



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

April 30, 2019 Government Records Council Meeting

Earl Hammond
Complainant

Complaint No. 2017-32

v.

NJ Department of Corrections
Custodian of Record

At the April 30, 2019 public meeting, the Government Records Council (“Council”) considered the April 23, 2019 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. The Complainant’s request item number 1, a log book page, is exempt from access pursuant to N.J.A.C. 10A:22-2.3(a)(13), applicable to OPRA by operation of N.J.S.A. 47:1A-9(a). As such, the Custodian has borne his burden of proof that he lawfully denied access to said record. N.J.S.A. 47:1A-6.
2. The Complainant’s request for item number 2, the cost of postage to mail legal mail, is invalid because it fails to seek identifiable government records. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); 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). Thus, the Custodian did not unlawfully deny access to said request item. 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 30th Day of April 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: May 3, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
April 30, 2019 Council Meeting**

Earl Hammond¹
Complainant

GRC Complaint No. 2017-32

v.

New Jersey Department of Corrections²
Custodial Agency

Records Relevant to Complaint: Copies of :

1. “ ... Legal Mail Postage Remit Log Book Page of July 17, 2013, at New Jersey State Prison. 7W Ad. Seg., 7up, 8 tier, cell 21, Log Book containing the remit for Earl Hammond, State #299876 / SBI#217942C; to Mercer County Civil Court.”
2. “ ... Mailroom records showing the cost of postage to mail the legal mail to the Mercer County Civil Court.”³

Custodian of Record: John Falvey
Request Received by Custodian: January 6, 2017
Response Made by Custodian: January 6, 2017
GRC Complaint Received: February 13, 2017

Background⁴

Request and Response:

On January 6, 2017, the Custodian received the Complainant’s Open Public Records Act (“OPRA”) request seeking the above-mentioned records. On January 6, 2017, the same day the request was received, the Custodian responded in writing informing the Complainant that request item number 1 was denied because the records are exempt pursuant to N.J.A.C. 10A:22-2.3(a)(12). The Custodian also informed the Complainant that request item number 2 was denied because any responsive record would depend on the size and weight of the package being mailed, as well as the prevailing postage rates. The Custodian informed the Complainant that if there was a specific identifiable record to please identify it.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Adam Robert Gibbons.

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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Denial of Access Complaint:

On February 13, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that request item number 1, the Legal Mail Postage Remit, was logged in while he was housed at 7 Wing Administrative Segregation, 7up, 8 tier, cell 21 of the New Jersey State prison on July 17, 2013. The Complainant also asserted that he requested as item number 2 the Mailroom record/Legal Mail Postage Receipt for the same date, which was July 17, 2013. The Complainant stated that this item must be documented.

The Complainant stated that the Custodian denied item 1 of his request under N.J.A.C. 10A:22-2.3(a)(12), which addresses “[r]ecords and/or content related to inmate phone, email, or visit information.” The Complainant asserted that the Custodian erred in denying the request item because the requested record is not related to phone, email, or visit information. The Complainant further argued that N.J.A.C. 10A:22-2.3(a)(12) was not in effect on the date of the request, but rather was only proposed at that time. The Complainant asserted that the referenced regulation will not become effective until after February 9, 2016. The Complainant also argued that request item number 2 should have been disclosed because it is the mailroom record of his cost for mailing an item on July 17, 2013.

Statement of Information:

On March 22, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on January 6, 2017, and responded in writing on that same date. The Custodian referred the GRC to an “attached certification” which contained his argument in support of the denial.⁵

For request item 1, the Custodian’s Counsel stated that the Custodian’s response mistakenly cited the wrong section of the regulation. Counsel stated that the response cited N.J.A.C. 10A:22-2.3(a)(12), but should have cited N.J.A.C. 10A:22-2.3(a)(13), which deems confidential all log books of the agency.

For request item number 2, the Custodian’s Counsel stated that the Custodian’s response was proper because the Complainant failed to specifically identify a government record. Counsel stated that the Complainant merely sought “the cost of mailing a package,” which did not identify the record sought with reasonable clarity. Counsel cited Gannett N.J. L.P. v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005) and Bent v. Stafford Police Dep’t, 381 N.J. Super. 30 (App. Div. 2005), in support of his argument.

Additional Submissions:

On April 12, 2019, the GRC e-mailed the Custodian’s Counsel in an effort to obtain a copy of the Custodian’s certification referenced in the SOI. On April 17, 2019, the Custodian’s Counsel telephoned the GRC and stated that there was no separate certification that was made a part of the SOI.

⁵ No separate certification was attached to the SOI.

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.

Request item number 1 - Legal Mail Postage Remit Log Book Page dated July 17, 2013

OPRA provides that “[t]he provisions of this act . . . shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to . . . regulation promulgated under the authority of any statute . . .” N.J.S.A. 47:1A-9(a).

Here, the Custodian denied the Complainant access to request item number 1 based upon N.J.A.C. 10A:22-2.3(a)(12). This Department of Corrections regulation provides that “[i]n addition to records designated as confidential pursuant to the provisions of [OPRA] . . . the following records shall not be considered government records subject to public access pursuant to [OPRA] . . . [r]ecords and/or content related to inmate phone, e-mail, or visit information.”

The Complainant argued that the Custodian unlawfully denied him access to the record because the Complainant asserted that the requested record is not related to phone, email, or visit information. As such, the Complainant argued that the record should be disclosed. However the Custodian, through Counsel, stated in the SOI that he cited the wrong subsection of N.J.A.C. 10A:22-2.3(a) in the response to the Complainant’s OPRA request. The proper citation should have been to subsection (13), which provides that “. . . the following records shall not be considered government records subject to public access pursuant to [OPRA] . . . [l]og books[.]” The Custodian’s Counsel stated that the Custodian properly denied the Complainant access under N.J.A.C. 10A:22-2.3(a)(13) because the Complainant sought a “Log Book Page” which is exempt from disclosure under the regulation.

The Complainant additionally argued that the Custodian in denying him access to the requested record relied upon a regulation that was not in effect on the date of the request, but rather, was only proposed at that time. The Complainant asserted that the relevant regulation would not become effective until after February 9, 2016. The GRC, however, determined that the Complainant’s assertion is inaccurate. The regulation relied upon by the Custodian to deny the Complainant access to request item number 1, N.J.A.C. 10A:22-2.3(a)(13), was effective December 19, 2016. The Complainant’s request is dated December 23, 2016; therefore, the regulation was in effect on the date of the request.

Thus, the Complainant’s request item number 1, a log book page, is exempt from access pursuant to N.J.A.C. 10A:22-2.3(a)(13), applicable to OPRA by operation of N.J.S.A. 47:1A-9(a). As such, the Custodian has borne his burden of proof that he lawfully denied access to said record. N.J.S.A. 47:1A-6.

Request item number 2 - records showing the cost of postage to mail legal mail to the Mercer County Civil Court

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 Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005)(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);⁶ N.J. Builders Assoc. 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).

Here, the Complainant requested records showing the cost of postage to mail legal mail to the Mercer County Court. The Complainant did not specifically identify a particular record. In the response, the Custodian informed the Complainant that any responsive record would depend on the size and weight of the package being mailed, as well as the prevailing postage rates. The Custodian asked the Complainant to clarify his request by specifically identifying the record he was seeking; however, there is nothing in the evidence of record to indicate that the Complainant subsequently clarified the request.⁷

⁶ Affirming Bent v. Stafford Police Dep’t, GRC Case No. 2004-78 (October 2004).

⁷ The Complainant provided further clarification only when he filed the Denial of Access Complaint, wherein he stated that he was seeking the mailroom record showing his cost for mailing an item on July 17, 2013.

Therefore, the Complainant's OPRA request for item number 2, the cost of postage to mail legal mail, 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 said request item. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Complainant's request item number 1, a log book page, is exempt from access pursuant to N.J.A.C. 10A:22-2.3(a)(13), applicable to OPRA by operation of N.J.S.A. 47:1A-9(a). As such, the Custodian has borne his burden of proof that he lawfully denied access to said record. N.J.S.A. 47:1A-6.
2. The Complainant's request for item number 2, the cost of postage to mail legal mail, is invalid because it fails to seek identifiable government records. MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); 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). Thus, the Custodian did not unlawfully deny access to said request item. N.J.S.A. 47:1A-6.

Prepared By: John E. Stewart
Staff Attorney

April 23, 2019