



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

March 22, 2013 Government Records Council Meeting

Judith Papiez
Complainant

Complaint No. 2012-57

v.

County of Mercer, Office of County Counsel
Custodian of Record

At the March 22, 2013 public meeting, the Government Records Council (“Council”) considered the March 15, 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. Although the Custodian responded in writing to the Complainant’s OPRA request within statutorily mandated time frame to respond, the Custodian’s written response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to provide a date certain upon which she would respond to the Complainant providing any responsive records. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).
2. Because the Complainant’s request failed to provide any specific identifiers other than a broad generic description of tests and test requests sought and would have forced the custodian to research his or her records in order to locate written, driving, performance, qualification and resume tests and test requests for the named departments over the specified time period, the Complainant’s request is overly broad and is invalid under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
3. The Custodian’s response was insufficient pursuant to N.J.S.A. 47:1A-5(i) because she failed to provide a date certain on which she would respond; however, the Complainant’s request is invalid. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s insufficient response did not rise to the level of a knowing and willful



violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 22nd Day of March, 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: March 26, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 22, 2013 Council Meeting**

**Judith Papiez¹
Complainant**

GRC Complaint No. 2012-57

v.

**County of Mercer, Office of County Counsel²
Custodian of Records**

Records Relevant to Complaint: Electronic copies (via e-mail) of test and test requests (written, driving, performance, qualification and resumes) from June 10, 2011 to February 14, 2012 for Mercer County Department of Transportation (“DOT”) and Public Works to include highway mosquito, heavy equipment, traffic, parks, driving, engineering and shade tree departments. Include Civil Service Commission (“CSC”) symbols, ranges, salaries and unclassified status.

Request Made: February 14, 2012

Response Made: February 15, 2012

GRC Complaint Filed: March 7, 2012³

Background⁴

The Complainant hand-delivered an OPRA request to the County on February 14, 2012. The Custodian responded in writing on February 15, 2012, the first (1st) business day after receipt of the subject request, stating that additional time would be necessary to retrieve the responsive records. The Complainant e-mailed the County on March 2, 2012 seeking a status update. The Custodian responded on March 19, 2012 seeking clarification of the Complainant’s OPRA request.

The Complainant filed her Denial of Access Complaint with the Government Records Council (“GRC”) on March 7, 2012. In said complaint, the Complainant argues that the Custodian violated N.J.S.A. 47:1A-5(i) by failing to provide a date certain on which she would respond to the Complainant.

¹ No legal representation listed on record.

² Sarah G. Crowley, Esq., Custodian of Records. No legal representation listed on record.

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

⁴ The parties may have submitted additional correspondence, or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

The Complainant submitted a letter to the GRC on April 23, 2012. In said letter, the Complainant provides clarification of her OPRA request as follows:

“Historical listings of all CSC tests requested/posted for open positions with DOT, Public Works from June 10, 2011 to [February 14, 2012] ... [which] include testing to fill/backfill positions in Highway, Mosquito, Heavy Equipment, Traffic, Parks, Driving, Engineering and Shade Tree ... postings for CSC promotional/open-competitive tests/unclassified titles ... written, driving, performance qualification and resume qualification ... [r]esults should include related CSC symbols, ranges and salaries.”

The Complainant asserts that pursuant to Lacava v. Mercer County Docket No. CSV-10401-07, available openings can be obtained at any time via the County and Municipal Personnel System (“CAMPS”). The Complainant asserts that CAMPS allows the County to securely transmit employee information to the CSC. The Complainant asserts that this clarification should provide the Complainant with enough information to immediately provide access to responsive records.

The Custodian filed her Statement of Information (“SOI”) on May 25, 2012. In the SOI, the Custodian certifies she received the Complainant’s OPRA request on February 14, 2012. The Custodian certifies she responded on February 15, 2012 stating that she needed an extension of time. The Custodian certifies that she responded again on March 19, 2012 seeking clarification.

The Custodian contends that instead of providing clarification, the Complainant filed this complaint. The Custodian asserts that in her April 23, 2012 letter to the GRC, the Complainant provided clarification that appears to seek a daily list of openings in every department for the past six (6) years. The Custodian asserts that the Complainant cites to Lacava but provides no details regarding the case and asserts that CAMPS allows the County to send employee information to the CSC. The Custodian asserts that even if the County could transmit information to the CSC, that has no bearing on this complaint. The Custodian contends that if the Complainant is seeking a particular test date or applicant for a job, then she should specifically identify same.

The Custodian further contends that it appears the Complainant’s clarification is actually a brand new request. The Custodian contends that the Complainant’s request is evidently a fishing expedition for public information.

The Complainant submitted an e-mail to the GRC on June 2, 2012 providing further clarification as follows:

“Historical listing of all CSC tests requested/posted for open positions with DOT, Public Works from June 10, 2011 to [February 14, 2012].”

Analysis⁵

Sufficiency of the Custodian's Response

OPRA provides that a custodian may have an extension of time to respond to a complainant's OPRA request, but the custodian must provide a date certain. N.J.S.A. 47:1A-5(i). OPRA further provides that should the custodian fail to provide a response on that specific date, "access shall be deemed denied." N.J.S.A. 47:1A-5(i).

In Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the custodian provided the complainant with a written response to the complainant's OPRA request on the seventh (7th) business day following receipt of said request. In the response, the custodian requested an extension of time to respond to said request but failed to provide a date certain upon which the requested records would be provided. The Council held that the custodian's request for an extension of time was inadequate under OPRA pursuant to N.J.S.A. 47:1A-5(i).

Here, the Custodian responded in writing to the Complainant's OPRA request on the first (1st) business day after receipt of same stating that additional time would be necessary to retrieve the responsive records. However, the Custodian failed to provide a date certain on which she would respond to the Complainant providing access to any responsive records.

Therefore, although the Custodian responded in writing to the Complainant's OPRA request within statutorily mandated time frame to respond, the Custodian's written response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick, *supra*, because the Custodian failed to provide a date certain upon which she would respond to the Complainant providing any responsive records. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).

Unlawful Denial of Access

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 OPRA request sought "test and test requests ... from June 10, 2011 to February 14, 2012 ..." for DOT and several divisions in Public Works to include CSC information. The Custodian responded on March 19, 2012 seeking clarification. The Complainant submitted clarification in a letter to the GRC on April 23, 2012, advising that her OPRA request seeks "[h]istorical listings of all CSC tests requested/posted for open positions with DOT, Public Works from June 10, 2011 to [February 14, 2012] ..."

⁵ There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

In the SOI, the Custodian contended that the Complainant's revised request appeared to be a brand new request and that the Complainant's request is evidently a fishing expedition for public information. The Custodian further asserted that if the Complainant is seeking a particular test date or applicant for a job, then she should specifically identify same. In response to the SOI, the Complainant provided a second (2nd) clarification seeking "[h]istorical listing of all CSC tests requested/posted for open positions with DOT, Public Works from June 10, 2011 to [February 14, 2012]."

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.

"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." [Emphasis added]. *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),⁶ 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."⁷ [Emphasis added].

Moreover, 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.

⁶ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁷ As stated in Bent, *supra*.

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 ...” Accordingly, the test under MAG then, is whether a requested record is a *specifically identifiable* government record.

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 [Items No.] 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] and [Bent].”

However, in Burnett v. County of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), the Court found an "any and all" request to be sufficiently specific. In that case, the plaintiff submitted a request to the county on March 14, 2008 asking for "[a]ny and all settlements, releases or similar documents entered into, approved or accepted from 1/1/2006 to present." Id. at 508-09. The Court determined that the fact that the plaintiff did not specify matters to which the settlements related "did not render his request a general request for information obtained through research, rather than a request for a specific record." Id. at 513-14.

In Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), the Court noted that plaintiff's request was confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information, namely, E-ZPass benefits provided to Port Authority retirees. The Court determine that, as in Burnett, *supra*, the request was limited to particularized identifiable government records, namely, correspondence with another government entity, rather than information generally.

In the matter before the Council, the Complainant sought “tests and tests requests (written, driving, performance, qualification and resumes) ...” to include certain CSC information for several departments over an eight (8) month period. The Complainant’s request failed to specify names of individual employees who were the subject of such tests. Further, Complainant’s request clearly contemplated a response that would have encompassed every employee in the departments named in the request, because the Complainant stated that the records requested were to include “CSC symbols, ranges, salaries and unclassified status.”

This matter is distinguishable from Burnett, *supra*, because there, the request sought a limited type of record, *i.e.*, settlements, releases *or similar documents* entered into during a specific time period. Here, although the request seeks tests and test requests over a specific time period, the Complainant seeks a dissimilar variety of tests and test requests, including “written, driving, performance, qualification and resumes.” This matter is also distinguishable from Burke, *supra*, because there, the request was limited to particularized identifiable government records, namely, correspondence with another government entity, rather than information generally. As in MAG, the Complainant’s request “provided neither names nor any identifiers other than a broad generic description” of tests and test requests sought. As such, the request would have forced the custodian to research his or her records in order to locate written, driving, performance, qualification and resume tests and test requests for the named departments over the specified time period. The Complainant’s April 23, 2012 clarification does not cure these deficiencies simply by the addition of the term “historical list,” which may also be a type of record without specifying the generic description “test” or “test requests.”⁸

Therefore, because the Complainant’s request failed to provide any specific identifiers other than a broad generic description of tests and test requests sought and would have forced the custodian to research his or her records in order to locate written, driving, performance, qualification and resume tests and test requests for the named departments over the specified time period, the Complainant’s request is overly broad and is invalid under OPRA. MAG, *supra*, Bent, *supra*, NJ Builders, *supra*, and Schuler, *supra*.

Knowing & Willful

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11(a).

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably

⁸ The GRC notes that it will not address the Complainant’s June 2, 2012 clarification, which the Complainant submitted three (3) months after the filing of the complaint and subsequent to the filing of the SOI.

denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996).

The Custodian’s response was insufficient pursuant to N.J.S.A. 47:1A-5(i) because she failed to provide a date certain on which she would respond; however, the Complainant’s request is invalid. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s insufficient response did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian responded in writing to the Complainant’s OPRA request within statutorily mandated time frame to respond, the Custodian’s written response was insufficient pursuant to N.J.S.A. 47:1A-5(i) and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to provide a date certain upon which she would respond to the Complainant providing any responsive records. *See also* Bentz v. Borough of Paramus (Bergen), GRC Complaint No. 2008-89 (June 2011).
2. Because the Complainant’s request failed to provide any specific identifiers other than a broad generic description of tests and test requests sought and would have forced the custodian to research his or her records in order to locate written, driving, performance, qualification and resume tests and test requests for the named departments over the specified time period, the Complainant’s request is overly broad and is invalid under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180

(App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

3. The Custodian's response was insufficient pursuant to N.J.S.A. 47:1A-5(i) because she failed to provide a date certain on which she would respond; however, the Complainant's request is invalid. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's insufficient response did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

March 15, 2013