



State of New Jersey

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Commissioner

FINAL DECISION

July 30, 2024 Government Records Council Meeting

Yehuda Miller
Complainant

Complaint No. 2022-232

v.

County of Cape May Board of Elections
Custodian of Record

At the July 30, 2024 public meeting, the Government Records Council (“Council”) considered the July 23, 2024 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 Custodian’s failure to provide a specific lawful basis for denying access to the requested ballots was insufficient. N.J.S.A. 47:1A-5(g); Schwarz v. N.J. Dep’t of Human Serv., GRC Complaint No. 2004-60 (February 2005).
2. The Complainant’s clarified OPRA request seeking “100 voter-completed ballots from the 2020 general election” is valid under prevailing case law. 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). Thus, the Custodian cannot rely on validity as a lawful basis for denying access to the subject OPRA request. N.J.S.A. 47:1A-6.
3. The Custodian unlawfully denied access to the ballots sought. N.J.S.A. 47:1A-6. Specifically, the ballots in question have been separated from any individual voter information and thus disclosure would not violate any of the provisions identified by the Custodian in the Statement of Information. Thus, the Custodian shall disclose to the Complainant 100 ballots contained within the universe of all cast in the 2020 general election.
4. **The Custodian shall comply with conclusion No. 3 above within twenty (20) business days from receipt of the Council’s Final Decision. In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council’s Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**

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 July 2024

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: August 1, 2024

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 30, 2024 Council Meeting**

**Yehuda Miller¹
Complainant**

GRC Complaint No. 2022-232

v.

**County of Cape May Board of Elections²
Custodial Agency**

Records Relevant to Complaint: Inspection and copies via personal scanning device of one (1) box of ballots from the 2021 general election.

Custodian of Record: Donna Doyle
Request Received by Custodian: May 4, 2022
Response Made by Custodian: May 4, 2022
GRC Complaint Received: June 1, 2022

Background³

Request and Response:

On May 4, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, the Custodian responded in writing stating that the request, as written, failed to identify specific records and was thus invalid. Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005). The Custodian thus stated that she was seeking clarification on whether the Complainant wanted access to sample ballots, voter-completed ballots, or something different. Later in the day, the Complainant confirmed that he was seeking voter-completed ballots.

On May 5, 2022, the Complainant e-mailed the Custodian further clarifying that he would like to inspect 100 completed ballots submitted during the “2020 general election.”⁴ The Complainant noted that he also wanted to use a personal scanner to “make electronic photographic [images].” On the same day, the Custodian responded in writing denying the subject OPRA request because the “requested records are confidential and not subject to review by the public.”

¹ No legal representation listed on record.

² Represented by Jeffrey R. Lindsay, Esq. (Cape May Court House, NJ).

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.

⁴ The Complainant changed the general election year in his May 5, 2022 clarification to 2020, which in the original OPRA request was 2021.

Denial of Access Complaint:

On June 1, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the Custodian unlawfully denied him access to inspect a box of ballots. The Complainant asserted that both Vermont and Colorado have held that ballots are subject to disclosure under state public records laws. Price v. Town of Fairlee, 211 VT 48 (2011); Marks v Koch, 284 P.3d 118 (Colo. App. 2011). The Complainant also noted that Wisconsin’s public records law provides that election returns are subject to access and the underlying records retained by the Wisconsin Elections Commission are available for inspection except in limited circumstances. Wis. Stat. § 5.89; 19.31. The Complainant asserted that the Price court presented a particularly compelling argument that “the right to public access to information must take precedence over electoral purity.”⁵

Statement of Information:

On June 29, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on May 4, 2022. The Custodian certified that she responded in writing on the same day seeking clarification. The Custodian affirmed that she received clarification and responded in writing on May 5, 2022 denying the subject OPRA request.

The Custodian argued that the Complainant sought inspection of a single box of ballots from the 2021 general election, which she lawfully denied based on clear statutory confidentiality of individual votes. The Custodian stated that N.J.S.A. 19:34-7 provides that it is a fourth-degree crime to require someone to disclose their ballot “during the preparation thereof or after it is prepared for voting in such a way as to reveal the contents . . .” Id. The Custodian further stated that N.J.S.A. 19:15-26 requires that individuals voting in a booth be allowed to do so “secretly and screened from the observation of others”: violation of this provision resulted in a disorderly person’s offense. See also N.J.S.A. 19:53A-3(a); 6(c). The Custodian noted that should a voter need assistance, the person providing same is prohibited from revealing the voter’s choices. N.J.S.A. 19:50-3. The Custodian further averred that mail-in ballots contain several clear statements regarding the “secrecy” of each completed ballot, warns that interference can result in loss of the right to vote, and prohibits the unsealing, marking, or inspection of a ballot. N.J.S.A. 19:63-12; 16(a)-(b). See also N.J.S.A. 19:63-16(c).

The Custodian also argued that the Complainant’s request was invalid because it failed to seek specific ballots. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent, 381 N.J. Super. 30; N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007). The Custodian argued that the request required her to research her records and

⁵ The Complainant also noted that he was seeking “[\$1.00] a day per document withheld as well as fees in the amount of \$500.00.” However, the only type of compensation available under OPRA is for prevailing party attorney’s fees. N.J.S.A. 47:1A-6. The GRC further notes that OPRA provides it no authority to order any other type of compensatory damages. Reid v. N.J. Dep’t of Corrections, GRC Complaint No. 2010-83 (Final Decision dated May 24, 2011). See also Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008) (holding that “. . . unlike other fee-shifting statutes, OPRA does not provide for damages. Under OPRA, a victorious party gains access to public records and possibly an award of attorney’s fees, but not civil damages.” Id. at 76.

randomly select ballots at the cost of determining “whose rights it would violate” through disclosure. The Custodian argued that such an action is neither required by OPRA nor permitted under existing State law.

Additional Submissions:

On June 29, 2022, the Complainant responded to the SOI arguing that the Custodian’s basis for denial only applied to actions taken against voters at the time of their vote. The Complainant argued that he was not seeking the disclosure of any voter information, noting that the ballots and envelopes containing individual voter information have long since been separated thus rendering them “anonymous.” The Complainant agreed that the intent of election laws is to promote individual privacy, but that intent does not apply to anonymous ballots not containing personal information. The Complainant finally contended that the Custodian’s argument that she would be forced to choose whose privacy to violate because the sought ballots cannot be connected to the separated envelopes. The Complainant asserted that if the Custodian still believed the request was invalid, she could have sought additional clarification.

On June 29, 2022, Custodian’s Counsel responded to the Complainant noting that his exact OPRA request sought “ballots completed by voters.” The Complainant responded refuting that his request sought anything other than the anonymous ballots separated from their envelopes.

Analysis

Sufficiency of Response

OPRA provides that “[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5(g). A custodian’s failure to do so results in an insufficient response and a violation of OPRA. See Schwarz v. N.J. Dep’t of Human Serv., GRC Complaint No. 2004-60 (February 2005) (setting forth the proposition that specific citations to the law that allows a denial of access are required at the time of the denial); Renna v. Union Cnty. Improvement Auth., GRC Complaint No. 2008-86 (May 2010) (noting that N.J.S.A. 47:1A-5(g) requires a custodian of record to indicate the specific basis for noncompliance).

Here, the Custodian responded to the Complainant’s clarified OPRA request denying access on the basis that they “are confidential and not subject to review by the public.” However, the Custodian failed to include any specific lawful basis for this denial. Thus, the forgoing evidence of record here is on point with Paff, GRC 2007-209 and supports a finding that the Custodian’s response was insufficient.

Accordingly, the Custodian’s failure to provide a specific lawful basis for denying access to the requested ballots was insufficient. N.J.S.A. 47:1A-5(g); Schwarz, GRC 2004-60.

Validity of Request

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. (emphasis added). Bent, 381 N.J. Super. at 37;⁶ N.J. Builders, 390 N.J. Super. at 180; Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

The validity of an OPRA request typically falls into three (3) categories. The first is a request that is overly broad (“any and all,” requests seeking “records” generically, *etc.*) and requires a custodian to conduct research. MAG, 375 N.J. Super. 534; Donato, GRC 2005-182. The second is those requests seeking information or asking questions. *See e.g. Rummel v. Cumberland Cnty. Bd. of Chosen Freeholders*, GRC Complaint No. 2011-168 (December 2012). The final category is a request that is either not on an official OPRA request form or does not invoke OPRA. *See e.g. Naples v. N.J. Motor Vehicle Comm’n*, GRC Complaint No. 2008-97 (December 2008).

In Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 236-237 (App. Div. 2015), the court held that plaintiff’s request was invalid because it required research. In reaching this conclusion, the court reasoned that:

The custodian in this case would have had to make a preliminary determination as to which travel records correlated to the governor and to his senior officials, past and present, over a span of years. The custodian would then have had to attempt to single out those which were third-party funded events. Next, he would have had to

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

collect all documents corresponding to those events and search to ensure he had accumulated everything, including both paper and electronic correspondence. OPRA does not convert a custodian into a researcher.

[Id. at 237.]

Here, the Complainant's clarified OPRA request sought 100 voter-completed ballots from the 2020 general election. The Custodian responded denying the OPRA request and the Complainant subsequently filed this complaint asserting that the denial was unlawful. In the SOI the Custodian argued in part that the request was invalid. More specifically, the Custodian argued that the nature of the OPRA request would require her to research her records and randomly select ballots at the cost of determining "whose rights it would violate" through disclosure. The Complainant responded refuting that his request was invalid and argued that the Custodian could have sought further clarification if she believed it remained so.

Upon review, the GRC is persuaded that the clarified OPRA request was not invalid. Unlike in Lagerkvist, the clarified OPRA request sought a specific type of "government record" within a defined time period: voter-completed ballots from the 2020 general election. Such a request is similar to those described as valid by the described as valid by the Bent court. Id. at 37. The request provides no mystery as to what the Custodian is seeking and where she can locate the responsive records. Such an action cannot be considered "research" as discussed in both MAG and Lagerkvist. Further, the fact that the Complainant did not identify a "specific ballot" is of no consequence: he is merely seeking 100 ballots from the full universe of those submitted in the 2020 general election. The GRC notes that, at least as it relates to "Vote-by-Mail and Provisional ballots," the New Jersey Department of State, Division of Elections ("Elections") has guided that "opened in batches of 100, 200, or 300" and re-bundled for storage after the count is complete. See Division of Elections. (2020). *Board of Elections Ballot Counting Guide*. (Revised May 25, 2023) at 3-4. Thus, the process prescribed by Elections necessarily means that the Custodian need only identify a batch, or portion thereof, for disclosure.

Accordingly, the Complainant's clarified OPRA request seeking "100 voter-completed ballots from the 2020 general election" is valid under prevailing case law. MAG, 375 N.J. Super. 534; Bent, 381 N.J. Super. at 37. Thus, the Custodian cannot rely on validity as a lawful basis for denying access to the subject OPRA 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.

Here, the Complainant has sought access to 100 voter-completed ballots from the 2020 general election. The Custodian initially denied access for a vague confidentiality reason. In the Denial of Access Complaint, the Complainant argued that other states require disclose of the

records in question. Price, 211 VT 48; Marks, 284 P.3d 118; Wis. Stat. § 5.89; 19.31. In the SOI, the Custodian argued in part that existing election statutes require secrecy in the voting process under threat of penalty or criminal prosecution. N.J.S.A. 19:34-7; N.J.S.A. 19:15-26; N.J.S.A. 19:53A-3(a); 6(c); N.J.S.A. 19:50-3; N.J.S.A. 19:63-12; 16(a)-(b); N.J.S.A. 19:63-16(c). The Custodian further argued that disclosure would require her to make a haphazard determination as to whose privacy to violate. In his sur-reply, the Complainant argued that he was not seeking personal information: the ballots sought were rendered anonymous because they were separated from their envelopes.

The threshold issue before the Council is whether OPRA supports disclosure of the ballots would result in actions already prohibited under existing statute. This issue is a matter of first impression for the Council, as it was unable to identify any precedential case law on the issue.

Initially, the GRC notes that the case law and provision identified by the Complainant does not provide much guidance on the current issue. Specifically, Price addressed disclosure of ballots Vermont's sealing period expired: the GRC could not find any evidence that such a statutory period exists in New Jersey. Marks held that the "secrecy" decree in Colorado only applied to disclosure of personally identifying information on individual ballots. The court thus ordered disclosure of ballots that did not include write-in candidates and did not include personally identifying information. Finally, Wis. Stat. § 5.89; 19.31 discloses some disclosures of elections records but does not support that ballots must be disclosed in their entirety.

As for the Custodian's arguments, the GRC does not find them to be compelling. The statutes identified provide that ballots connected to personal information are prohibited from disclosure. However, the cited provisions appear to apply to tampering with mail-in ballots, divulging an individual voter's selections to the public, or not providing for the secrecy of a voter casting their vote. However, these provisions do not address what happens after the ballots are cast and counted. Fortunately, the *Ballot Counting Guide* disclosing how ballots are handled through the process. Of note is the directive that ballots are separated from the envelopes identifying them and, as indicated above, batched together. Id. at 3-4. This strongly suggests that the Complainant's sur-reply assertion is correct in that the requested stored ballots are anonymous because they are devoid of any personal information. Further, there are no additional provisions within the relevant election statutes that prohibit disclosure of the underlying ballot disconnected from the identity of the individual that cast same. Based on this, the GRC finds that an unlawful denial of access occurred.

Therefore, the Custodian unlawfully denied access to the ballots sought. N.J.S.A. 47:1A-6. Specifically, the ballots in question have been separated from any individual voter information and thus disclosure would not violate any of the provisions identified by the Custodian in the SOI. Thus, the Custodian shall disclose to the Complainant 100 ballots contained within the universe of all cast in the 2020 general election.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to provide a specific lawful basis for denying access to the requested ballots was insufficient. N.J.S.A. 47:1A-5(g); Schwarz v. N.J. Dep't of Human Serv., GRC Complaint No. 2004-60 (February 2005).
2. The Complainant's clarified OPRA request seeking "100 voter-completed ballots from the 2020 general election" is valid under prevailing case law. 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). Thus, the Custodian cannot rely on validity as a lawful basis for denying access to the subject OPRA request. N.J.S.A. 47:1A-6.
3. The Custodian unlawfully denied access to the ballots sought. N.J.S.A. 47:1A-6. Specifically, the ballots in question have been separated from any individual voter information and thus disclosure would not violate any of the provisions identified by the Custodian in the Statement of Information. Thus, the Custodian shall disclose to the Complainant 100 ballots contained within the universe of all cast in the 2020 general election.
4. **The Custodian shall comply with conclusion No. 3 above within twenty (20) business days from receipt of the Council's Final Decision. In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council's Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**

Prepared By: Frank F. Caruso
Executive Director

July 23, 2024