INTERIM ORDER

November 12, 2019 Government Records Council Meeting

Steven Wronko                                       Complaint No. 2017-237
Complainant

v.

Township of South Brunswick (Middlesex)
Custodian of Record

At the November 12, 2019 public meeting, the Government Records Council (“Council”) considered the October 30, 2019 Findings and Recommendations of the Council Staff 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:


2. The Custodian shall either comply with paragraph 2 above within five (5) business days from receipt of the Council’s Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,1 to the Council Staff;2 or in the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC’s 14-point analysis3 and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council’s Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the

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1 “I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.”

2 Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium.

records. The Complainant’s failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant’s payment of the special service charge, the Custodian shall deliver to the Council Staff certified confirmation of compliance as first provided above. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Council Staff a statement confirming the Complainant’s refusal to purchase the requested records and such statement shall be in the form of a certification in accordance with N.J. Court Rule 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

Interim Order Rendered by the
Government Records Council
On The 12th Day of November 2019

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: November 14, 2019
STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
November 12, 2019 Council Meeting

Steven Wronko 1
Complainant

v.

Township of South Brunswick 2
Custodial Agency

Records Relevant to Complaint: Copies via facsimile transmission of “. . . all settlement agreements from January 1, 2014 through October 19, 2017.” 3

Custodian of Record: Barbara Nyitrai
Request Received by Custodian: October 19, 2017
Response Made by Custodian: October 19, 2017
GRC Complaint Received: December 13, 2017

Background 4

Request and Response:

On October 19, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 19, 2017, the day the Custodian received the request, the Custodian responded in writing informing the Complainant that “[t]he records requested . . . are being denied as they are broad and unclear.” The Custodian further stated that the request failed to identify specific government records and would require her to conduct research in order to determine which records would be responsive to the request. In support of the denial the Custodian cited MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005), N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). The Custodian further informed the Complainant that she could be of further assistance to him if he provided clarification and identified the records being sought.

1 Represented by C.J. Griffin, Esq., of Pashman Stein Walder Hayden P.C. (Hackensack, NJ).
2 Represented by Donald J. Sears, Esq. (Monmouth Junction, NJ).
3 There were other records requested that are not relevant to this complaint.
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.
On October 19, 2017, the Complainant e-mailed the Custodian, informing her that he was clarifying his request. The Complainant stated, “[f]or settlement agreements, I want all of your settlement agreements from the dates I specified.”

Denial of Access Complaint:

On December 13, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”) alleging that he was denied access to the records relevant to the complaint. The Complainant, through Counsel, asserted that the requested records are government records subject to disclosure under N.J.S.A. 47:1A-1.1 because they are records “made, maintained or kept on file in the course of [South Brunswick’s] official business.” The Complainant’s Counsel stated that the request sufficiently identified the records the Complainant was seeking, and that the request did not require the Custodian to conduct research. Counsel cited Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010), as being directly on point because in that case the requestor was seeking “any and all settlements, releases or similar documents” and that the exact subject matter to which the records related was not specified in the request. Counsel stated that the Burnett court held that the OPRA request was a valid request. The Complainant’s Counsel also stated that per Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012), a requestor is not required to set forth the exact record he or she is seeking. Rather, the requestor need only reasonably describe the requested records.

Counsel argued that the request in the instant complaint did not require the Custodian to conduct research because she did not have to analyze, compile, and collate the information contained in the requested records. Counsel stated that, instead, the Custodian merely needed to search the files for any settlement agreement that was executed within the specified time frame and disclose same to the Complainant in response to his request. The Complainant’s Counsel asked the GRC to find that:

- The Custodian violated OPRA by unlawfully denying the Complainant’s request.
- The Complainant is a prevailing party entitled to attorney’s fees.
- The Complainant be awarded any further relief that the GRC deems proper.

Statement of Information:

On January 18, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on October 19, 2017 and responded in writing on that same date. The Custodian certified that shortly after she received the Complainant’s OPRA request, he telephoned her to inform her that he wanted the requested records immediately. The Custodian certified that she told the Complainant that because the Township does not keep its settlement agreements in one location, she would need clarification of the request so that she could search the appropriate files for the requested records. The Custodian certified that the Complainant became irate and the call ended. The Custodian certified that shortly thereafter she prepared the response to the request informing the Complainant that the request was broad and unclear.
The Custodian also certified that the Township does not “keep a list of settlement agreements or a file for settlement agreements as they are filed based on subject and/or parties.” The Custodian further certified that because storage of the requested records is decentralized, her staff would have to check “with each department on whether any settlement agreements have been reached over the past 3 years without knowing what or who it is regarding.”

The Custodian’s Counsel argued that the Custodian properly denied the Complainant’s request due to the broad nature of the request and the fact that they are not maintained in a specific file or database, but rather filed based on subject and/or named parties. Counsel stated that the Custodian would therefore be required to review, analyze, collate or compile data in order to fulfill the request.

The Custodian’s Counsel stated that the Complainant relied primarily upon Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010). Counsel stated that in the decision, the Appellate Division found that a request for "any and all settlements, releases or similar documents entered into, approved or accepted from 1/1/2006 to present" was permitted by OPRA. Counsel stated that the court determined that the request was for “particularized identifiable government records . . . rather than information generally.” Counsel stated that the court found that Burnett’s request “did not require [the] custodian to exercise discretion, survey employees or conduct research, rather, the responsive records are self-evident.” Counsel argued that in the instant complaint, the facts demonstrate that the Custodian would be required to “exercise discretion, survey employees or conduct research’ in order to fulfill the request.

The Custodian’s Counsel stated that since the holding in Burnett, the Appellate Division determined in Shipyard Assocs., L.P. v. City of Hoboken, 2015 N.J. Super. Unpub. LEXIS 2117 (App. Div. 2015) that:

> While an exact definition of an impermissibly overly broad request is abstract, courts have found requests that require a custodian to exercise his discretion, survey employees or undertake research to determine whether a record is responsive are overly broad and not encompassed by OPRA. We have concluded requests for “any and all documents and data . . . relied upon, considered, reviewed or otherwise utilized” were impermissibly overbroad. N.J. Builders Ass'n, supra, 390 N.J. Super. at 177.

[Id. at *8.]

Counsel continued to cite the court’s decision in Shipyard, which goes on to reference MAG, 375 N.J. Super. 534, 549-50 (App. Div. 2005), and then states, “[n]otably, the agency did not already maintain a database or list of its records . . . [a]s a result, the request would have required the custodian to create a database of all records under the general topic as the requestor's descriptor of the records sought was not otherwise used to identify records or materials within the agency.” Id. at *9, *10.

The Custodian’s Counsel relies on this unpublished decision to conclude that here “since the Custodian was required to ‘exercise [her] discretion, survey employees or undertake research
to determine whether a record is responsive, the [Complainant’s] request was overly broad and not encompassed by OPRA.”

Analysis

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 New Jersey Appellate Division has held that OPRA “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).


In contrast, the court in Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506 (App. Div. 2010) evaluated a request for “[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. Likewise, the court in Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012) found a request for the E-Z Pass benefits of Port Authority retirees to be valid because it was confined to a specific subject matter that was clearly and reasonably described with sufficient identifying information. Id. at 176. The court emphasized that “the fact that the custodian of records in this case actually performed a search and was able to locate and identify records responsive to plaintiff’s request belies any assertion that the request was lacking in specificity or was overbroad.” Id. at 177.

The Custodian’s Counsel, when citing to Shipyard Assocs., L.P. v. City of Hoboken, 2015 N.J. Super. Unpub. LEXIS 2117 (App. Div. 2015), failed to cite to the very next paragraph in that decision, which provides:

In contrast, courts have determined requests for "particularized identifiable government records . . . rather than information generally" are permissible. Burke.

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

Steven Wronko v. Township of South Brunswick, 2017-237 – Findings and Recommendations of the Executive Director

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We have determined that requests that identified a specific subject matter with sufficient identifying information were not overly broad even where a custodian was required to search and locate records according to a specific topic area. For example, a request for "any and all settlements, releases or similar documents entered into, approved or accepted from 1/1/2006 to present" was permitted by OPRA. Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 508-09, 2 A.3d 1110 (App. Div. 2010). "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.'" Burke, supra, 429 N.J. Super. at 176-77 (citing Burnett, supra, 415 N.J. Super. at 508-09).


Here, similar to the fact pattern in Burnett, 415 N.J. Super. 506, the Complainant requested settlement agreements for a specific time period. As such, the complaint sought a specific type of document. And although the request did not specify a particular matter to which such document related, the request was not overly broad.

Therefore, the Custodian has not borne her burden of proving that the Complainant’s request is invalid under OPRA for being overbroad and unclear; rather, the Complainant made a sufficiently specific request for copies of settlement agreements during a specified time period.

OPRA provides for such eventuality by providing that:

Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section … involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition
to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies …” N.J.S.A. 47:1A-5(c). (Emphasis added.)

The determination of what constitutes an “extraordinary expenditure of time and effort” under OPRA must be made on a case by case basis and requires an analysis of the variety of factors discussed in The Courier Post v. Lenape Regional High School, 360 N.J. Super. 191, 199 (Law Div. 2002). There, the plaintiff publisher filed an OPRA request with the defendant school district, seeking to inspect invoices and itemized attorney bills submitted by four law firms over a period of six and a half years. Id. at 193. Lenape assessed a special service charge due to the “extraordinary burden” placed upon the school district in responding to the request. Id.

Based upon the volume of documents requested and the amount of time estimated to locate and assemble them, the court found the assessment of a special service charge for the custodian’s time was reasonable and consistent with N.J.S.A. 47:1A-5(c). Id. at 202. The court noted that it was necessary to examine the following factors in order to determine whether a records request involves an “extraordinary expenditure of time and effort to accommodate” pursuant to OPRA: (1) the volume of government records involved; (2) the period of time over which the records were received by the governmental unit; (3) whether some or all of the records sought are archived; (4) the amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying; (5) the amount of time, if any, required to be expended by government employees to monitor the inspection or examination; and (6) the amount of time required to return the documents to their original storage place.

Id. at 199.

The court determined that in the context of OPRA, the term “extraordinary” will vary among agencies depending on the size of the agency, the number of employees available to accommodate document requests, the availability of information technology, copying capabilities, the nature, size and number of documents sought, as well as other relevant variables. Id. at 202.

In the instant complaint, because the Custodian has certified that the requested records are not maintained in a specific file or database, and therefore she will be required to have her office staff check with all of the departments to determine whether there are any records responsive to the Complainant’s request, a special service charge may be applicable.

**Knowing & Willful**

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.
Prevailing Party Attorney’s Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:


2. The Custodian shall either comply with paragraph 2 above within five (5) business days from receipt of the Council’s Interim Order by disclosing the responsive records with any appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously providing certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Council Staff; or in the event the Custodian determines that a special service charge is applicable, the Custodian shall complete the GRC’s 14-point analysis and calculate the appropriate special service charge. The Custodian shall then make the amount of the charge, together with the completed 14-point analysis, available to the Complainant within five (5) business days from receipt of the Council’s Interim Order. The Complainant shall, within five (5) business days from receipt of the special service charge, deliver to the Custodian (a) payment of the special service charge or (b) a statement declining to purchase the records. The Complainant’s failure to take any action within said time frame shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5 and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within twenty (20) business days following the Complainant’s payment of the special service charge, the Custodian shall deliver to the Council Staff certified confirmation of compliance as first provided above. Conversely, if the Complainant declined to purchase the records, the Custodian shall deliver to the Council Staff a statement confirming the Complainant’s refusal to purchase the requested records and such statement shall be in the

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form of a certification in accordance with N.J. Court Rule 1:4-4. The completed 14-point analysis shall be attached to the certification and incorporated therein by reference.

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

Prepared By: John E. Stewart
Staff Attorney

October 30, 2019