilly, Esq., of Reilly Counselors at Law (Red Bank, NJ).
[3] The GRC received the Denial of Access Complaint on this date.
[4] The Custodian certified to such fact in the Statement of Information.

47:1A-1.1. The Custodian also asserts that it is standard practice of the police department not to release summaries and assumptions in any case.

May 17, 2010

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

- Complainant's OPRA request dated May 2, 2010
- Letter from the Custodian to the Complainant dated May 5, 2010[5]

The Complainant states that he requested access to the records involving personal e-mails between him and his attorney discussing pending criminal charges from the Atlantic Highlands Police Department ("AHPD"). The Complainant asserts that knowledge of the AHPD's receipt of such e-mails was not discovered until the Complainant's receipt of discovery in connection with the litigation matter referenced in his request, wherein the e-mails had been printed and added to the discovery materials. The Complainant states that he initially made a request in January 2010 and was notified that the case (AHPD case # 09-5419) was still an active, open investigation and the records could not be released. The Complainant maintains that he made an OPRA request for the records on May 2, 2010 and was told that the records could not be released despite the matter being closed.

The Complainant argues that the conversations with his attorney are protected speech. The Complainant maintains that someone attempted to sabotage his defense during his criminal trial by sending e-mails between himself and his attorney to the AHPD. The Complainant also states that it is likely that e-mails between him and his attorney discussing matters relating to separate divorce proceedings were also accessed.

The Complainant states that he is entitled to know how the AHPD got the information contained in his e-mails. The Complainant maintains that this information would all be contained in the records of the case. The Complainant asserts that he was denied access to such records and that he was verbally informed in a telephone conversation on April 30, 2010 by an AHPD sergeant that the matter was closed.

The Complainant does not agree to mediate this complaint.

May 24, 2010

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

May 26, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated May 2, 2010
- Letter from the Custodian to the Complainant dated May 5, 2010
- An index of all files contained in AHPD Case File # 09-5419

[5] Additional documentation not relevant to the adjudication of this complaint was also attached.

The Custodian certifies that her search for the requested records included a review of AHPD Case File #09-5419. The Custodian certifies that the requested records have a two (2) year retention requirement and that no responsive records have been destroyed. The Custodian states that she presumes that the Complainant has copies of the e-mails related to the complaint because he was a party to such e-mails.

Custodian's Counsel states that the complaint involves a trespassing arrest. Counsel certifies that the Complainant was provided with discovery documents that included copies of e-mails the Complainant transmitted to his attorney. Counsel certifies that these e-mails were forwarded to the Atlantic Highlands Police Department.

Counsel certifies that the Complainant then filed an investigation request with the Atlantic Highlands Police Department requesting a criminal investigation into the manner in which said e-mails were forwarded to the AHPD. Counsel argues that the records requested are criminal investigatory records, which are defined in N.J.S.A. 47:1A-1.1 as a "record which is not required to be made, maintained, or kept on file that is held by a law enforcement agency which pertains to any criminal investigation." *Id*. Counsel contends that such records regarding the investigation into allegations of criminal conduct by law enforcement agencies are exempt from OPRA disclosure pursuant to Janeczko v. N.J. Dept. of Law, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004).

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 states that:

> "… [W]here it shall appear that the record or records which are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency, the right of access provided for in [OPRA]… may be denied if the inspection, copying or examination of such record or records shall be inimical to the public interest; provided, however, that this provision shall not be construed to allow any public

> agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced…." N.J.S.A. 47:1A-3.a.

In the instant case, the Complainant's request seeks "all documents involved in case # 09-5419 regarding three (3) e-mails between Complainant and his attorney" and fails to specify identifiable government records sought. Moreover, the Complainant's request would require the Custodian to conduct research among all records for specific texts and subject manner. Under MAG, such requests are not valid 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.

In determining that MAG Entertainment's request for "all documents or records" from the Division of Alcoholic Beverage Control pertaining to selective enforcement was invalid under OPRA, the Appellate Division noted that:

> "[m]ost 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.

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 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

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

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 Complainant's request to the police department seeks "all documents involved in case # 09-5419." This request fails to specify identifiable government records sought; moreover, the request would require the Custodian to research all of his files to locate those records containing the requested subject matter, *i.e.*, pertaining in any way to this particular investigation. As such, the request is overly broad and is therefore invalid under OPRA. 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).

Furthermore, 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, the Complainant requested records that are part of a police investigation file. The Custodian argues that these records are criminal investigatory records which are exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1.

Criminal investigatory records are defined in OPRA as those records which are not required by law to be made, maintained or kept on file and which are held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding. N.J.S.A. 47:1A-1.1. Those records which fall under this definition are *excluded* from the public accessibility requirements that OPRA places upon government records. *Id.*

The status of records purported to fall under the criminal investigatory records exemption pursuant to N.J.S.A. 47:1A-1.1 was examined by the GRC in Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004), affirmed in an unpublished opinion of the Appellate

Division of the New Jersey Superior Court in May 2004. In Janeczko, the complainant requested access to copies of records related to alleged criminal actions committed by her son, who was ultimately killed by police officers. The Council found that under OPRA, "criminal investigatory records include records involving all manner of crimes, resolved or unresolved, and includes information that is part and parcel of an investigation, confirmed and unconfirmed". Consequently, the complainant's request was denied.

The Complainant argues that he is entitled to the requested records because his request was made after the conclusion of the pertinent police investigation. It is important to note that the criminal investigatory records exemption continues to survive the conclusion of the investigation. As the Council pointed out in Janeczko, *supra*:

> "[the criminal investigatory records exemption] does not permit access to investigatory records once the investigation is complete. The exemption applies to records that conform to the statutory description, without reference to the status of the investigation and the Council does not have a basis to withhold from access only currently active investigations and release those where the matter is resolved or closed."

The finding in Janeczko concurs with the Council's decision in Gatson v. Borough of Cliffside Park Police Dep.'t. (Bergen), 2009-239 (October 2010). In Gatson, the Complainant requested "any and all statements, reports, e-mails, faxes, texts, and photographs" that pertained to a police investigation against him. The Council held that the requested records were exempt pursuant to OPRA's criminal investigatory records exemption.

Therefore, the Complainant's request seeks criminal investigatory records which are exempt from the definition of a government record in OPRA; as such, the Custodian has borne his burden of proof that the denial of access was lawful. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); and Gatson v. Borough of Cliffside Park Police Dep.'t. (Bergen), 2009-239 (October 2010).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Complainant's request to the police department seeks "all documents involved in case # 09-5419." This request fails to specify identifiable government records sought; moreover, the request would require the Custodian to research all of his files to locate those records containing the requested subject matter, *i.e.*, pertaining in any way to this particular investigation. As such, the request is overly broad and is therefore invalid under OPRA. 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).

2. The Complainant's request seeks criminal investigatory records which are exempt from the definition of a government record in OPRA; as such, the Custodian has borne his burden of proof that the denial of access was lawful. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004); and Gatson v. Borough of Cliffside Park Police Dep.'t. (Bergen), 2009-239 (October 2010).

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 20, 2011