State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

February 28, 2012 Government Records Council Meeting

Danny Rios
Complainant
v.
New Jersey Department of Corrections
Custodian of Record

Complaint No. 2010-255

At the February 28, 2012 public meeting, the Government Records Council ("Council") considered the February 21, 2012 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 fails to specify identifiable government records, the request is invalid under OPRA pursuant to 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 of Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008). As such, the Custodian has not unlawfully denied access to the Complainant's request. 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 28th Day of February, 2012

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Denise Parkinson Vetti, Esq., Secretary
Government Records Council

Decision Distribution Date: March 5, 2012

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
February 28, 2012 Council Meeting

Danny Rios[1] **GRC Complaint No. 2010-255**
Complainant

v.

New Jersey Department of Corrections[2]
Custodian of Records

Records Relevant to Complaint: Copies of:

1. Any records/documents from January 1, 2005 to present maintained by the New Jersey Department of Corrections ("DOC") and its prisons: East Jersey State Prison ("EJSP")(between March 16, 2005 and April 11, 2005), Bayside State Prison ("BSP")(Between January 4, 2007 and January 18, 2008), South Woods State Prison ("SWSP")(between January 5, 2007 and January 18, 2007) and Southern State Prison ("SSP")(between February 1, 2009 and February 17, 2009) regarding the Complainant's placement in temporary close custody or Involuntary Protective Custody in four (4) New Jersey prisons.
2. Any records/documents from January 1, 2005 to present of interviews with the Complainant conducted by the Special Investigations Division ("SID") in EJSP, BSP, SWSP and SSP.
3. Any records/documents from May 1, 1997 to present regarding affiliation of the Complainant with any security threat group ("STG") included but not limited to May 5, 1998 at the New Jersey State Prison ("NJSP").

Request Made: June 28, 2010
Response Made: July 6, 2010
Custodian: Deidre Fedkenheuer[3]
GRC Complaint Filed: September 23, 2010[4]

Background

June 28, 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.

[1] No legal representation listed on record.
[2] Represented by DAG Dianne Moratti, on behalf of the NJ Attorney General. Previously represented by DAG Jason S. Postelnik.
[3] Ms. Wendy Myers from DOC verbally notified the GRC on August 15, 2011 that Mr. John Falvey, Esq., replaced Ms. Deirdre Fedkenheuer as Custodian of Record.
[4] The GRC received the Denial of Access Complaint on said date.

July 6, 2010

Custodian's response to the OPRA request. The Custodian responds in writing via letter the Complainant's OPRA request on the same day as receipt of such request.[5] The Custodian responds as follows:

Request Item No. 1

The Custodian states that access to this request item is granted. The Custodian states that the NJSP OPRA Liaison will advise the Complainant within seven (7) business days of the appropriate copy costs incurred for any responsive records.

Request Items No. 2 and No. 3

The Custodian states that access to these two (2) request items is denied. The Custodian states that informant records and statements of SID investigations shall not be considered government records pursuant to N.J.S.A. 47:1A-1 et seq., provided that redaction of information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility.

The Custodian further states that OPRA recognizes exemptions found in executive orders. N.J.S.A. 47:1A-9.a. The Custodian states that reports or records relating to an identified individual which, if disclosed, would jeopardize the safety of any person or the safe and secure operation of a correctional facility or other designated place of confinement is exempt from disclosure pursuant to Executive Order No. 26 (McGreevey, 2002)("EO 26").

The Custodian finally states that DOC cannot provide the Complainant with information gathered by the SID because disclosure might compromise investigative techniques utilized by DOC and/or ongoing investigations.

July 7, 2010

"OPRA Records Request Payment Notification and Authorization" form ("Authorization form") from Mr. Frank Bruno ("Mr. Bruno"), NJSP OPRA Liaison, to the Complainant. Mr. Bruno states that the copying cost incurred for the responsive record is $3.75.

July 11, 2010

Authorization form from the Complainant to Mr. Bruno. The Complainant authorizes payment of the copying cost of $3.75 for the responsive records.

July 19, 2010

Authorization form from Mr. Bruno to the Complainant. Mr. Bruno states that access to the responsive record is granted.

[5] The Custodian certifies in the Statement of Information that she received the Complainant's OPRA request on July 6, 2010.

September 23, 2010

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching letter from the Custodian to the Complainant dated July 6, 2010.

The Complainant states that he submitted an OPRA request to DOC on June 28, 2010. The Complainant states that the Custodian responded on July 6, 2010 as follows:

Request Item No. 1

The Complainant states that the Custodian granted access to records; however, the Custodian only provided records for EJSP and SWSP.

Request Item No. 2 and No. 3

The Complainant states that the Custodian denied access to these two (2) request items. The Complainant asserts that request Item No. 2 relates to request Item No. 1 and that he is seeking the records that indicate the reasons the Complainant was placed in temporary closed custody in each institution. The Complainant further contends that disclosure of the records responsive to request Item No. 3 is imperative. The Complainant contends that he is being accused of being affiliated with an STG. The Complainant asserts that he needs the records to prove that he is not affiliated with said STG. The Complainant asserts that DOC is single-handedly responsible for this claim and is the only agency in possession of the alleged records on which the claim is based.

September 29, 2010

Offer of Mediation sent to both parties.

September 30, 2010

The Custodian declines mediation.[6]

September 30, 2010

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

October 7, 2010

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension of five (5) business days to submit the requested SOI.

October 7, 2010

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension of time until October 15, 2010 to submit the requested SOI.

October 15, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated June 28, 2010.
- Letter from the Custodian to the Complainant dated July 6, 2010.

[6] The Complainant did not respond to the Offer of Mediation.

- Legal Certification of Mr. Bruno.
- "OPRA Records Request Payment Notification and Authorization" form ("Authorization form") dated July 7, 2010 with the Complainant's notes thereon dated July 11, 2010 and Mr. Bruno's notes thereon dated July 19, 2010.
- Legal Certification of Ms. Wendy M. Myers ("Ms. Myers"), Secretarial Assistant III.

The Custodian certifies that no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.[7]

The Custodian certifies that she received the Complainant's OPRA request on July 6, 2010 and responded on the same day in writing granting access to request Item No. 1 and denying access to request Items No. 2 and No. 3 pursuant to OPRA, EO 26 and DOC's proposed regulations. The Custodian certifies that the Complainant filed this complaint disputing the denial of access to request Items No. 2 and No. 3 as well as contending that the Custodian did not provide the Complainant with all records responsive to request Item No. 1. The Custodian certifies that the following represents all records responsive to the Complainant's OPRA request:

(A) List of all records responsive to Complainant's OPRA request	**(B) List the Records Retention Requirement and Disposition Schedule**	**(C) List of all records provided to Complainant, in their entirety or with redactions**	**(E) If records were denied in their entirety, give a general nature description of the record.**	**(F) List the legal explanation and statutory citation for the denial of access to records in their entirety or with redactions.**
Request Item No. 1: Notice of Protective Custody Hearing Form – EJSP, dated April 1, 2005 (1 pg.)	10 years after DOC jurisdiction has ended.	Provided in entirety on July 19, 2010.	N/A	N/A
Protective Custody Hearing Adjudication Form – EJSP dated April 1, 2005 (2 pgs.)	10 years after DOC jurisdiction has ended.	Provided in entirety on July 19, 2010.	N/A	N/A
Temporary Closed Custody Placement Form - EJSP dated March 16, 2005 (1 pg.)	10 years after DOC jurisdiction has ended.	Provided in entirety on July 19, 2010.	N/A	N/A
Temporary Closed Custody Release Form – SWSP dated February 2, 2009 (1	10 years after DOC jurisdiction has ended.	Provided in entirety on July 19, 2010.	N/A	N/A

[7] The Custodian did not specifically certify to the search undertaken to locate the records responsive as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

pg.)				
Request Items No. 2 and No. 3: SID investigation report dated April 8, 2005 (3 pgs.)	10 years after DOC jurisdiction has ended.	N/A	SID investigation report	Proposed regulations at *N.J.A.C.* 10A-1-1.4 through 31-6.13, PRN 2002-228
SID investigation report dated August 5, 2008 (5 pgs.)	10 years after DOC jurisdiction has ended.	N/A	SID investigation report	Proposed regulations at *N.J.A.C.* 10A-1-1.4 through 31-6.13, PRN 2002-228
SID investigation report dated August 5, 2008 (22 pgs.)	10 years after DOC jurisdiction has ended.	N/A	SID investigation report	Proposed regulations at *N.J.A.C.* 10A-1-1.4 through 31-6.13, PRN 2002-228
SID investigation report dated December 30, 2008 (4 pgs.)	10 years after DOC jurisdiction has ended.	N/A	SID investigation report	Proposed regulations at *N.J.A.C.* 10A-1-1.4 through 31-6.13, PRN 2002-228
SID investigation report dated February 5, 2009 (4 pgs.)	10 years after DOC jurisdiction has ended.	N/A	SID investigation report	Proposed regulations at *N.J.A.C.* 10A-1-1.4 through 31-6.13, PRN 2002-228
Request Item No. 3: SID investigation report dated May 19, 2003 (4 pgs.)	10 years after DOC jurisdiction has ended.	N/A	SID investigation report	Proposed regulations at *N.J.A.C.* 10A-1-1.4 through 31-6.13, PRN 2002-228

The Custodian certifies that no responsive records to request Item No. 1 originating from BSP or SSP were located.

Counsel submits a letter brief in support of DOC's position. Counsel recapitulates the facts of this complaint and contends that the Custodian lawfully denied access to those records at issue herein. Counsel reiterates the Custodian's certified statement that no records responsive to request Item No. 1 from either BSP or SSP exist.

Counsel further contends that the records responsive to the Complainant's request Items No. 2 and No. 3 are SID records not subject to disclosure. Counsel contends that pursuant to N.J.S.A. 47:1A-9.a., EO 21 and Executive Order No. 26 (McGreevey, 2002)("EO 26"), State agencies were directed "… to handle all government records requests in a manner consistent with the rules as they have been proposed and published."

EO 21.[8] Counsel states that at the time of the Complainant's OPRA request, DOC's proposed regulations provided that:

> " the following records shall not be considered government records subject to public access pursuant to [OPRA]:
>
> 1. Informant documents and statements;
> 2. [SID] investigations, provided that redaction of the information would be insufficient to protect the safety of any person or the safe and secure operation of a correctional facility;
>
> ...
>
> 6. A report or record relating to an identified individual which, if disclosed, would jeopardize the safety of any person or the safe and secure operation of the correctional facility or other designated place of confinement." *N.J.A.C.* 10A-1-1.4 through 31-6.13, PRN 2002-228.

Counsel notes that on October 4, 2010 and after the Custodian's July 6, 2010 response to the request herein, DOC published a revised regulation that includes these exemptions with substantially the same language. 42 N.J.R., 2305(a)(October 4, 2010)(*N.J.A.C.* 10A:22-2.3.)

Counsel further argues that SID investigation reports are confidential. Counsel asserts that the records at issue herein cannot be redacted. Counsel notes that written information implicates safety and security issues, but information gathered also implicates these issues. Counsel contends that disclosure of any records in redacted form would disclose how the SID gathers intelligence, thus compromising investigative techniques and/or ongoing investigations. Counsel argues that the records are exempt from disclosure. *See* Muglia v. New Jersey Department of Corrections, GRC Complaint No. 2008-148 (August 2009). Counsel further asserts that applicable case law recognizes the need to maintain the confidentiality of investigatory materials. *See* Loigman v. Kimmelman, 102 N.J. 98, 107-108 (1986).

Counsel further argues that the records cannot be provided to an inmate because they contain certain references to an STG and are prohibited materials under *N.J.A.C.* 10A:5-6.2. Counsel asserts that possession or exhibition of anything related to an STG is in violation of disciplinary infraction *.011 and subjects an inmate to charges and sanctions. *N.J.A.C.* 10A:4-4.1.

[8] Counsel notes that the Appellate Division held in Slaughter v. Government Records Council, 413 N.J. Super. 544 (App. Div. 2010) that the provisions of EO 21 and EO 26 regarding proposed regulations were only temporary and are reasonably no longer in effect. Counsel further notes that the Court stayed the effectiveness of its decision until November 5, 2010 to allow all State agencies time to promulgate OPRA regulations in accordance with the Administrative Procedures Act ("APA").

Counsel requests that this complaint be dismissed because DOC provided the Complainant with all disclosable records and properly denied access to request Items No. 2 and No. 3.

Mr. Bruno certifies that on July 6, 2010, he received the Complainant's OPRA request from the Custodian. Mr. Bruno certifies that he obtained responsive records from the Complainant's NJSP file. Mr. Bruno certifies that he was unable to locate any records from BSP or SSP. Mr. Bruno certifies that on July 7, 2010, he sent the Complainant an Authorization form for $3.75.[9] Mr. Bruno states that the Complainant executed the Authorization form on July 11, 2009. Mr. Bruno certifies that the Complainant was provided with the responsive records on July 19, 2010.

Ms. Myers certifies that she received the Complainant's OPRA request on July 6, 2010 and began to search for responsive records. Ms. Myers certifies that upon reviewing records responsive to request Items No. 2 and No. 3, she determined that all responsive records made references to STGs.

Analysis

Whether the Complainant's request is invalid under OPRA?

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.

[9] Mr. Bruno charged the Complainant $0.75 per page for five (5) pages of records. In Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010), the Court held that beginning July 1, 2010, unless and until the Legislature amended OPRA to specify otherwise or some other statute or regulation applies, public agencies must charge requestors of government records no more than the reasonably approximated "actual costs" of copying such records. The GRC notes that the Complainant's OPRA request was submitted prior to July 1, 2010; therefore, Mr. Bruno charged the per page copying charge that was consistent with OPRA and case law at the time of submission of the Complainant's OPRA request.

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 "records/documents from January 1, 2005 to present" from four (4) DOC institutions "regarding the Complainant's placement in temporary close custody," "records/documents from January 1, 2005 to present of interviews with the Complainant conducted by [SID]" from the same four (4) DOC facilities and "records/documents from May 1, 1997 to present regarding affiliation of the Complainant with any [STG] included but not limited to May 5, 1998 at the [NJSP]." These three (3) request items fail to identify the types of government records sought over a lengthy time period.

Settled case law requires that OPRA requests identify specific 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). 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),[10] 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."[11]

Additionally, in New Jersey Builders Association v. New Jersey Council of 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…"

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008), the Council held that "[b]ecause the Complainant's OPRA requests [No.] 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.

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

534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005)."

As discussed above, the Court has determined that a valid OPRA request should identify specific government records and that OPRA is not intended to be used "*as a research tool litigants may use to force government officials to identify and siphon useful information.*" MAG, *supra*. Moreover, "a proper request under OPRA must identify with reasonable clarity those documents that are desired…" Bent, *supra*. *See also* NJ Builders, *supra, and* Schuler, *supra*.

Here, the Complainant's request sought "records/documents" from four (4) different facilities in two (2) request items over a five (5) year period and in the third (3rd) request item over nearly a 13-year period. The Complainant's request would force the Custodian to research all of the records in her possession over a lengthy time period to determine which records pertained to each of the Complainant's request. The Custodian is not obligated to make a decision as to those records that may be responsive to each request item; rather, MAG, *supra*, requires that the Custodian provide specifically identifiable government records.

Therefore, because the Complainant's request fails to specify identifiable government records, the request is invalid under OPRA pursuant to MAG, *supra*, Bent, *supra*, New Jersey Builders, *supra*, and Schuler, *supra*. As such, the Custodian has not unlawfully denied access to the Complainant's request. N.J.S.A. 47:1A-6.

Finally, notwithstanding the fact that the Custodian was able to locate records responsive to the Complainant's request, said request is far removed from the type of OPRA request envisioned by the Legislature in that the request sought multiple and nonspecific types of records over a lengthy time frame.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant's request fails to specify identifiable government records, the request is invalid under OPRA pursuant to 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 of Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008). As such, the Custodian has not unlawfully denied access to the Complainant's request. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 21, 2012