



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

Abdiel F. Avila

Complainant

v.

New Jersey Department of Corrections

Custodian of Record

Complaint No. 2010-36

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 because the Complainant’s request fails to identify the specific government records sought, the Complainant’s 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 on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). 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 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**

**Abdiel F. Avila¹
Complainant**

GRC Complaint No. 2010-36

v.

**New Jersey Department of Corrections²
Custodian of Records**

Records Relevant to Complaint: Copies of any and all Federal court orders from 2002-2009, *to wit*: United States Bankruptcy Court, District of New Jersey, and all associated papers (*i.e.* Chapter 7 and/or 11), to include all associated D.N.J. local forms 1-21 on “Admin files” in this facility. The records are required for judicial proceedings.

Request Made: January 3, 2010

Response Made: February 4, 2010

Custodian: Deirdre Fedkenheuer

GRC Complaint Filed: February 24, 2010³

Background

January 3, 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. The Complainant requests that if no records responsive exist, the Custodian certify to same. The Complainant further requests that if no records responsive exist, the Custodian forward the request to the agency that maintains the requested records.

February 4, 2010

Custodian’s response to the OPRA request. The Custodian certified in the SOI that she received the Complainant’s OPRA request on February 3, 2010. The Custodian responds in writing to the Complainant’s OPRA request on the first (1st) business day following receipt of such request. The Custodian states that the Complainant’s request is overly broad and does not identify the records sought. The Custodian states that OPRA only requires a response to a request for specific records, not information. The Custodian states that OPRA also does not require the creation of any records in order to respond. The Custodian states that a request is deemed to be invalid where it requires a custodian to conduct research and correlate data from various records. *See* MAG Entertainment v. Division of ABC, 375 N.J. Super. 534 (App. Div. 2005).

¹ No legal representation listed on record.

² Represented by DAG Ellen M. Hale, on behalf of the NJ Attorney General.

³ The GRC received the Denial of Access Complaint on said date.

The Custodian states that if the Complainant wishes to request specific records, he must clearly identify the records sought and provide the description to the Custodian.

February 24, 2010

Denial of Access Complaint filed with the Government Records Council (“GRC”) with no attachments.

The Complainant states that he sent an OPRA request to the New Jersey Department of Corrections (“DOC”) on or about January 5, 2010.⁴ The Complainant states that on February 16, 2010, he received the Custodian’s February 4, 2010 written response denying access to the requested records. The Complainant states that the Custodian did not definitively state whether any records responsive exist.

The Complainant states that his OPRA request complied with the provisions of OPRA. Specifically, the Complainant states that his request was in writing and mailed or conveyed to the appropriate custodian pursuant to N.J.S.A. 47:1A-5.g. Additionally, the Complainant states that N.J.S.A. 47:1A-7.g., which provides that “[t]he council shall not have jurisdiction over the Judicial or Legislative Branches of State Government or any agency, officer, or employee of those branches,” does not apply in the instant complaint because the GRC has jurisdiction over the DOC. The Complainant states that the instant complaint has a reasonable factual basis as the Complainant submitted an OPRA request to the DOC and received a response.⁵

The Complainant states that the burden of proving a lawful denial of access rests with the public agency. N.J.S.A. 47:1A-6. The Complainant contends that the Custodian failed to bear said burden of denying access to the requested records. Further, the Complainant contends that the Custodian has violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond within the statutorily mandated seven (7) business days. Further, the Complainant contends that the Custodian unlawfully denied access to the requested records and failed to indicate whether any records responsive exist. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).

Additionally, the Complainant asserts that his request did not disrupt agency operations nor did the Custodian offer a reasonable solution to accommodate the Complainant’s request. N.J.S.A. 47:1A-5.g. The Complainant contends that these accommodations included forwarding the Complainant’s request to the correct public agency such as the United States Bankruptcy Court, District of New Jersey, and so on, as the Complainant initially requested that the Custodian do in his OPRA request.

The Complainant contends that the requested records are necessary to assist in his defense pursuant to N.J.S.A. 47:1A-2.2(b).⁶ Moreover, the Complainant argues that the

⁴ The GRC subsequently received a copy of the Complainant’s OPRA request dated January 3, 2010 from the Custodian.

⁵ The Complainant cites to Magargal v. New Jersey Department of Military and Veterans Affairs, GRC Complaint No. 2007-250 (October 2007). The GRC administratively disposed of that complaint after the custodian certified that she never received the complainant’s OPRA request.

⁶ The GRC notes that OPRA further provides that “[a] determination that the information is necessary to assist in the requestor's defense shall be made by the court upon motion by the requestor or his Abdiel F. Avila v. New Jersey Department of Corrections, 2010-36 – Findings and Recommendations of the Executive Director 2

requested records are not exempt from disclosure under OPRA because said records name the Complainant as the debtor. The Complainant reiterates that the Custodian failed to certify that no records responsive exist and further failed to provide access to the records sought.⁷

The Complainant agreed to mediate this complaint.

March 11, 2010

Letter from the GRC to the Custodian attaching the Complainant's Denial of Access Complaint. The GRC states that the attached Denial of Access Complaint was received by the GRC on February 24, 2010. The GRC states that in said complaint, the Complainant asserts that he submitted an OPRA request to the DOC in December 2009; however, the Complainant failed to provide a copy of said request. The GRC states that the Complainant further asserts that the DOC responded on February 4, 2010 denying access to the requested records; however, the Complainant also failed to include a copy of said response.

The GRC requests that the Custodian forward a copy of the Complainant's OPRA request form and the Custodian's response relevant to this complaint, if those documents exist. Additionally, the GRC requests that the Custodian legally certify to the following:

1. On what date the DOC received the Complainant's OPRA request?
2. On what date the DOC responded to the Complainant's OPRA request?
3. Whether the DOC made, maintained, kept on file or received the records requested by the Complainant?

The GRC requests that the Custodian provide the requested documents and legal certification by March 16, 2010.

April 6, 2011

Custodian's legal certification with the following attachments:

- Complainant's OPRA request dated January 3, 2010 (with the DOC's date stamp dated February 3, 2010 thereon).
- Letter from the Custodian to the Complainant dated February 4, 2010.

The Custodian certifies that the DOC received the Complainant's OPRA request on February 3, 2010. The Custodian certifies that upon reviewing the Complainant's OPRA request and not being able to identify what records were being sought, the Custodian responded in writing on February 4, 2010 stating that the Complainant's request was overly broad and unclear.

representative." N.J.S.A. 47:1A-2.2(b). The Complainant has provided no determination from the court regarding the Complainant's request.

⁷ The Complainant cited to several provisions from the DOC Administrative Code, which mirror the provisions of OPRA. *N.J.A.C.* 10A:22-1 et seq. The Complainant also cites to the federal Freedom of Information Act.

April 26, 2010

Request for the Statement of Information (“SOI”) sent to the Custodian.⁸

May 21, 2010

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for an SOI on April 26, 2010 and to date has not received a response. Further, the GRC states that if the SOI is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

May 26, 2010

E-mail from the Custodian’s Counsel to the GRC. Counsel states that as discussed in an earlier telephone conversation, Counsel has just received this complaint from the DOC. Counsel requests an extension of time until June 3, 2010 to review the complaint and prepare the SOI.

May 26, 2010

E-mail from the GRC to the Custodian’s Counsel. The GRC grants Counsel an extension of time until June 3, 2010 to submit the requested SOI.

June 3, 2010

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated January 3, 2010 (with the DOC’s date stamp dated February 3, 2010 thereon).
- Letter from the Custodian to the Complainant dated February 4, 2010.

The Custodian certifies that the question whether any records that may have been 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 (“DARM”) is not applicable in the instant complaint.⁹

The Custodian certifies that she received the Complainant’s OPRA request on February 3, 2010. The Custodian certifies that she responded to said request in writing on February 4, 2010 stating that the Complainant’s request was overly broad and unclear. The Custodian notes that she further advised that if the Complainant wished to request specific records, he must clearly identify the records sought and provide the description to the Custodian.

The Custodian contends that the Complainant’s request is overly broad. The Custodian argues that it is unclear whether the DOC would have any of the records requested as they appear to be United States Bankruptcy Court decisions and federal forms.

⁸ The GRC did not send out an offer of mediation prior to sending out the SOI.

⁹ The Custodian did not certify to the search undertaken.

The Custodian's Counsel submits a legal brief in support of the DOC's position. Counsel states that 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 in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material." N.J.S.A. 47:1A-1.1.

Counsel argues that the Custodian correctly determined that the Complainant's OPRA request was broad and unclear; thus, the Custodian denied the Complainant's OPRA request pursuant to MAG Entertainment v. Division of ABC, 375 N.J. Super. 534 (App. Div. 2005). Counsel states that the court in MAG, *supra*, held that public agencies are only required to disclose identifiable government records. *Id.* at 549. Counsel contends that the Complainant did not clearly identify the records sought.

Additionally, Counsel asserts that the Complainant appeared to be requesting court decisions from Bankruptcy Court and possibly other federal courts over a seven (7) year period. Counsel argues that even if the Complainant had been more specific, it is unclear whether the records requested would be in the possession of the DOC as they appear to be relating to bankruptcy and other federal court decisions and forms.

Counsel notes that although the Custodian denied the Complainant's request, the Custodian informed the Complainant that if he clarified his OPRA request, the Custodian would attempt to locate responsive records. Counsel states that the Complainant failed to submit a more specific request.

Counsel asserts that based on the foregoing, the Complainant's request should be dismissed.¹⁰

Analysis

Whether the Complainant's request is a valid request 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.

¹⁰ The Complainant submitted additional correspondence containing arguments that are either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

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.

The Complainant’s request in the instant complaint sought copies of “any and all Federal court orders from 2002-2009, *to wit*: United States Bankruptcy Court, District of New Jersey, and all associated papers (*i.e.* Chapter 7 and/or 11), to include all associated D.N.J. local forms 1-21 on ‘Admin files’ in this facility. The records are required for judicial proceedings.” The Complainant appears to be requesting several types of records over a seven (7) year period; however, the Custodian would have to conduct research through all of the DOC’s files to find and identify any records that may be responsive to the Complainant’s request, if any records are in the possession of the DOC. Moreover, the Complainant’s request fails to specify identifiable government records sought; “records” is a generic term rather than a specific type of record.

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),¹¹ 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.”¹²

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).”

In the instant complaint, the Complainant’s request fails to identify specific government records sought; rather, said request sought several generic types of records over a seven (7) year period for all Federal Bankruptcy Court orders from the United States Bankruptcy Court, District of New Jersey and all associated documents. OPRA

¹¹ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹² As stated in Bent, *supra*.

does not countenance an open-ended search of a public agency's files. MAG, *supra*, at 549.

Therefore, because the Complainant's request fails to identify the specific government records sought, the Complainant's request is invalid under OPRA pursuant to MAG, *supra*, Bent, *supra*, NJ 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.

The GRC notes that although the Complainant asserts that the Custodian failed to respond in a timely manner, the evidence of record indicates that the Custodian received the Complainant's request on February 3, 2010 and responded in writing thereto on February 4, 2010, or the first (1st) business day after receipt of said request. Therefore, the Custodian's response was timely pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

The GRC finally notes that the Complainant disputed the fact that the Custodian did not forward the request at issue to the appropriate agency or agencies that maintained the records sought, which presumably would include the United States Bankruptcy Court, District of New Jersey. Additionally, the Complainant argued in the Denial of Access Complaint that N.J.S.A. 47:1A-7.g. does not apply in the instant complaint because the GRC has jurisdiction over the DOC.

OPRA provides that:

"Any officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record." (Emphasis added.) N.J.S.A. 47:1A-5.h.

OPRA further provides that:

"The council shall not have jurisdiction over the Judicial or Legislative Branches of State Government or any agency, officer, or employee of those branches." N.J.S.A. 47:1A-7.g.

N.J.S.A. 47:1A-5.h. speaks to an employee or official receiving an OPRA request and forwarding same to the appropriate custodian or directing the requestor to the custodian within the same agency. A custodian is under no obligation to forward a request to another public agency or the judiciary, which the Complainant appears to have argued in the Denial of Access Complaint that the Custodian should have done in order to satisfy the Complainant's request.

Finally, the Complainant requested that the Custodian's response to the request at issue here should contain a certification that no records responsive exist, if such fact were true. The GRC notes that OPRA contains no requirement for a custodian to certify whether records responsive exist when responding to a request.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant's request fails to identify the specific government records sought, the Complainant's 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 on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). 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

April 20, 2011