



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

May 24, 2011 Government Records Council Meeting

Louis Paul Toscano
Complainant

Complaint No. 2010-149

v.

New Jersey Department of Treasury
Custodian of Record

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 amended findings and recommendations. The Council, therefore, finds that:

1. Because the Complainant’s request is overly broad, fails to specify identifiable government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant’s request is invalid under OPRA. 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 of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
2. Because the Custodian has certified that no record responsive to the Complainant’s OPRA request Item No. 1 and No. 2 exist and there is no credible evidence in the record to refute the Custodian’s certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

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 2, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

Louis Paul Toscano¹
Complainant

GRC Complaint No. 2010-149

v.

New Jersey Department of Treasury²
Custodian of Records

Records Relevant to Complaint: Copies of:

1. All records relevant to how the Department of Treasury will respond to the Complainant's Notice of Claim against the Department of Labor of Workforce Development (LWD).
2. All records relevant to how the Department of Treasury will respond to the Complainant's claim with the Merit System Board Appeal.

Request Made: June 26, 2010

Response Made: July 12, 2010

Custodian: Michael Tyger³

GRC Complaint Filed: July 19, 2010⁴

Background

June 26, 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.

July 12, 2010

Custodian's response to the OPRA request. The Custodian certifies that he received the Complainant's OPRA request on June 30, 2010. The Custodian responds in writing to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request. The Custodian states that access to the requested records responsive to request Items No. 1 and No. 2 is denied because OPRA addresses existing records "made, maintained, or kept on file," but does not include future records not yet created. The Custodian also states that after she reviewed their files, the Department of Treasury has no records on file which correspond to a response to a notice of claim or to

¹ No legal representation listed on record.

² Represented by DAG Melissa A. Haas, on behalf of the NJ Attorney General.

³ Barbara O'Hare, Manager of the Government Records Access Unit, responded to the Complainant's OPRA request on behalf of the Custodian.

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

the Merit System Board with regard to the Complainant's appeals. The Custodian states that the Department has no records responsive to the Complainant's request for Items No 1 and No. 2.

July 19, 2010

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

- Complainant's OPRA request dated June 26, 2010
- Letter from the Custodian to the Complainant dated July 12, 2010

The Complainant states that he does not accept the Custodian's denial of his OPRA request.⁵

The Complainant does not agree to mediate this complaint.

July 28, 2010

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

August 4, 2010⁶

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated June 30, 2010
- Letter from the Custodian to the Complainant dated July 12, 2010

The Custodian certifies that Barbara O'Hare (Ms. O'Hare), Manager of the Department's Government Records Access Unit, responded to the Complainant's request on July 12, 2010. The Custodian also certifies that Ms. O'Hare stated to the Complainant in her response to the OPRA request that after conducting a review of the Department's files, no records exist which are responsive to the Complainant's OPRA request.

The Custodian certifies that his search for the requested records included searching the files in the Human Resources Department to see if the Department had been asked by the Merit System Board or the LWD to respond to anything related to the Complainant. The Custodian certifies that he did not find any request and no responsive records exist.

The Custodian certifies that the Department received the Complainant's OPRA request dated June 26, 2010 on June 30, 2010. The Custodian certifies that the Complainant's request sought records pertaining to 1) how the Department will respond to the Complainant's notices of claim against the LWD and 2) records pertaining to the Department's response to the Complainant's appeal to the Merit System. The Custodian argues that N.J.S.A. 47:1A-1.1 defines a government record as including only those records that are made, maintained, or kept on file by a government agency and records

⁵ The Complainant also sets forth other arguments not relevant to the adjudication of this complaint.

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.

received by that agency in the course of official business. The Custodian argues that this definition does not require that a government agency make or maintain any particular type of records that do not currently exist in its possession.

Furthermore, the Custodian argues that the court in MAG Entertainment LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546-547 (App. Div. 2005), held that “OPRA simply operates to make identifiable government records ‘readily accessible for inspection, copying or examination.’” In addition, the Custodian argues that in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 171 (App. Div. 2006), the court held that OPRA does not require an agency to create “new documents” in order to respond to an OPRA request. The Custodian also argues that many prior decisions by the Government Records Council have also indicated that where no records responsive exist within an agency’s possession, a Custodian has not violated OPRA by denying a request for such records. See Riggins v. Borough of Jamesburg, GRC Complaint No. 2009-105 (March 2010); Recht v. Essex County Prosecutor’s Office, GRC Complaint No. 2007-240 (November 2007); Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

The Custodian certifies that after reviewing its files, the Department determined that it did not have any response to a notice of claim or to a Merit System Board appeal in its possession. The Custodian argues that the Complainant was properly denied access because there are no records responsive to provide to the Complainant.

The Custodian also argues that the response dated July 12, 2010 met the requirements of N.J.S.A. 47:1A-5.g., which states that a Custodian must provide a specific basis for a denial of access, because the Custodian explained clearly the reason why the Department was unable to provide the requested records. Lastly, the Custodian argues that because Ms. O’Hara diligently and appropriately responded to the Complainant’s OPRA request and because the basis for the response to the request is supported by OPRA and prior decisions by the New Jersey Courts and the GRC, the Complainant’s Denial of Access Complaint should be dismissed.

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.

In the instant complaint, the Complainant's request Item No. 1 sought all records relevant to how the Department of Treasury will respond to the Complainant's Notice of Claim against the LWD; Complainant's request Item No. 2 sought all records relevant to how the Department of Treasury will respond to the Complainant's claim with the Merit System Board Appeal.

The evidence of record indicates that the Custodian responded to the Complainant's request timely and in writing, denying the Complainant's request for Items No. 1 and 2 because OPRA addresses existing records "made, maintained, or kept on file," but does not include future records not yet created. The Custodian's response also stated that no records responsive to either request item exist; the Custodian certified to such fact in his SOI dated August 4, 2010.

The Complainant's request, however, is overly broad and fails to specify identifiable government records sought. Moreover, the Complainant's request would require the Custodian to conduct research through every file in his possession to locate and identify responsive records. The Complainant's request 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 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).”

Therefore, because the Complainant’s request for Items No. 1 and 2 is overly broad, fails to specify identifiable government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant’s request is invalid under OPRA. 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 Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Additionally, the Custodian responded to the Complainant’s OPRA request on the seventh (7th) business day stating that after she reviewed their files, the Department of Treasury has no records on file which correspond to a response to a notice of claim or to the Merit System Board with regard to the Complainant’s appeals. The Custodian states that the Department has no records responsive to the Complainant’s request for Items No 1 and No. 2. Furthermore, the Custodian has certified in the SOI that no records exist

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

⁸ As stated in Bent, *supra*.

which are responsive to request Item No. 1 and No. 2. Further, the Complainant has failed to submit any evidence to refute the Custodian's certification in this regard.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The Complainant failed to submit any evidence to refute the Custodian's certification. The GRC held that the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

Therefore, because the Custodian has certified that no record responsive to the Complainant's OPRA request Item No. 1 and No. 2 exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that

1. Because the Complainant's request is overly broad, fails to specify identifiable government records sought and would require the Custodian to conduct research in order to determine the records which may be responsive to the request, the Complainant's request is invalid under OPRA. 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 of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
2. Because the Custodian has certified that no record responsive to the Complainant's OPRA request Item No. 1 and No. 2 exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). N.J.S.A. 47:1A-6.

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

Approved By: Catherine Starghill, Esq.
Executive Director

April 20, 2011