



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

February 26, 2013 Government Records Council Meeting

Angel L. Alicea
Complainant

Complaint No. 2011-103

v.

City of Hoboken Police Department (Hudson)
Custodian of Record

At the February 26, 2013 public meeting, the Government Records Council (“Council”) considered the January 22, 2013 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 Custodian lawfully denied access to the roll call sheets responsive to Item No. 1 of the Complainant’s second (2nd) request because such information could pose a significant risk to the safety of police personnel pursuant to N.J.S.A. 47:1A-1.1, Rivera v. City of Plainfield, Police Department (Union), GRC Complaint 2009-317 (May 2011). *See McElwee v. Borough of Fieldsboro*, 400 N.J. Super. 388 (App. Div. 2008).
2. Because the Complainant’s first (1st) request and Item No. 2 of the second (2nd) request are overly broad, fail to identify specific government records sought, fail to provide sufficient identifying information to enable the Custodian to locate responsive records and would require the Custodian to conduct research in order to determine the records which may be responsive to the requests, the Complainant’s requests are 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) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).

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 26th Day of February, 2013

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

Robin Berg Tabakin, Esq., Chair
Government Records Council

Decision Distribution Date: February 27, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 26, 2013 Council Meeting**

**Angel L. Alicea, II¹
Complainant**

GRC Complaint No. 2011-103

v.

**City of Hoboken Police Department (Hudson)²
Custodian of Records**

Records Relevant to Complaint:

December 1, 2010: Video recordings on or around July 2010 showing a physical altercation that occurred inside police headquarters involving police personnel.

March 29, 2010:³

1. Roll call sheets from January 1, 2010 to the present.
2. Internal Investigation deposition documentation involving Lieutenant Kevin Houghton (“Lieutenant Houghton”) and Sergeant Edward Drishti (“Sergeant Drishti”).

Request Made: December 1, 2010
Response Made: December 9, 2010
Custodian: James Farina
GRC Complaint Filed: April 6, 2011⁴

Background

December 1, 2010

Complainant’s first (1st) Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

December 9, 2010

Chief of Police, Anthony Falco’s, (Chief Falco), response to the OPRA request. Chief Falco responds in writing to the Complainant’s OPRA request on the fifth (5th)

¹ No legal representation listed on record. The Complainant is the former Public Safety Director for the City of Hoboken.

² Represented by Arnold R. Gerst, Esq., of Weiner Lesniak, LLP, (Parsippany, NJ).

³ The Complainant filed two (2) separate OPRA requests for these records, which requests were the subject of the Denial of Access Complaint. However, due to the commonality of the parties and the date of the requests, the GRC refers to these requests as a single request for the purposes of this adjudication.

⁴ The GRC received the Denial of Access Complaint on said date. The Complainant signed his Denial of Access Complaint on March 17, 2011.

business day following receipt of such request. Chief Falco states that access to the requested record is denied because the requested material is part of the Internal Affairs investigative file which is confidential.

March 29, 2011

Complainant's second (2nd) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

April 1, 2011

Custodian's response to the OPRA request. The Custodian responds in writing on the second (2nd) business day following receipt of such request.⁵ The Custodian states that access to the records responsive to request Item No. 1 is denied because as per directive by the Hudson County Prosecutor's Office ("HCPO") sent on June 29, 2010, roll call sheets are internal records that are not to be disseminated. The Custodian states that access to the records responsive to request Item No. 2 is denied because such records pertain to an internal investigation and pursuant to Attorney General Guidelines, such records are considered confidential.

April 6, 2011

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

- Complainant's first (1st) OPRA request dated December 1, 2010
- Letter from Chief Falco to the Complainant dated December 6, 2010
- Complainant's second (2nd) OPRA request dated March 29, 2011
- Letter from the Custodian to the Complainant dated April 1, 2011⁶

The Complainant states that on July 22, 2010 it came to his attention that a Hoboken Police Lieutenant slapped a Police Sergeant and a fight ensued immediately thereafter. The Complainant also states that he wrote a letter to the Police Chief denouncing the behavior of the two (2) supervisors and directing the Police Chief to initiate a thorough and complete investigation of the incident. The Complainant further states that he sent several letters to Chief Falco requesting updates on the investigation. The Complainant additionally states that on November 29, 2010 Chief Falco informed the Complainant that the Internal Investigation was sustained and the Police Lieutenant would receive a five (5) day suspension. The Complainant further states that on November 29, 2010 he sent a letter to Chief Falco stating that he needed details of the suspension.⁷

The Complainant states although he is the Public Safety Director he filed an OPRA request to obtain a copy of the videotape recording of the incident between the Police Lieutenant and the Police Sergeant. The Complainant also states that Chief Falco denied his request for the videotape because it was part of an Internal Affairs

⁵ The Custodian certifies in the SOI that he received the Complainant's OPRA request on March 30, 2011.

⁶ The Complainant also includes additional documentation not relevant to the adjudication of this complaint.

⁷ The letter dated November 29, 2010 was not a OPRA request.

Investigation file and the file is deemed confidential. The Complainant asserts that as the Director he should have access to records upon request in order to facilitate the evaluation and assessment of all the Department's operations.

The Complainant states that the video camera is situated in the police headquarters' lobby area, which is open to the public twenty-four (24) hours a day seven (7) days a week. The Complainant argues that the videotape is not a criminal investigatory record. The Complainant also argues that the videotape does not fall under the security measures/surveillance techniques exception. The Complainant further argues that the video surveillance cameras are in a public area and the cameras are conspicuously displayed for the public to see upon entering the building. The Complainant additionally argues that release of this tape cannot create any additional safety risk if that measure or technique is already publicly known. The Complainant states that the Internal Affairs Investigators decided that the altercation was not a criminal matter and only proceeded with the investigation internally.⁸

Second OPRA request:

The Complainant argues that the record responsive to request Item No. 2 is not a criminal investigatory record, it is not part of a civil enforcement proceedings and is not part of any investigation. The Complainant states that the record responsive to request Item No. 2 is a record-keeping document that is used upon the conclusion of an Internal Affairs Investigation.

The Complainant argues that the record responsive to request Item No. 1 is a roll call sheet that contains the names of police personnel that are assigned to a corresponding squad or bureau. The Complainant also argues that the record responsive to request Item No. 1 would not contain any information concerning an ongoing investigation or any sensitive information that can potentially compromise the end product of an investigation.

The Complainant does not agree to mediate this complaint.

April 7, 2011

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

April 11, 2011

Telephone call from former Custodian's Counsel, Ms. Alysia Smickley ("Ms. Smickley") to the GRC. Ms. Smickley requests an extension until April 21, 2011 to complete the SOI.

April 11, 2011

E-mail from the GRC to Ms. Smickley. The GRC grants Ms. Smickley's request for an extension until April 21, 2011 to complete the SOI.

⁸ The Complainant also makes arguments why the records requested should be disclosed under common law. However, the GRC does not have authority over common law requests. See N.J.S.A. 47:1A-7 Angel L. Alicea, II v. City of Hoboken Police Department (Hudson), 2011-103 – Findings and Recommendations of the Executive Director 3

April 20, 2011⁹

Custodian's SOI with the following attachments:

- Complainant's first (1st) OPRA request dated December 1, 2010
- Letter from Chief Falco to the Complainant dated December 6, 2010
- Complainant's second (2nd) OPRA request dated March 29, 2011
- Letter from the Custodian to the Complainant dated April 1, 2011

The Custodian certifies that he sent the Complainant's OPRA requests to Chief Falco. The Custodian also certifies that the Complainant's OPRA requests were denied without conducting a search. The Custodian also certifies that any record responsive to the Complainant's request should not have been destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services. The Custodian certifies that he has attempted to obtain all the records responsive to the Complainant's requests; however Chief Falco refuses to provide a copy of all the records.

First (1st) OPRA Request:

The Custodian certifies that he received the Complainant's OPRA request on December 1, 2010. The Custodian also certifies that Chief Falco responded on December 9, 2010 denying the Complainant access to the requested records because said records are part of the Internal Affairs Investigation file which is considered confidential.

The Custodian argues that the records responsive are not releasable pursuant to the Attorney General Guidelines, November 2000, pages 11-44, which require confidentiality of internal affairs records. The Custodian also argues that the records responsive are not releasable because the GRC held in Janeczko v. NJ Department of Law and Public Safety, GRC Complaint No. 2002-79 and 2002-80 (August 2003) and Feggans v. City of Newark (Essex), GRC Complaint No. 2007-238 (October 2008) that investigation files are exempt regardless of whether the investigation is complete or ongoing. The Custodian also argues that the records responsive are considered criminal investigatory records and thus exempt from disclosure pursuant to N.J.S.A. 47:1A-3(b).

Second (2nd) OPRA Request:

The Custodian certifies that he received the Complainant's OPRA request on March 30, 2011. The Custodian also certifies that he responded in writing on April 1, 2011. The Custodian further certifies that he denied the Complainant access to the records responsive to request Item No. 1 because as per the directive by the HCPO on June 29, 2010, roll call sheets are internal records, not to be disseminated. The Custodian additionally certifies that he denied the Complainant access to the records responsive to request Item No. 2 because such records pertain to an internal investigation and pursuant to Attorney General Guidelines, such records are confidential.

⁹ The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant's OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).
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The Custodian argues that with regards to the records responsive to request Item No. 1 the Appellate Division held in Gerofsky v. Passaic County Society for the Prevention of Cruelty, 376 N.J. Super. 405 (App. Div. 2005) and Cherrits v. Village of Ridgewood, 311 N.J. Super. 517 (App. Div. 1998) that municipal police departments are subject to the supervision of the County Prosecutor. The Custodian certifies that the HCPO in a letter dated June 29, 2010 to Chief Falco stated that roll call sheets are internal records that are not to be disseminated. The Custodian states that Chief Falco maintains that this letter directs him to keep the roll call sheets confidential.

The Custodian argues that the records responsive to request Item No. 2 are not releasable pursuant to the Attorney General Guidelines, November 2000, pages 11-44, which require confidentiality of internal affairs records. The Custodian also argues that the records responsive to request Item No. 2 are not releasable because the GRC held in Janeczko v. NJ Department of Law and Public Safety, GRC Complaint No. 2002-79 and 2002-80 (August 2003) and Feggans v. City of Newark (Essex), GRC Complaint No. 2007-238 (October 2008) that investigation files are exempt from disclosure regardless of whether the investigation is complete or ongoing. The Custodian also argues that the records responsive to request Item No. 2 are considered criminal investigatory records and are thus exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-3(b).

Analysis

Whether the Custodian unlawfully denied access to the roll call sheets responsive to the Item No. 1 of the second (2nd) OPRA request?

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 provides that:

“[a] government record shall not include the following information which is deemed to be confidential for the purposes of [OPRA]...:

...

security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software...” 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 second (2nd) request Item No. 1 sought “roll call sheets from January 1, 2010 to the present.” The Complainant states that the roll call sheets that contain the names of police personnel that are assigned to a corresponding squad or bureau.

In Rivera v. City of Plainfield, Police Department (Union), GRC Complaint 2009-317 (May 2011) the complainant requested “police daily duty log for January 9, 2009 from 4:00 p.m. to 7:00 p.m. [and] January 12, 2009 from 4:00 p.m. to 11:59 p.m. that includes all police officers, supervisors and civilians working during that time and what their assignments were.” The Council held that these records “include details regarding surveillance techniques and staffing levels. If disclosed, such information could pose a risk to the safety of police personnel as well as civilians employed by the Plainfield Police Department.” The Council also held that these records are not disclosable pursuant to N.J.S.A. 47:1A-1.1. See McElwee v. Borough of Fieldsboro, 400 N.J. Super. 388 (App. Div. 2008). In the instant complaint the Complainant’s request for roll call sheets is similar to the police duty logs requested in Rivera, supra. The requested roll call sheets state which police officers are assigned to a particular squad.

Therefore, the Custodian lawfully denied access to the roll call sheets responsive to Item No. 1 of the Complainant’s second (2nd) request because such information could pose a significant risk to the safety of police personnel pursuant to N.J.S.A. 47:1A-1.1, Rivera, supra. See McElwee, supra.

The Council notes that the Complainant argued in his Denial of Access Complaint that as the Public Safety Director for the City of Hoboken he should have access to records upon request in order to facilitate the evaluation and assessment of all the Department’s operations. However, OPRA does not contain any provisions which grant the Complainant any more access rights than the average citizen because he held the position of Public Safety Director as the time of his request.

Whether the Complainant's first (1st) request and Item No. 2 of the second (2nd) request are valid?

In the instant complaint, the Complainant's first (1st) OPRA request sought "video recordings on or around July 2010 showing a physical altercation that occurred inside police headquarters involving police personnel. Item No. 2 of the Complainant's second (2nd) request sought internal investigation documentation involving Lieutenant Houghton and Sergeant Drishti. These requests are overly broad and would require the Custodian to conduct research in order to fulfill same. These items of the Complainant's requests are 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). As the court noted in invalidating MAG's request under OPRA:

"Most 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.* at 549.

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.*

In addition, 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

¹⁰ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹¹ As stated in Bent, *supra*.

Moreover, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the court enumerated the responsibilities of a custodian and a requestor as follows:

“OPRA identifies the responsibilities of the requestor and the agency relevant to the prompt access the law is designed to provide. The custodian, who is the person designated by the director of the agency, N.J.S.A. 47:1A-1.1, must adopt forms for requests, locate and redact documents, isolate exempt documents, assess fees and means of production, identify requests that require "extraordinary expenditure of time and effort" and warrant assessment of a "service charge," and, when unable to comply with a request, "indicate the specific basis." N.J.S.A. 47:1A-5(a)-(j). The requestor must pay the costs of reproduction and submit the request with information that is essential to permit the custodian to comply with its obligations. N.J.S.A. 47:1A-5(f), (g), (i). *Research is not among the custodian's responsibilities.*” (Emphasis added), NJ Builders, 390 N.J. Super. at 177.

Under such rationale, the GRC has repeatedly found that blanket requests are not valid OPRA requests. In the matter of Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), the relevant part of the Complainant’s request sought:

- Item No. 2: “From the Borough Engineer’s files: all engineering documents for all developments or modifications to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
- Item No. 3: From the Borough Engineer’s files: all engineering documents for all developments or modifications to North St., to the south and east of Wilson St.
- Item No. 4: From the Borough Attorney’s files: all documents related to the development or modification to Block 25, Lot 28; Block 25, Lot 18; Block 23, Lot 1; Block 23, Lot 1.02.
- Item No. 5: From the Borough Attorney’s files: all documents related to the development or modification to North Street, to the south and east of Wilson St.”

In reviewing the complainant’s request, the Council found 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 first (1st) request fails to identify sufficient information to enable the Custodian to identify the responsive video recording, such as, at a minimum, a specific date for the video recording sought. This request would require the Custodian to review every video recording taken at police headquarters for more than a month to

determine which video would be responsive to the request. This request item is, therefore, invalid under OPRA.

Item No. 2 of the Complainant's second (2nd) request fails to identify a specific government record, as "documentation" is a generic term. Moreover, this request item fails to specify any date range sought or any individual who provided the deposition. Thus, the Complainant's request is overly broad and is invalid under OPRA.

Therefore, because the Complainant's first (1st) request and Item No. 2 of the second (2nd) request are overly broad, fail to identify specific government records sought, fail to provide sufficient identifying information to enable the Custodian to locate responsive records and would require the Custodian to conduct research in order to determine the records which may be responsive to the requests, the Complainant's requests are invalid under OPRA pursuant to MAG, *supra*, Bent, *supra* and New Jersey Builders, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian lawfully denied access to the roll call sheets responsive to Item No. 1 of the Complainant's second (2nd) request because such information could pose a significant risk to the safety of police personnel pursuant to N.J.S.A. 47:1A-1.1, Rivera v. City of Plainfield, Police Department (Union), GRC Complaint 2009-317 (May 2011). *See* McElwee v. Borough of Fieldsboro, 400 N.J. Super. 388 (App. Div. 2008).
2. Because the Complainant's first (1st) request and Item No. 2 of the second (2nd) request are overly broad, fail to identify specific government records sought, fail to provide sufficient identifying information to enable the Custodian to locate responsive records and would require the Custodian to conduct research in order to determine the records which may be responsive to the requests, the Complainant's requests are 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) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).

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

Approved By: Karyn Gordon, Esq.
Acting Executive Director

January 22, 2013¹²

¹² This decision was originally prepared for the January 29, 2013 meeting; however this case was not adjudicated due to a lack of quorum.

