



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

October 27, 2015 Government Records Council Meeting

Mark L. Tompkins

Complainant

v.

Essex County Prosecutor's Office

Custodian of Record

Complaint No. 2014-404

At the October 27, 2015 public meeting, the Government Records Council ("Council") considered the October 20, 2015 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. Because the Complainant's request Item No. 1 seeks information rather than a specifically identifiable government record, the request is invalid pursuant to MAG Entertainm't LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Township of Stafford Police Dept., 381 N.J. Super. 30 (2005); NJ Builders Assoc. v. NJ 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). The Custodian has therefore lawfully denied access to Complainant's request. N.J.S.A. 47:1A-6.
2. Because the Custodian certified in the Statement of Information that the Prosecutor's Office's file of the referenced case does not contain a copy of the requested dismissal order, but rather such records might instead be maintained by the Essex County Judiciary, and because there is no evidence in the record to refute the Custodian has not unlawfully denied access to the requested records responsive to the Complainant's OPRA request Item No. 2. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005) and 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 27th Day of October, 2015

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: October 29, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 27, 2015 Council Meeting**

**Mark L. Tompkins¹
Complainant**

GRC Complaint No. 2014-404

v.

**Essex County Prosecutor's Office²
Custodial Agency**

Records Relevant to Complaint:

1. The identity of the prosecutor who dismissed the eluding complaint-warrant W#2002-034287 on 7-9-2003, including the prosecutor's name and prosecution office of employment at the time he dismissed the complaint.
2. A copy of the dismissal order dated 7-9-2003, eluding complaint-warrant W#2002-034287, including prosecutor's identity that dismissed the complaint and the name of the judge that signed the order.

Custodian of Record: Debra G. Simms, Esq.
Request Received by Custodian: October 20, 2014
Response Made by Custodian: October 28, 2014
GRC Complaint Received: December 1, 2014

Background³

Request and Response:

On October 6, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On October 28, 2014, the Custodian responded in writing, denying the request, as a review of the prosecutor's file on the matter failed to disclose any dismissal order. The Custodian further stated that a review of the *Promis Gavel* computer system revealed no record or information satisfying the request. The Custodian further suggested that the Complainant consider submitting the request to the criminal records office of the Essex County Judiciary.

¹ No legal representation listed on record.

² Represented by James Paganelli, Esq.

³ 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.

Denial of Access Complaint:

On November 18, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the denial of access was improper but made no other legal arguments.

Statement of Information:

On December 15, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on October 20, 2014. The Custodian certified that she reviewed the prosecutor’s file relating to this case, documents submitted to the District Court in response to the Complainant’s petition for *habeas corpus* relief, and she searched the *Promis Gavel* computer system. The Custodian certified that she responded in writing on October 28, 2014, denying the request.

With respect to part 1 of the Complainant’s OPRA request, the Custodian argued that the request was properly denied, as it constituted a request for information and not a document, pursuant to N.J.S.A. 47:1A-1, N.J.S.A. 47:1A-1.1, MAG Entertainm’t LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005). The Custodian further argued that part 2 of the request was properly denied because the prosecutor’s file did not contain a copy of the dismissal order, nor was the record provided to the District Court in response to the Complainant’s petition for *habeas corpus* relief.

Additional Submissions

On December 20, 2014, the Complainant wrote to the GRC, contesting the Custodian’s certification that the file does not contain a copy of the dismissal order. In support of his argument, the requester attached copies of a motion, which references the alleged dismissal order.

On October 9, 2015, the Custodian submitted a certification in response to a GRC request for additional information concerning the portion of the request concerning the dismissal order. The Custodian certified that she again reviewed the prosecutor’s file and did not find a copy of the order. Further, she certified that she consulted with the Assistant Prosecutor who had responded to the Complainant’s petition for *habeas corpus* relief and ascertained that a dismissal order was not provided to the District Court. The Custodian stated that the Prosecutor’s Office provided the District Court with copies of correspondence received from Denise Bivins of the Newark Municipal Court, indicating that Complaint No. W-2002-034287 was dismissed in Superior Court on July 9, 2003. The Custodian certified that no order accompanied the correspondence.

Analysis

Validity of Request

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 Appellate Division has held that:

While 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.

MAG, 375 N.J. Super. at 546 (emphasis added).

The Court reasoned that:

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.

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. at 549 (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);⁴ NJ Builders Assoc. v. NJ 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).

In the instant matter, the Complainant’s request sought “the identity” of the prosecutor who dismissed the cited complaint, including the individual’s name and office of employment at the time the complaint was dismissed. This request item, which asks for information regarding an unnamed individual, does not constitute a request for a specific government record.

Therefore, because the Complainant’s request Item No. 1 seeks information rather than a specifically identifiable government record, the request is invalid pursuant to MAG, 375 N.J.

⁴ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

Super. at 546; Bent, 381 N.J. Super. at 37; NJ Builders, 390 N.J. Super. at 180; Schuler, GRC 2007-151. The Custodian has therefore lawfully denied access to Complainant's request. N.J.S.A. 47:1A-6.

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 Council has previously found that, in light of a custodian's certification that the agency does not maintain copies of the records responsive to the Complainant's request, no unlawful denial of access occurred. *See Pusterhofer v. N.J. Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005). Here, the Custodian certified that part two of the request, seeking a copy of the July 2003 dismissal order, was properly denied, as there was no copy of the dismissal order in the file, nor was the record provided to the District Court in response to the Complainant's petition for *habeas corpus*. The Custodian certified that she reviewed the file once more in October 2015, and spoke to an Assistant Prosecutor who stated that correspondence referencing the dismissal was received by the Prosecutor's Office, but there was no order which accompanied the correspondence. Additionally, in her initial denial of the request on October 28, 2014, the Custodian suggested to the Complainant that he submit the request to the criminal records office of the judiciary of Essex County. Additionally, the Complainant failed to provide any other evidence in the record to rebut the Custodian's certification that they did not house the requested document.

Because the Custodian certified in the Statement of Information that the Prosecutor's Office's file of the referenced case does not contain a copy of the requested dismissal order, but rather such records might instead be maintained by the Essex County Judiciary, and because there is no evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied access to the requested records responsive to the Complainant's OPRA request Item No. 2. Pusterhofer, GRC 2005-49 and N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant's request Item No. 1 seeks information rather than a specifically identifiable government record, the request is invalid pursuant to MAG Entertainm't LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Township of Stafford Police Dept., 381 N.J. Super. 30 (2005); NJ Builders Assoc. v. NJ 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). The Custodian has therefore lawfully denied access to Complainant's request. N.J.S.A. 47:1A-6.

2. Because the Custodian certified in the Statement of Information that the Prosecutor's Office's file of the referenced case does not contain a copy of the requested dismissal order, but rather such records might instead be maintained by the Essex County Judiciary, and because there is no evidence in the record to refute the Custodian has not unlawfully denied access to the requested records responsive to the Complainant's OPRA request Item No. 2. Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005) and N.J.S.A. 47:1A-6.

Prepared By: Husna Kazmir
Staff Attorney

Reviewed By: Joseph D. Glover
Executive Director

October 20, 2015