



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

September 25, 2012 Government Records Council Meeting

Scott L. Derby
Complainant

Complaint No. 2011-112

v.

New Jersey Civil Service Commission
Custodian of Record

At the September 25, 2012 public meeting, the Government Records Council (“Council”) considered the September 18, 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 first (1st) and second (2nd) requests fail to identify a specific government record and would require the Custodian to conduct research, such 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, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) and Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010).

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 25th Day of September, 2012

Robin Berg Tabakin, Chair
Government Records Council



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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: October 1, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 25, 2012 Council Meeting**

**Scott L. Derby¹
Complainant**

GRC Complaint No. 2011-112

v.

**New Jersey Civil Service Commission²
Custodian of Records**

Records Relevant to Complaint:

March 12, 2011:

1. All letters, requests, correspondence, memoranda, e-mails, or other documents relative to the title of “Assistant Chief Investigator, Secured Facilities.”³
2. All letters, requests, correspondence, memoranda, e-mails or other documents relative to the title “Chief Investigator, Secured Facilities” especially pertaining to the matter of any request or effort to reallocate this title from career or classified service to unclassified service.⁴

March 17, 2011:

1. Copies of files or records regarding the respective histories of the following titles, “Investigator Secured Facilities,” “Senior Investigator Parole and Secured Facilities,” “Principal Investigator Parole and Secured Facilities,” “Assistant Chief Investigator Secured Facilities,” and “Chief Investigator Secured Facilities.”
2. Copies of files or records regarding the history of the title, “Chief, Bureau Law Enforcement, Environmental Protection.”
3. Copies of files or records regarding the history of the title, “Police Commander.”⁵

¹ No legal representation listed on record.

² Represented by DAG Lisa Dorio Ruch on behalf of the NJ Attorney General.

³ The Complainant states that the New Jersey Law Enforcement Commanding Officers Association has initiated litigation with the New Jersey Public Employment Relations Commission to collectively organize those serving in the title.

⁴ The Complainant filed two (2) separate OPRA requests on March 12, 2011. 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.

⁵ The Complainant also filed three (3) separate OPRA requests on March 17, 2011. 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.

Request Made: March 12, 2011 and March 17, 2011
Response Made: March 15, 2011 and March 18, 2011
Custodian: Christopher Randazzo
GRC Complaint Filed: April 13, 2011⁶

Background

March 12, 2011

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. The Complainant indicates that he prefers to conduct an on-site investigation of the records.

March 15, 2011

Custodian's response to the OPRA request.⁷ The Custodian responds in writing via e-mail to the Complainant's OPRA request on the second (2nd) business day following receipt of such request. The Custodian states that access to the records responsive to request Item No. 1 and No. 2 is denied pursuant to N.J.S.A. 47:1A-1.1, as "inter-agency or intra-agency advisory, consultative or deliberative ["ACD"] material." The Custodian also states that the Complainant's request is overly broad and unclear. The Custodian states that under OPRA the New Jersey Civil Service Commission ("NJCS") is obligated to only disclose specifically identifiable government records. *See* 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. 180 (App. Div. 2007); and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

March 17, 2011

Complainant's second (2nd) 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 indicates that the preferred method of delivery is U.S. Mail.

March 18, 2011

Custodian's response to the OPRA request.⁸ The Custodian responds in writing via e-mail to the Complainant's OPRA request the following business day following receipt of such request. The Custodian states that access to the records responsive to request Item No. 1 through No. 3 is denied because these requests are broad and unclear. The Custodian states that under OPRA the NJCS is obligated to only disclose specifically identifiable government records. *See* MAG, supra; Bent, supra; NJ Builders, supra; and Schuler, supra.

⁶ The GRC received the Denial of Access Complaint on said date.

⁷ The Custodian responded with two (2) separate e-mails. However, due to the commonality of the parties and the date of the responses, the GRC refers to these responses as a single response for the purposes of this adjudication.

⁸ The Custodian responded with three (3) separate e-mails. However, due to the commonality of the parties and the date of the responses, the GRC refers to these responses as a single response for the purposes of this adjudication.

April 13, 2011

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

- Complainant’s first (1st) OPRA request dated March 12, 2011
- E-mail from the Custodian to the Complainant dated March 15, 2011
- Complainant’s second (2nd) OPRA request dated March 17, 2011
- E-mail from the Custodian to the Complainant dated March 18, 2011.

Complainant’s first (1st) OPRA Request:

The Complainant states that the Custodian denied his request via e-mail on March 15, 2011 asserting that access to the records responsive to request Item No. 1 and No. 2 contain ACD material and that the Complainant’s request is overly broad and unclear. The Complainant asserts that two (2) facts must be present in order for the Custodian to properly claim the ACD privilege: 1) the requested records must exist and 2) the custodian must have understood what the Complainant was seeking to decide that such records contain ACD material. The Complainant argues that the records responsive to his request do not contain ACD material. The Complainant further asserts that the records are not pre-decisional and do not contain opinions, recommendations or advice about agency policies. The Complainant states that he merely requested public records concerning a reallocation of certain civil service job titles from the career service to the unclassified service.

Complainant’s second (2nd) OPRA Request:

The Complainant states that the Custodian denied his request via e-mail on March 18, 2011 asserting that these requests are overly broad and unclear. The Complainant also states that the NJCSC maintains a file for every civil service job title. The Complainant asserts that his OPRA requests are not overly broad. The Complainant states that he is requesting files for civil service titles, the contents of which are available on the NJCSC’s website. The Complainant also states that by allowing unlimited third (3rd) party access to the material through a public website, the material is a public record.

The Complainant agrees to mediate this complaint.

April 13, 2011

Offer of Mediation sent to the Custodian.

April 13, 2011

The Custodian declines mediation.

April 14, 2011

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

April 20, 2011

E-mail from the Custodian to the GRC. The Custodian requests an extension until May 5, 2011 to complete the SOI.

April 21, 2011

E-mail from the GRC to the Custodian. The GRC grants the Custodian's request for an extension to complete the SOI. The GRC states that since it is granting an extension longer than the normal five (5) business days, it can only grant one extension to complete the SOI.

May 5, 2011⁹

Custodian's SOI with no attachments.

Complainant's first (1st) OPRA request:

The Custodian certifies that he received the Complainant's first (1st) OPRA request on March 12, 2011. The Custodian also certifies that he responded to the Complainant's OPRA request on March 15, 2011 via e-mail, the second (2nd) business day following receipt of such request. The Custodian certifies that he denied access to the records responsive to request Item No. 1 and No. 2 pursuant to N.J.S.A. 47:1A-1.1, as ACD material. The Custodian certifies that he also denied the Complainant's request as overly broad and unclear. The Custodian also certifies that under OPRA the New Jersey Civil Service Commission ("NJCS") is obligated to only disclose specifically identifiable government records. *See* MAG, supra; Bent, supra; NJ Builders, supra; and Schuler, supra.

Complainant's second (2nd) OPRA request:

The Custodian certifies that he received the Complainant's second (2nd) OPRA request on March 17, 2011. The Custodian also certifies that he responded to the request on March 17, 2011, via e-mail. The Custodian certifies that he denied access to the records responsive to request Item No. 1 through No. 3 because these requests are broad and unclear. The Custodian certifies that under OPRA the NJCS is obligated to only disclose specifically identifiable government records. *See* MAG, supra; Bent, supra; NJ Builders, supra; and Schuler, supra.

Custodian's Counsel argues that the Complainant's requests sought all records related to nine (9) different civil service titles within the Department of Corrections and the Department of Environmental Protection. Counsel also argues that the Complainant's requests do not specifically identify a government record. Counsel further argues that the requests seek all records related to the career service history of the requested civil service titles. *See* Burnett v. County of Gloucester, 45 N.J. Super. 506 (App. Div. 2010) (request is not invalid where it requires searching for specific, identifiable documents requested, not researching information from documents); MAG, supra (agencies are required to disclose only "identifiable" governmental records not otherwise exempt, not wholesale requests for general information to be analyzed, collated and compiled).

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).

Counsel argues that the portion of the Complainant's first (1st) OPRA request Item No. 2 for "the matter of any request or effort to reallocate" is also broad and unclear pursuant to MAG, supra. Counsel also argues that the Complainant's first (1st) OPRA request Item No. 1, seeks all e-mails without specifying dates, senders or recipients. Counsel further argues that in order to properly file an OPRA request seeking e-mails, the request must identify "1) the content and/or subject of the e-mail; 2) the specific date or range of dates during the e-mail was transmitted; and 3) the sender and/or recipient of the e-mail." See Elcavage v. Township of West Milford (Passaic), GRC Complaint No. 2009-07 (April 2010). Counsel argues that the Complainant's request fails to identify relevant dates, senders or recipients. Lastly, Counsel argues that the Custodian appropriately denied the Complainant's first (1st) and second (2nd) OPRA requests as overly broad and unclear.

Counsel states that the Custodian denied the Complainant's first (1st) OPRA request because such records can possibly contain privileged communications that were part of NJCSC's deliberative process. Counsel argues that it is well established that records used in an agency's decision-making process may be protected from disclosure by the deliberative process privilege pursuant to N.J.S.A. 47:1A-1.1. See Education Law Center v. New Jersey Department of Education, 198 N.J. 274 (2007) (record that contains or involves factual components is entitled to deliberative process protection when it was used in the decision-making process and its disclosure would reveal deliberations that occurred during that process). Counsel also argues that the mental processes of public officials by means of which a governmental action is determined are beyond the scope of judicial review. See State v. Mitchell, 164 N.J. Super. 198 (App. Div. 1978) and New Jersey Turnpike Authority v. Sisselman, 106 N.J. Super. 358 (App. Div. 1969). Lastly, Counsel argues that the Custodian appropriately denied the Complainant's first (1st) and OPRA request in order to protect privileged communications that were part of the deliberative process.

Analysis

Whether the Complainant's requests are valid?

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.

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),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

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

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 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).”

The Complainant asserted in his Denial of Access Complaint that the NJCSC maintains a file for every civil service job title and therefore his requests are not overly broad. Custodian’s Counsel argued in the SOI that the Complainant’s requests fail to specifically identify a government record. Counsel also argued that the Complainant’s requests seek all records related to the career service history of the requested civil service titles.

The test under MAG, then, is whether a requested record is a *specifically identifiable* government record. If so, the record is disclosable, barring any exemptions to disclosure contained in OPRA. The GRC established the criteria deemed necessary to specifically identify an e-mail communication in Sandoval v. NJ State Parole Board, GRC Complaint No. 2006-167 (October 2008). In Sandoval, the Complainant requested “e-mail...between [two individuals] from April 1, 2005 through June 23, 2006 [using seventeen (17) different keywords].” The Custodian denied the request, claiming that it was overly broad. The Council determined:

“The Complainant in the complaint now before the GRC requested specific e-mails *by recipient, by date range and by content*. Based on that information, the Custodian has identified [numerous] e-mails which fit the specific recipient and date range criteria Complainant requested.” (Emphasis added.) *Id.*

¹¹ As stated in Bent, *supra*.

Moreover, in Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010), the Council examined what constitutes a valid request for e-mails under OPRA. The Council determined that:

“In accord with MAG, supra, and its progeny, in order to specifically identify an e-mail, OPRA requests must contain (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted, and (3) a valid e-mail request must identify the sender and/or the recipient thereof.” (Emphasis in original). *Id.*

The Complainant’s OPRA requests fail to specifically identify a government record. Further, the requests would require the Custodian to conduct research to determine if said records were responsive to the requested titles. The Complainant’s request for “correspondence or other documents” and “records” are not identifiable government records. Moreover, it is clear from the requests that the specific records enumerated therein, i.e., letters, requests, memoranda, e-mails, and files, are illustrative only and are not a request for specific identifiable government records because they are listed in conjunction with the words “or other documents.”

Therefore, because the Complainant’s first (1st) and second (2nd) requests fail to identify a specific government record and would require the Custodian to conduct research, such 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, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) and Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant’s first (1st) and second (2nd) requests fail to identify a specific government record and would require the Custodian to conduct research, such 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, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) and Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010).

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

Approved By: Karyn Gordon, Esq.

Acting Executive Director

September 18, 2012