



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

FINAL DECISION

December 18, 2012 Government Records Council Meeting

Michael I. Inzelbuch  
Complainant

Complaint No. 2011-220

v.

Hamilton Township Board of Education  
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the October 23, 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:

1. Counsel’s June 16, 2011 request for an extension is insufficient under OPRA pursuant to the Council’s decision in Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because Counsel failed to specify an anticipated date on which access to the requested records would be granted or denied. Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the Complainant’s request items no. 4-5 fail to identify the specific government records sought, the Complainant’s request items are overly broad and 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), 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). *See also* Elcavage v. West Milford Township, GRC Complaint Nos. 2009-07 and 2009-08 (March 2010). Therefore, the Custodian has not unlawfully denied access to said request items.

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 18<sup>th</sup> Day of December, 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: December 20, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 18, 2012 Council Meeting**

**Michael I. Inzelbuch<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-220**

v.

**Hamilton Township Board of Education (Mercer)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of:

1. Any and all district policies, memorandum, regulation, directions regarding students transferring from another school district, private school, or a non-public school;
2. Any and all district policies, memorandum, regulation, directions regarding evaluating students from another school district, private school, or a non-public school;
3. Any and all district policies, memorandum, regulation, directions regarding evaluating students who receive home instruction services;
4. Any and all Board minutes, documentation, e-mails, and/or any other written instrument with regard to B.C.<sup>3</sup>; and
5. Any and all documentation, e-mails, memorandum, notes, etc., written and/or received by the Child Study Team and/or Board members and/or employees and/or third parties with regard to B.C.

**Request Made:** June 7, 2011

**Response Made:** June 16, 2011 and July 8, 2011

**Custodian:** Joseph J. Tramontana

**GRC Complaint Filed:** June 21, 2011<sup>4</sup>

**Background**

**June 7, 2011**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in a letter referencing OPRA.

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Michael J. Heron, Esq., of Lenox, Socey, Formidoni, Brown, Giordano, Colley & Casey (Trenton, NJ).

<sup>3</sup> The Complainant identified the full name of an individual; however, the GRC elects to use initials here because the individual is a presumed minor.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

**June 16, 2011**

Custodian Counsel's response to the Complainant's OPRA request on the sixth (6<sup>th</sup>) business day following receipt of such request.<sup>5</sup> Counsel states that because this matter is currently involved in litigation, all records must go through his office. Counsel states that he is in the process of meeting with District personnel to evaluate the requested policies, if any exist, as well as any additional records regarding B.C. Counsel states that he will forward correspondence to the Complainant regarding this request "some time [sic] next week."

**June 21, 2011**

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

- Complainant's OPRA request dated June 7, 2011
- Custodian Counsel's response to the OPRA request dated June 16, 2011

The Complainant states that he submitted his OPRA request on June 7, 2011. Additionally, the Complainant states that he received a response from the Custodian's Counsel on June 16, 2011.

The Complainant does not agree to mediate this complaint.

**July 8, 2011**

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

**July 8, 2011**

Custodian Counsel's subsequent response to the Complainant's OPRA request. Counsel states that he has enclosed the policies maintained by the Board in response to the Complainant's OPRA request. Counsel states that all other records have been forwarded regarding evaluations, memoranda and written reports concerning the Complainant's client.

**July 15, 2011**

E-mail from GRC to Custodian. The GRC grants a five (5) business day extension of time for the Custodian to submit his completed SOI.<sup>6</sup> The GRC states that the extended deadline is July 22, 2011.

**July 21, 2011**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated June 7, 2011
- Custodian Counsel's response to the Complainant's OPRA request dated June 16, 2011

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<sup>5</sup> The Custodian certifies in the Statement of Information that he received the Complainant's OPRA request on or about June 8, 2011.

<sup>6</sup> In response to the Custodian's verbal request via telephone on the same date.

- Custodian Counsel’s subsequent response to the Complainant’s OPRA request dated July 8, 2011
- Hamilton Township Board of Education’s Policy on “Eligibility of Resident/Nonresident Pupils”
- Hamilton Township Board of Education’s Policy on “Entrance Age”

In Custodian Counsel’s cover letter to the Custodian’s SOI submission, Counsel states that this matter has an Office of Administrative Law (“OAL”) docket number of EDS-4461-11 and all documents pertaining to B.C. which the Complainant sought pursuant to this OPRA request had been forwarded to him either prior to or during the OAL hearing. Counsel states that the only additional records forwarded to the Complainant in response to his OPRA request were the Board policies and procedures. Counsel states that said policies could have been obtained on the Board’s website.

The Custodian certifies that he received the Complainant’s OPRA request on June 8, 2011. The Custodian stated that on June 16, 2011, the District’s Counsel responded to the Complainant indicating that records would be provided the following week. Additionally, the Custodian states that on July 8, 2011, Counsel provided the Complainant with the requested policies. The Custodian states that said letter also indicated that all other records have already been forwarded to the Complainant concerning an OAL hearing.

The Custodian certifies that his search for the requested records involved utilizing the Special Services Department and legal counsel to formulate a response to the Complainant’s request.

The Custodian also certifies that the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services is not applicable.

### Analysis

#### **Whether the Custodian timely responded to the Complainant’s OPRA request?**

OPRA provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access to a government record or deny a request for access to a government

record as soon as possible, *but not later than seven business days after receiving the request*, provided that the record is currently available and not in storage or archived. ... *The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.*" (Emphasis added). N.J.S.A. 47:1A-5.i.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.<sup>7</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the Custodian provided the Complainant with a written response to his request on the seventh (7<sup>th</sup>) business day following receipt of such request in which the Custodian requested an extension of time to fulfill said request but failed to notify the Complainant of when the requested records would be provided. The Council held that:

"...because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5.i., the Custodian's written response to the Complainant dated June 20, 2007 and the request for an extension of time dated June 29, 2007 are inadequate under OPRA and the Complainant's request is 'deemed'; denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley [v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007)]."

The facts in Hardwick are similar to the facts in this instant complaint because the Custodian's Counsel provided a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days in which Counsel requested an extension of time but failed to provide an anticipated deadline upon which the requested records would be made available. Counsel stated that he would respond further "some time [sic] next week" which is not a specific deadline date. Further, Counsel failed to respond "some time [sic] next week" and rather responded again on July 8, 2011, approximately fifteen (15) business days later.

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<sup>7</sup> It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

Counsel's June 16, 2011 request for an extension is insufficient under OPRA pursuant to the Council's decision in Hardwick because Counsel failed to specify an anticipated date on which access to the requested records would be granted or denied. Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra.

### **Whether the Custodian unlawfully denied access to the requested records?**

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions*..." (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file* ... or *that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

"...[t]he public agency shall have the burden of proving that the denial of access is authorized by law..." N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In the Custodian's Statement of Information, the Custodian stated that Counsel provided the requested policies on July 8, 2011. Therefore, despite the Custodian's deemed denial, the requested policies were provided to the Complainant and were thus delayed and not denied.

However, the Custodian certified that all other records were already provided to the Complainant regarding an OAL hearing. In Oswald v. Township of Hamilton, Health Department (Mercer), GRC Complaint No. 2007-86 (Interim Order July 2007), the Council held that:

“...although the Municipal Clerk’s response was timely, the Municipal Clerk simply advised the Complainant in the response that all records had previously been provided. The Municipal Clerk’s response is therefore insufficient under N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because the Municipal Clerk did not grant access, deny access, seek clarification or request an extension of the statutorily mandated response time. See also Kelley v. Rockaway Township, GRC Complaint No. 2006-176 (March 2007); Caggiano, supra. Therefore, the Municipal Clerk violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.”

The Municipal Clerk, therefore, did not bear her burden of proving that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.”

Thus, the fact that the same records had already been provided to the Complainant during the adjudication of another matter is not a lawful basis to refuse access to said records under OPRA. A requestor has a statutory right to access records under OPRA, regardless of whether the requestor could have, should have, or already has accessed the same records by another method.

However, in Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008), the Appellate Division held that a complainant could not have been denied access to a requested record if he already had it in his possession at the time of the OPRA request the document he sought pursuant to OPRA. *Id.* at 617. The Appellate Division noted that requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. *Id.* (citations omitted).

The Appellate Division’s decision in Bart, supra, turns upon the specific facts of that case. In the adjudication of the Denial of Access Complaint, the complainant actually admitted that he was in possession of this record at the time of the OPRA request for the same record. Bart v. City of Paterson Housing Authority, GRC Complaint No. 2005-145 (May 2006).

The Appellate Division’s decision in Bart is not applicable here because there is no evidence in the record to support the finding that the Complainant admitted to being in possession of the record at the time of the OPRA request. As such, there is no basis to refuse access under OPRA in this instance.

Nevertheless, 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),<sup>8</sup> 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.”<sup>9</sup>

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...”

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 item nos. 4-5 of the Complainant’s OPRA request, the Complainant sought access to:

6. Any and all Board minutes, documentation, e-mails, and/or any other written instrument regarding B.C.;<sup>10</sup> and

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<sup>8</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>9</sup> As stated in Bent, *supra*.

<sup>10</sup> The Complainant identified the full name of an individual; however, the GRC elects to use initials here because the individual is a presumed minor.

7. Any and all documentation, e-mails, memorandum, notes, etc., written and/or received by the Child Study Team and/or Board members and/or employees and/or third parties regarding B.C.

These items of the Complainant's OPRA request are invalid requests because they fail to identify with reasonable clarity the specific government records sought.

This matter is substantially different from the facts presented in Burnett v. County of Gloucester, 415 N.J.Super. 506 (App. Div. 2010). In Burnett, the plaintiff appealed from an order of summary judgment entered against him in his suit to compel production by the County of Gloucester of documents requested pursuant to OPRA, consisting of "[a]ny and all *settlements, releases or similar documents* entered into, approved or accepted from 1/1/2006 to present." Id. at 508. (Emphasis added). The Appellate Division determined that the request sought a specific type of document, although it did not specify a particular case to which such document pertained, and was therefore not overly broad. Id. at 515-16.

In this instant matter, the Complainant identifies *some* types of records such as Board minutes, e-mails and memorandum, however, the Complainant fails to include enough additional information to render the request valid under OPRA.

In item no. 4, "any and all Board minutes, documentation, e-mails, and/or any other written instrument regarding B.C.," the Complainant identifies Board minutes, but provides no period for the request. The Complainant fails to specify what constitutes "documentation" or "any other written instrument." Further, the Complainant fails to identify any parties to the requested e-mails.

In Elcavage v. West Milford Township, 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.*

In item no. 5, "any and all documentation, e-mails, memorandum, notes, etc., written and/or received by the Child Study Team and/or Board members and/or employees and/or third parties regarding B.C.," the Complainant again fails to specify what constitutes "documentation." Further, the Complainant fails to include specific parties to correspondence, but rather includes entire groups such as the Child Study Team, the Board members, or employees.

Because the Complainant's request items no. 4-5 fail to identify the specific government records sought, the Complainant's request items are overly broad and are invalid under OPRA pursuant to MAG, supra, Bent, supra, NJ Builders, supra, and

Schuler, *supra*. See also Elcavage, *supra*. Therefore, the Custodian has not unlawfully denied access to said request items.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Counsel's June 16, 2011 request for an extension is insufficient under OPRA pursuant to the Council's decision in Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because Counsel failed to specify an anticipated date on which access to the requested records would be granted or denied. Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because the Complainant's request items no. 4-5 fail to identify the specific government records sought, the Complainant's request items are overly broad and 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), 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). See also Elcavage v. West Milford Township, GRC Complaint Nos. 2009-07 and 2009-08 (March 2010). Therefore, the Custodian has not unlawfully denied access to said request items.

Prepared By: Dara L. Barry  
Communications Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

October 23, 2012<sup>11</sup>

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<sup>11</sup> This complaint was prepared and scheduled for adjudication at the Council's October 30, 2012 meeting; however, said meeting was cancelled due to Hurricane Sandy. Additionally, the Council's November 27, 2012 was cancelled due to lack of quorum.