



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

Robert A. Pizzuto
Complainant

Complaint No. 2011-91

v.

Borough of Oradell (Bergen)
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 OPRA request fails to identify a specific government record, such request is 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

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**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Robert A. Pizzuto¹
Complainant**

GRC Complaint No. 2011-91

v.

**Borough of Oradell (Bergen)²
Custodian of Records**

Records Relevant to Complaint: All correspondence including memoranda, e-mail or text messages sent or received by Councilwoman Donna Alonso (“Councilwoman Alonso”), Councilman Eric Schuler (“Councilman Schuler”), Councilman Garrie Murphy (“Councilman Murphy”), Councilman James Koth (“Councilman Koth”), and/or the Custodian between February 21, 2011 and February 25, 2011 regarding the business of the Borough of Oradell (“Borough”) including but not limited to professional appointments.

Request Made: March 10, 2011

Response Made: March 21, 2011

Custodian: Laura J. Graham

GRC Complaint Filed: March 22, 2011³

Background

March 10, 2011

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above in an e-mail referencing OPRA. The Complainant indicates that the preferred method of delivery is via e-mail.

March 21, 2011

Custodian’s response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant’s OPRA request on the seventh (7th) business day following receipt of such request. The Custodian states that upon Custodian’s Counsel advice, the Complainant’s OPRA request is invalid. The Custodian also states that pursuant to MAG Entertainment v. Division of Alcohol Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), a custodian is not required to conduct research to locate records responsive to an OPRA request.

¹ No legal representation listed on record.

² Represented by Brian Giblin, Esq., of Giblin & Giblin (Oradell, NJ).

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

March 22, 2011

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

- Complainant’s OPRA request dated March 10, 2011
- Letter from the Custodian to the Complainant dated March 21, 2011.

The Complainant states that he filed an OPRA request on March 10, 2011 seeking “all correspondence including memoranda, e-mail or text messages sent or received by Councilwoman Alonso, Councilman Schuler, Councilman Murphy, Councilman Koth, and/or the Custodian between February 21, 2011 and February 25, 2011 regarding the business of the Borough including but not limited to professional appointments.” The Complainant states that the Custodian responded in writing on March 21, 2011 denying him access to records because his request was invalid pursuant to MAG, *supra*. The Complainant further states that he believes that the Borough purposefully denied the Complainant’s OPRA request. The Complainant asserts that his OPRA request is not overly broad. The Complainant states that his OPRA request seeks any and all documents pertaining to, but not limited to, the professional appointments made by the Borough.

The Complainant agrees to mediate this complaint.

March 22, 2011

Telephone call from the Custodian to the Complainant. The Custodian informs the Complainant that there is an official form attached to the request indicating a specific reason for the denial. The Custodian also states that the e-mail she sent to the Complainant on March 21, 2011 was merely a statement approved by Custodian’s Counsel informing the Complainant that his request was overly broad. The Custodian further states that she informed the Complainant that in various training sessions through the Municipal Clerks Association, the use of the language “any and all” is not permitted and OPRA does not require a custodian to research records responsive to a request. Lastly, the Custodian states that if the Complainant removed the language in his request “pertaining to the business of the Borough,” the request would be specific.

April 6, 2011

Offer of Mediation sent to the Custodian.

April 8, 2011

The Custodian agrees to mediate this complaint.

April 11, 2011

Denial of Access Complaint is referred to mediation.

July 25, 2011

Denial of Access Complaint is referred back from mediation to the GRC for adjudication.

August 2, 2011

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

August 9, 2011

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated March 10, 2011
- E-mail from the Custodian to the Complainant dated March 21, 2011.⁴

The Custodian certifies that her search for the requested records included, upon receiving the Complainant’s OPRA request, asking each individual named in the request for copies of correspondence, memos, e-mails and text messages. The Custodian also certifies that each individual named in the OPRA request indicated that all discussion relating to professional appointments was done verbally.

The Custodian further certifies that the memoranda, e-mails and correspondence must be kept for three (3) years in accordance with the Records Destruction Schedule established and approved by Records Management Services.

The Custodian certifies that she received the Complainant’s OPRA request on March 10, 2011. The Custodian certifies that she responded on March 21, 2011 via e-mail stating that the Complainant’s request was invalid because a custodian is not required to conduct research to locate records responsive to an OPRA request pursuant to MAG Entertainment v. Division of Alcohol Beverage Control, 375 N.J. Super. 534 (App. Div. 2005).

The Custodian certifies that she spoke with the Complainant on March 22, 2011 and informed the Complainant that there was an official form attached to the OPRA request form indicating the reason for the denial. The Custodian further certifies that the e-mail she sent on March 21, 2011 was merely a statement approved by the Custodian’s Counsel informing the Complainant that the request was too broad. The Custodian additionally certifies that she informed the Complainant that in various training sessions through the Municipal Clerks Association, the use of the language “any and all” is not permitted and that OPRA does not require a custodian to research records responsive to a request. The Custodian certifies that she also informed the Complainant that if the Complainant removed the language in his request “pertaining to the business of the Borough,” the request would be specific.

The Custodian certifies that she interpreted the Complainant’s OPRA request as seeking every document that came through the Borough for a period of four (4) days. The Custodian asserts that this would include all mail opened, copied and filed, all projects worked on, purchase orders processed and signed, all phone calls received and returned, every document worked on for the Council, all personnel records, all residential requests, and all complaints filed, etc. The Custodian certifies that she holds two (2) titles, Borough Administrator and Borough Clerk. The Custodian argues that the Complainant phrased his OPRA request to seek copies of the entire operational business

⁴ The Custodian includes documentation not relevant for the OPRA request at issue in this Denial of Access Complaint.

of a Borough of 100 employees, a \$13million budget and 8,000 residents. The Custodian argues that the research to locate records responsive to the Complainant's request would not be permitted under OPRA. The Custodian certifies that her staff files all records daily and would have to open every file in every office to see if the Custodian handled those records between February 21, 2011 and February 25, 2011.

The Custodian certifies that she attempted to work with the Complainant to amend his request so that it could be fulfilled. The Custodian certifies that the Complainant did not amend his request and instead sought relief in the form of this complaint. The Complainant asserts that it appears the Complainant interpreted the Custodian's e-mail dated March 21, 2011 as a denial although the Custodian clearly explained to the Complainant on March 22, 2011 that it was not a denial. The Custodian certifies that she always works with requestors to accommodate their requests to fulfill them in a timely manner. The Custodian argues that she was disappointed that Complainant filed a Denial of Access Complaint with the GRC instead of attempting to resolve the issue without a complaint.

Analysis

Whether the Complainant's OPRA request is 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),⁵ 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."⁶

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

⁵ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁶ As stated in Bent, *supra*.

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 OPRA request sought "all correspondence including memoranda, e-mail or text messages sent or received by Councilwoman Alonso, Councilman Schuler, Councilman Murphy, Councilman Koth, and/or the Custodian between February 21, 2011 and February 25, 2011 regarding the business of the Borough including but not limited to professional appointments." The Custodian timely responded in writing to the Complainant's OPRA request stating that said the Complainant's request is invalid and a custodian is not required to conduct research to locate records responsive to an OPRA request.

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.*

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 request seeking all "correspondence" fails to specifically identify a government record. The Complainant has failed to specify what type of

correspondence he is seeking. Although the Complainant's request noted that he sought "memoranda, e-mail or text messages," the request was clear that these were not the only types of records sought. In addition, the Complainant's request for the subject "regarding the business of the Borough" would include every government record in the Borough's possession.

Therefore, because the Complainant's OPRA request fails to identify a specific government record, such request is 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 OPRA request fails to identify a specific government record, such request is 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