



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

April 29, 2014 Government Records Council Meeting

Katalin Gordon
Complainant

Complaint No.: 2013-256

v.

City of Orange (Essex)
Custodian of Record

At the April 29, 2014 public meeting, the Government Records Council (“Council”) considered the April 22, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s August 2, 2013 written response is insufficient because the Custodian failed to provide a specific legal basis for denying the requested records. N.J.S.A. 47:1A-5(g). See also Morris v. Trenton Police Department, GRC Complaint No. 2007-160 (May 2008) and Rader v. Township of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008).
2. The Complainant’s OPRA request is invalid because it fails to seek identifiable government records. 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); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian did not unlawfully deny access to the Complainant’s request. N.J.S.A. 47:1A-6.

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 29th Day of April, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 2, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 29, 2014 Council Meeting**

**Katalin Gordon¹
Complainant**

GRC Complaint No. 2013-256

v.

**City of Orange (Essex)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all records or parts thereof, from January 1, 2010 to July 24, 2013, which show ongoing and pending litigation involving City Clerk Dwight Mitchell.

Custodian of Records: Dwight Mitchell, City Clerk³

Request Received by Custodian: July 24, 2013

Response Made by Custodian: August 2, 2013

GRC Complaint Received: September 10, 2013

Background

Request and Response:

On July 24, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 2, 2013, the seventh (7th) business day following receipt of said request, the Custodian’s Counsel responded in writing informing the Complainant that the request “...seeks documents that would fall into one, if not more of the following categories.

- Inter-agency or intra-agency advisory, consultative, or deliberative material
- Records that are subject to attorney-client privilege
- Information which is a communication between a public agency and its insurance carrier
- Information generated by or on behalf of public employers or public employees in connection with any grievance filed by or against an individual
- Ongoing investigations – any records pertaining to an investigation in progress by any public agency if disclosure of such record or records shall be detrimental to the public interest.”

¹ No legal representation listed on record.

² Represented by Avram D. White, Esq. (Orange, NJ).

³ Although Laressa Bradshaw responded to the complaint, she said that she was acting on behalf of the Custodian’s Counsel.

The Custodian's Counsel also suggested that it might be helpful to meet with the Complainant to discuss specific documents.

Denial of Access Complaint:

On September 10, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserts that on July 24, 2013, she filed an OPRA request for the records relevant to this complaint. The Complainant further asserts that on July 24, 2013, she received a response from the Custodian's Counsel denying her request.⁴ The Complainant states that her request was denied by Counsel because he stated that, at minimum, it sought records that would fall into one or more of the following categories:

- Inter-agency or intra-agency advisory, consultative, or deliberative material
- Records that are subject to attorney-client privilege
- Information which is a communication between a public agency and its insurance carrier
- Information generated by or on behalf of public employers or public employees in connection with any grievance filed by or against an individual
- Ongoing investigations – any records pertaining to an investigation in progress by any public agency if disclosure of such record or records shall be detrimental to the public interest.

The Complainant contends that the response failed to identify the records she requested. The Complainant further contends that the response did not even address whether there existed any ongoing and pending litigation involving City Clerk Dwight Mitchell. The Complainant states that because Counsel failed to make any reference to "ongoing and pending litigation" he indirectly admitted that there were no such proceedings. The Complainant asks the GRC to make a determination that the Custodian's Counsel withheld the fact there was ongoing and pending litigation involving Mr. Mitchell.

The Complainant contends that the Custodian's Counsel gave no lawful reason for denying her OPRA request. The Complainant further contends that Counsel misrepresented facts regarding the existence of ongoing and pending litigation involving Mr. Mitchell, and as such he knowingly and wilfully violated OPRA. The Complainant cites Johnson v. Borough of Oceanport (Monmouth), GRC Complaint No. 2007-107 (August 2009), in support of her argument.

The Complainant states that the instant complaint is closely related to GRC Complaint No. 2013-255, which she filed on the same date.

Statement of Information:

On September 11, 2013, the GRC sent the Custodian a request for the Statement of Information ("SOI"). The Custodian failed to submit the SOI to the GRC.

⁴ The evidence of record reveals that the response was dated August 2, 2013.

Analysis

Sufficiency of Response

In Morris v. Trenton Police Department, GRC Complaint No. 2007-160 (May 2008), the complainant requested several records. The custodian, without further elaboration, stated that access to the requested records was denied. The Council, in finding that the custodian violated OPRA, stated "...the Custodian's failure to supply the requester with a detailed lawful basis for denial violates N.J.S.A. 47:1A-5(g)." Subsequently, in Rader v. Township of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008), the Council, upon finding that the custodian's written response was insufficient, noted that, "...N.J.S.A. 47:1A-5(g) provides that if a custodian is 'unable to comply with a request for access, then the custodian shall indicate the specific basis' for noncompliance."

Here, the Custodian responded to the Complainant's request by stating, "...[y]our request appears, that at minimum, seeks documents that would fall into one, if not more of the following categories." The Custodian then listed five (5) reasons that the request could be denied. The Custodian did not cite to any of the OPRA provisions; however, four of the reasons are found in N.J.S.A. 47:1A-1.1 and the remaining reason is found in N.J.S.A. 47:1A-3(a).

OPRA does not allow a custodian to simply list several exemptions that may apply either in the alternative or in the aggregate, rather it requires a custodian to cite a *specific* basis for denial. Providing the Complainant with a "laundry list" of exemptions that may or may not be applicable to the denial of access cannot be construed as citing a specific basis for denial.

Accordingly, the Custodian's August 2, 2013 written response is insufficient because the Custodian failed to provide a specific legal basis for denying the requested records. N.J.S.A. 47:1A-5(g). See also Morris, GRC 2007-160 and Rader, GRC 2007-239.

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 Custodian's Counsel provided the Complainant with the following five (5) reasons for denying access to the requested records:

1. Inter-agency or intra-agency advisory, consultative, or deliberative material
2. Records that are subject to attorney-client privilege
3. Information which is a communication between a public agency and its insurance carrier

4. Information generated by or on behalf of public employers or public employees in connection with any grievance filed by or against an individual
5. Ongoing investigations – any records pertaining to an investigation in progress by any public agency if disclosure of such record or records shall be detrimental to the public interest.

It is unnecessary, however, for the GRC to analyze the five reasons the Custodian listed in the response as grounds for denying access because the Complainant's request is not valid.

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.” MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (citing N.J.S.A. 47:1A-1) (quotations omitted). The Court reasoned 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. at 549 (emphasis added).

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.” Id. (emphasis added). *See also Bent v. Stafford Police Dep’t*, 381 N.J. Super. 30, 37 (App. Div. 2005), N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Further, in LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the complainant requested the number of Jamesburg residents that held library cards. The GRC determined that the complainant's request was not for an identifiable government record, but for information. Id. As such, the request was deemed invalid pursuant to MAG. Id.; *see also Ohlson v. Twp. of Edison (Middlesex)*, GRC Complaint No. 2007-233 (August 2009). Similarly, in Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009), the complainant made an OPRA request in the form of several questions regarding when a property was added to the “tax rolls,” how much tax was

owed, and why there was any delay in adding the property to the tax roll. The Council determined that the request was an invalid because it failed to identify government records. Id.

Here, the Complainant requested *all records or parts thereof* which show ongoing and pending litigation involving Mr. Mitchell. Worded as such, the Complainant's request is overly broad. The Custodian would have to conduct research to examine every record on file which might reflect the requested ongoing and pending litigation, and this would be the type of open-ended search the MAG court denounced.

Therefore, the Complainant's OPRA request is invalid because it fails to seek identifiable government records. MAG, 375 N.J. Super. 534 at 546; Bent, 381 N.J. Super. 30 at 37; N.J. Builders Ass'n, 390 N.J. Super. 166 at 180; Schuler, GRC 2007-151. Thus, the Custodian did not unlawfully deny access to the Complainant's request. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's August 2, 2013 written response is insufficient because the Custodian failed to provide a specific legal basis for denying the requested records. N.J.S.A. 47:1A-5(g). *See also* Morris v. Trenton Police Department, GRC Complaint No. 2007-160 (May 2008) and Rader v. Township of Willingboro (Burlington), GRC Complaint No. 2007-239 (June 2008).
2. The Complainant's OPRA request is invalid because it fails to seek identifiable government records. 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); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian did not unlawfully deny access to the Complainant's request. N.J.S.A. 47:1A-6.

Prepared By: John E. Stewart, Esq.

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

April 22, 2014