



State of New Jersey

GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

March 29, 2011 Government Records Council Meeting

Michele Rosen
Complainant

Complaint No. 2010-14

v.

Township of Ocean (Ocean)
Custodian of Record

At the March 29, 2011 public meeting, the Government Records Council (“Council”) considered the March 22, 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 because the Complainant’s request for the records relevant to the complaint fails to seek specific identifiable government records, 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 (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 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.

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 March, 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: April 1, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 29, 2011 Council Meeting**

**Michele Rosen¹
Complainant**

GRC Complaint No. 2010-14

v.

**Township of Ocean (Ocean)²
Custodian of Records**

Records Relevant to Complaint: Copies of correspondence, memos, e-mails and evaluations with reference to professional appointments in 2010, including all e-mails from or to the personal computers of Township Committeemen.³

Request Made: January 4, 2010

Response Made: January 13, 2010

Custodian: Diane Ambrosio, Clerk

GRC Complaint Filed: January 15, 2010⁴

Background

January 4, 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.

January 13, 2010

E-mail from the Complainant to the Custodian. The Complainant informs the Custodian that this e-mail is a reminder that it had been seven (7) days since the Complainant filed her OPRA request.

January 13, 2010

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. The Custodian includes eight (8) attachments to the e-mail response and informs the Complainant that all items requested in her OPRA request dated January 4, 2010 are attached.

¹ No legal representation listed on record.

² Represented by Gregory P. McGuckin, Esq., Dasti, Murphy, McGuckin, Ulaky, Cherkos and Connors (Forked River, NJ).

³ The records requested are described differently in the Denial of Access Complaint than they were described in the original OPRA request and there were other records requested that are not relevant to this complaint.

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

January 14, 2010

Letter from the Custodian to the Complainant. The Custodian replies to the Complainant's verbal request for a written statement from the Custodian that "...no documents exist concerning instructions from members of the Township Committee..." by informing the Complainant that all records that were requested have been sent via e-mail to the Complainant.

January 15, 2010

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

- Complainant's OPRA request dated January 4, 2010
- E-mail from the Complainant to the Custodian dated January 13, 2010
- Custodian's response to the OPRA request dated January 13, 2010
- E-mail forwarding a letter from the Custodian to the Complainant dated January 14, 2010

The Complainant states that she filed an OPRA request with the Custodian dated January 4, 2010 asking for the records relevant to the complaint. The Complainant further states that on January 11, 2010 she visited the Office of the Municipal Clerk and asked the Custodian if the Committeemen communicated their choices for appointees in writing. The Complainant states that the Custodian informed the Complainant that the Committeemen communicated their choices verbally. The Complainant asserts that she then requested that the Custodian inform the Complainant in writing "that no documents exist concerning instructions from members of the Township Committee concerning the appointments."

The Complainant further states that she sent the Custodian an e-mail dated January 13, 2010 as a reminder that the seven (7) day period for responding to her OPRA request ended on that date. The Complainant states that later that same date she received an e-mail response to her OPRA request that included as Attachment No. 3 a list of professionals that provided proposals for the various appointed positions. The Complainant asserts that she telephoned the Custodian on January 14, 2010 and informed the Custodian that she still had not received anything confirming that there were no written documents instructing the Custodian to prepare resolutions appointing the various professionals. The Complainant states that later on January 14, 2010, the Complainant received an e-mailed letter from the Custodian informing the Complainant that all records that were requested have been sent via e-mail to the Complainant. The Complainant contends that on January 15, 2010 she sent an e-mail to the Custodian informing the Custodian that her response to the Complainant's OPRA request does not meet the requirements of OPRA. The Complainant states that this e-mail is attached to her Denial of Access Complaint.⁵

The Complainant does not agree to mediate this complaint.

⁵ No such e-mail was attached to the Complainant's complaint that was received by the GRC. Michele Rosen v. Township of Ocean (Ocean), 2010-14 – Findings and Recommendations of the Executive Director

February 1, 2010

E-mail from the Complainant to the Custodian. The Complainant informs the Custodian that if there are no documents responsive to the Complainant's request and the Custodian so informs the Complainant that no records exist responsive to the Complainant's request, the Complainant will withdraw the Complaint.⁶

February 3, 2010

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

February 4, 2010

Letter from the Custodian to the Complainant. The Custodian informs the Complainant that this communication is in furtherance of her letter to the Complainant dated January 14, 2010. The Custodian states that she has provided the Complainant with all records that she requested in her OPRA request and that there are no other records responsive to the Complainant's request.

February 9, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated January 4, 2010
- Read receipt for a January 13, 2010 e-mail from the Custodian to the Complainant dated January 13, 2010
- Letter from the Custodian to the Complainant dated January 14, 2010
- Complainant's Denial of Access Complaint dated January 15, 2010
- E-mail from the Complainant to the Custodian dated February 1, 2010
- Letter from the Custodian to the Complainant dated February 4, 2010

The Custodian does not certify as to her search for the requested records. The Custodian does certify that the records that may have been responsive to the request must be retained for three (3) years before being destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that she received the OPRA request upon which the complaint is based on January 4, 2010 and responded to the request on January 13, 2010. The Custodian certifies that she determined that the records responsive to the Complainant's request comprised an eight (8) page Request for Proposal containing a three (3) page list of 2009 professionals. The Custodian further certifies that all records that were requested by the Complainant were provided to the Complainant as attachments to the Custodian's response to the Complainant's request.

Analysis**Whether the Custodian unlawfully denied access to the requested records?**

⁶The Complainant also comments upon other issues that are not relevant to the instant complaint. Michele Rosen v. Township of Ocean (Ocean), 2010-14 – Findings and Recommendations of the Executive Director

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 also provides that:

“A request for access to a government record *shall be in writing* and hand-delivered, mailed, transmitted electronically or otherwise conveyed to the appropriate custodian.” (Emphasis added.) N.J.S.A. 47:1A-5.g.

OPRA further provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but not later than seven business days after receiving the request...The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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 evidence of record reveals that the Custodian received the Complainant’s OPRA request on January 4, 2010 and responded in writing to said request in a timely manner on January 13, 2010, which was the seventh (7th) business day following receipt

of the request. The Custodian informed the Complainant in the response that all items responsive to the Complainant's OPRA request dated January 4, 2010 were attached.

The Complainant asserted that on January 11, 2010, upon learning from the Custodian that the Committeemen communicated their choices for appointees verbally, the Complainant personally requested the Custodian to inform the Complainant in writing "that no documents exist concerning instructions from members of the Township Committee concerning the appointments." The Complainant stated in her complaint that she repeated this same request to the Custodian during a telephone call to the Custodian on January 14, 2010 and again in an e-mail dated January 15, 2010, but the Custodian failed to modify her response accordingly or otherwise create such a document.

The Custodian does not have an obligation to respond to the Complainant's OPRA request in a manner requested by the Complainant. OPRA provides that "...a custodian of a government record shall grant access...as soon as possible, but not later than seven business days after receiving the request..." As such, the Custodian satisfied her obligation under OPRA because she provided a written response to the Complainant's request wherein she disclosed to the Complainant all records that were responsive to the Complainant's request within the time period provided by OPRA, and has certified to such.

Although the Custodian certified that all records that were requested by the Complainant were disclosed to the Complainant as attachments to the Custodian's response to the Complainant's OPRA request, the Custodian was not obligated to disclose said records to the Complainant because the Complainant's request was overly broad and unclear and 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.

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),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 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).”

This matter is substantially different from the facts presented in Burnett v. County of Gloucester, 415 N.J.Super. 506 (App. Div. 2010). In Burnett, the plaintiff appealed from an order of summary judgment entered against him in his suit to compel production by the County of Gloucester of documents requested pursuant to OPRA, consisting of “[a]ny and all *settlements, releases or similar documents* entered into, approved or accepted from 1/1/2006 to present.” *Id.* at 508. (Emphasis added). The Appellate Division determined that the request sought a specific type of document, although it did not specify a particular case to which such document pertained, and was therefore not overly broad. *Id.* at 515-16.

In the instant complaint, the Complainant requested copies of correspondence, memos, e-mails and evaluations with reference to professional appointments in 2010,

⁷ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁸ As stated in Bent, *supra*.

including all e-mails from or to the personal computers of Township Committeemen. The Complainant failed to specifically identify any records by sender, recipient (except for Committeemen, but see analysis, *infra*), dates, date range, subject (with respect to the professional appointment), rater or ratee (with respect to evaluations) or type of profession encompassed within the 2010 appointment(s). Further, the Complainant did not specify the sender of the e-mails to the personal computers of Township Committeemen or clarify whether such e-mails were sent to all Township Committeemen or just some Township Committeemen, and if the latter, which Township Committeemen. As such, the Complainant's request is overly broad and unclear and therefore invalid under OPRA.

Therefore, because the Complainant's request for the records relevant to the complaint fails to seek specific identifiable government records, 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant's request for the records relevant to the complaint fails to seek specific identifiable government records, 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 (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 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.

Prepared By: John E. Stewart, Esq.
Mediator

Approved By: Catherine Starghill, Esq.
Executive Director

March 22, 2011