



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

December 18, 2008 Government Records Council Meeting

Laure Zucker
Complainant

Complaint No. 2008-68

v.

Bergen County Improvement Authority
Custodian of Record

At the December 18, 2008 public meeting, the Government Records Council ("Council") considered the December 10, 2008 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. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not carried his burden of proving a lawful denial of access to the requested records because such records are payroll records subject to public access pursuant to N.J.S.A. 47:1A-10. See Gerald Weimer v. Township of Middletown, GRC Complaint No. 2004-22 (August 2005).
2. Because the Complainant's request for Item #2 failed to identify with reasonable clarity those records that were desired, pursuant to Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and because a custodian is required to disclose only identifiable government records, pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), the Custodian is under no lawful duty pursuant to N.J.S.A. 47:1A-6. to disclose the record(s) requested in Item #2.
3. Because the Custodian certified that Mr. Rudolph began employment with the Bergen County Improvement Authority in 2007 and there is no record responsive to the Complainant's request for 2006, and because the Complainant has failed to provide any evidence to contradict the Custodian's certification, the requested record for 2006 cannot be disclosed and there was no unlawful denial of access with respect to that portion of the record. See Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).



4. The Custodian shall disclose Elnatan Rudolph's time record for the year 2007 from the date of hire to the date of request, December 4, 2007, with all appropriate redactions, if any. If any portions of the record are redacted, the Custodian must provide a redaction index detailing the nature of the information redacted and the lawful basis for the redaction(s).
5. **The Custodian shall comply with item #4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
6. 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.

Interim Order Rendered by the
Government Records Council
On The 18th Day of December, 2008

Robin Berg Tabakin, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: December 19, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 18, 2008 Council Meeting**

**Laure Zucker¹
Complainant**

GRC Complaint No. 2008-68

v.

**Bergen County Improvement Authority²
Custodian of Records**

Records Relevant to Complaint:

1. Elnatan Rudolph's time records for 2006 and 2007.
2. Attendance sheet for Elnatan Rudolph³

Request Made: December 4, 2007

Response Made: December 11, 2007

Custodian: Edward H. Hynes

GRC Complaint Filed: April 1, 2008⁴

Background

December 4, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

December 11, 2007

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request.⁵ The Custodian states that access to the records relevant to the complaint is denied because they are personnel records exempt from disclosure under N.J.S.A. 47:1A-10.

April 1, 2008

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated December 4, 2007

¹ No legal representation listed on record.

² Represented by Daniel Zwillenberg, Esq., Law Offices of Dennis J. Oury, LLC (Hackensack, NJ).

³ There were other records requested that are not relevant to this complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ The Custodian's Secretary, Bernadette Losito, responded to the Complainant's OPRA request on behalf of the Custodian.

- Custodian's response to the OPRA request dated December 11, 2007

The Complainant states that she submitted her OPRA request to the Custodian on December 4, 2007. The Complainant states that she received a response to her request dated December 11, 2007, wherein she was denied access to the time records and attendance sheet for Bergen County Improvement Authority ("BCIA") Deputy Director Elnatan Rudolph because the Custodian stated that the records are personnel records exempt from disclosure under N.J.S.A. 47:1A-10. The Complainant expresses concern that she is being misled and/or stalled in her effort to obtain the records relevant to the complaint. The Complainant further questions whether the law has been misinterpreted, consequently denying her access to records that should have been disclosed.

The Complainant did not agree to mediate this complaint.

April 8, 2008

Request for the Statement of Information sent to the Custodian.

April 14, 2008

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated December 4, 2007
- Custodian's response to the OPRA request dated December 11, 2007

The Custodian certifies that his search for the requested records involved requesting the payroll records from the BCIA principal accountant and researching the BCIA files for records that may be responsive to the Complainant's request. The Custodian also certifies that no records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that Elnatan Rudolph did not commence working for the BCIA until 2007; therefore the Custodian certifies that there are no records responsive to the Complainant's request for 2006. The Custodian further certifies that Mr. Rudolph maintained a 2007 calendar on which he documented the hours of his employment as well as his leave time. The Custodian certifies that Mr. Rudolph submitted the calendar pages from January 2007 through December 2007 to the BCIA Treasurer as his time records/attendance sheets. Accordingly, the Custodian certifies that the calendar pages are the records responsive to the Complainant's request.

The Custodian certifies that after the Treasurer finished with Mr. Rudolph's calendar pages, the pages were transferred to Mr. Rudolph's personnel file. The Custodian certifies that because the calendar pages are documents relating to the employment of Mr. Rudolph and are stored in Mr. Rudolph's personnel file, they are exempt from disclosure as personnel records under N.J.S.A. 47:1A-10. Further, the Custodian contends that the calendar pages do not fall within the payroll records exception to N.J.S.A. 47:1A-10 and that the payroll records were previously made available to the Complainant.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA also states that:

“[n]otwithstanding the provisions of [OPRA]...the personnel or pension records of any individual in the possession of a public agency...shall not be considered a government record and shall not be made available for public access, except that an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record...” N.J.S.A. 47:1A-10.

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.

In the instant complaint, the BCIA decided to use employee Elnatan Rudolph’s personnel file as a repository for his time and attendance records. Due to this administrative procedure, the Custodian denied the Complainant access to such records alleging that, because the records are stored in Mr. Rudolph’s personnel file, they are exempt from disclosure as personnel records under N.J.S.A. 47:1A-10.

The threshold issue in this analysis is whether the time and attendance records are indeed personnel records. Although N.J.S.A. 47:1A-10 provides that "...the personnel or pension records of any individual in the possession of a public agency...shall not be considered a government record and shall not be made available for public access..." the statute goes on to list several exceptions to the personnel record proscription; to wit, "...an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received..." Therefore, whether the time and attendance records are government records subject to disclosure turns upon whether those records can reasonably be characterized as fitting one or more exception categories set forth in N.J.S.A. 47:1A-10.

One of the exceptions to the prohibition on disclosure of personnel records in N.J.S.A. 47:1A-10 is a "payroll record." A payroll record is not defined in OPRA; however, a New Jersey Department of Labor Regulation enumerates the items which constitute a payroll record. N.J.A.C. 12:16-2.1(a) provides that:

"Every employing unit having workers in employment...shall keep payroll records which shall show, for each pay period:

1. The *beginning and ending dates*;
2. The full name of each employee and *the day or days in each calendar week on which services for remuneration are performed*;
3. The total amount of remuneration paid to each employee showing separately cash, including commissions and bonuses; the cash value of all compensation in any medium other than cash; gratuities received regularly in the course of employment if reported by the employee, or if not so reported, the minimum wage rate prescribed under applicable laws of this State or of the United States or the amount of remuneration actually received by the employee from his employing unit, whichever is the higher; and service charges collected by the employer and distributed to workers in lieu of gratuities and tips;
4. The total amount of all remuneration paid to all employees;
5. The *number of weeks worked*." (Emphasis added.)

Thus, according to the Department of Labor, time and attendance records are an integral part of a payroll record. Therefore, because a payroll record is an exception to the prohibition on disclosure of personnel records, *a fortiori*, so are time and attendance records.

This analysis is consistent with the Council's earlier decision in Weimer v. Township of Middletown, GRC Complaint No. 2004-22 (August 2005). In Weimer, the Complainant sought attendance records of a government employee and the Council determined that:

"[i]t is reasonable that attendance, overtime and compensatory time records are within the realm of payroll records. As indicated by the Custodian, attendance, overtime and compensatory time may be contained

in an [employee's] personnel file, however, should not be considered exempt under the 'personnel and pension' provision of OPRA. The content of the record is applicable in this case and not the potential location of the record.”

Accordingly, pursuant to N.J.S.A. 47:1A-6, the Custodian has not carried his burden of proving a lawful denial of access to the requested records because such records are payroll records subject to public access pursuant to N.J.S.A. 47:1A-10. See Weimer, supra.

Although the Custodian cannot deny access to the requested records pursuant to the personnel records exemption under N.J.S.A. 47:1A-10., the Custodian is not obligated to disclose a record if that record is not clearly identified.

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.

Further, 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

In this complaint, the Complainant requested as Item #2 the "[a]ttendance sheet for Elnatan Rudolph." The Complainant, however, neither identified a particular attendance sheet nor did she attempt to narrow the scope of the request by specifying a date, a precise number of dates or even a bracketed time frame. Based upon the manner in which the Complainant framed her request for Item #2; therefore, the Custodian cannot with any degree of accuracy identify the specific record desired.

Because the Complainant's request for Item #2 failed to identify with reasonable clarity those records that were desired, pursuant to Bent, supra and because a custodian is required to disclose only identifiable government records, pursuant to MAG, supra, the Custodian is under no lawful duty pursuant to N.J.S.A. 47:1A-6. to disclose the record(s) requested in Item #2.

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

⁷ As stated in Bent.

Although Item #1 is not exempt from disclosure, because the Custodian certified that Mr. Rudolph began employment with the BCIA in 2007 and therefore there is no record responsive to the Complainant's request for 2006, and because the Complainant has failed to provide any evidence to contradict the Custodian's certification, the requested record for 2006 cannot be disclosed and there was no unlawful denial of access with respect to that portion of the record. *See Pusterhofer v. NJ Department of Education*, GRC Complaint No. 2005-49 (July 2005).

The Custodian did, however, certify that Mr. Rudolph was employed with the BCIA in 2007; therefore the time record for that year is subject to disclosure. Accordingly, the Custodian shall disclose Elnatan Rudolph's time record for the year 2007 from the date of hire to the date of request, December 4, 2007, with all appropriate redactions, if any. If any portions of the record are redacted, the Custodian must provide a redaction index detailing the nature of the information redacted and the lawful basis for the redaction(s).

Whether the Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not carried his burden of proving a lawful denial of access to the requested records because such records are payroll records subject to public access pursuant to N.J.S.A. 47:1A-10. *See Gerald Weimer v. Township of Middletown*, GRC Complaint No. 2004-22 (August 2005).
2. Because the Complainant's request for Item #2 failed to identify with reasonable clarity those records that were desired, pursuant to Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and because a custodian is required to disclose only identifiable government records, pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), the Custodian is under no lawful duty pursuant to N.J.S.A. 47:1A-6. to disclose the record(s) requested in Item #2.
3. Because the Custodian certified that Mr. Rudolph began employment with the Bergen County Improvement Authority in 2007 and there is no record responsive to the Complainant's request for 2006, and because the Complainant has failed to provide any evidence to contradict the Custodian's certification, the requested record for 2006 cannot be disclosed and there was no unlawful denial of access with respect to that portion of the record. *See*

Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).

4. The Custodian shall disclose Elnatan Rudolph's time record for the year 2007 from the date of hire to the date of request, December 4, 2007, with all appropriate redactions, if any. If any portions of the record are redacted, the Custodian must provide a redaction index detailing the nature of the information redacted and the lawful basis for the redaction(s).
5. **The Custodian shall comply with item #4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
6. 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.

Prepared By: John E. Stewart
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

December 10, 2008