



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

August 11, 2009 Government Records Council Meeting

Alfred M. Sallie, Sr.
Complainant

Complaint No. 2007-227

v.

New Jersey Department of Banking & Insurance
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council (“Council”) considered the August 4, 2009 Supplemental 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 because the Complainant has failed to establish in his request for reconsideration of the Council’s April 29, 2009 Final Decision that 1) the GRC's decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and rendered an arbitrary, capricious or unreasonable decision, said request for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 11th Day of August, 2009



Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: August 17, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
August 11, 2009 Council Meeting**

**Alfred M. Sallie, Sr.¹
Complainant**

GRC Complaint No. 2007-227

v.

**NJ Department of Banking and Insurance²
Custodian of Records**

Records Relevant to Complaint: Copies of, or inspection of, information regarding Ernest Scheidemann, Bridget Lydick, John D. Pogorelec, Jr., RLI Insurance Company confirmation #12057, case #200700316, Passaic County Surrogate Court.³

Request Made: August 30, 2007

Response Made: August 31, 2007⁴

Custodian: Gary Vogler

GRC Complaint Filed: September 26, 2007⁵

Background

April 29, 2009

Government Records Council's ("Council") Final Decision. At the April 29, 2009 public meeting, the Government Records Council ("Council") considered the April 22, 2009 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, found that:

1. Because the Custodian certified that the investigation of case #200700136 was still pending at the time of the Complainant's request, and because *N.J.A.C.* 11:17-2.15 (b) 6 provides that a licensee's investigative files in any matter pending investigation are not public records, and because that regulation contains provisions not abrogated by OPRA pursuant to N.J.S.A. 47:1A-9.a., said provisions exempt the licensee's investigative files from the definition of a government record disclosable under OPRA. Accordingly, the Custodian

¹ No legal representation listed on record.

² Represented by DAG Kristine A. Maurer, on behalf of the New Jersey Attorney General.

³ The records requested are different in the Denial of Access Complaint than in the original request; however, this is the OPRA request set forth on the Complainant's request receipt provided to the GRC as an attachment to his Denial of Access Complaint form.

⁴ The request and response are dated August 30, 2007 on the Government Records Response Receipt; however, both parties acknowledge August 31, 2007 as the date of the Custodian's response.

⁵ The GRC received the Denial of Access Complaint on said date.

lawfully denied the Complainant access to records comprising case #200700136.

2. Because *N.J.A.C.* 11:17-2.15 (b) 6 provides that a licensee's investigative files in any completed investigation in which no formal disciplinary action was taken are not public records, and because that regulation contains provisions not abrogated by OPRA pursuant to N.J.S.A. 47:1A-9.a., said provisions exempt the licensee's investigative files from the definition of a government record disclosable under OPRA. The Custodian therefore lawfully denied the Complainant access to such record.

May 4, 2009

Council's Final Decision distributed to the parties.

May 14, 2009

Complainant's request for reconsideration. The Complainant requests that the GRC reconsider the Final Decision of his Denial of Access Complaint pursuant to *N.J.A.C.* 5:105-2.10. The Complainant asserts that the GRC reconsider this matter based upon (a) mistake, (b) fraud, (c) new evidence and (d) illegality.

The Complainant attaches to his request for reconsideration the following documents:

- One (1) page copy of GRC Administrative Complaint Disposition captioned Alfred M. Sallie, Sr. v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint No. 2008-21 (February 2008)
- Six (6) page copy of a letter from Alfred M. Sallie, Sr. to GRC Case Manager Dara Lownie dated June 24, 2008
- One (1) page copy of GRC Administrative Complaint Disposition captioned Alfred Sallie v. NJ Department of Law and Public Safety, Office of the Attorney General, GRC Complaint No. 2008-100 (June 2008)

The Complainant argues that his complaint was ripe because he filed it on September 26, 2007. The Complainant also argues that he did not receive a response from the Custodian denying him access to the requested records. The Complainant further argues that the Custodian falsely reported that there were no documents responsive to the Complainant's request. In support of the Complainant's assertion that there is new evidence in this matter, the Complainant alleges he learned that Custodian's Council submitted false documents and made false statements in another matter.⁶ The Complainant argues that Counsel's actions in the other matter therefore taint his Statement of Information ("SOI") in this matter.

⁶ The Complainant refers to the Custodian's original counsel in this matter, DAG Paul Witko. DAG Witko prepared the legal argument for the Custodian's Statement of Information in this matter.
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May 29, 2009

Custodian's objection to the request for reconsideration. The Custodian's Counsel contends that although the Complainant asserts that reconsideration of Council's Final Decision should be granted due to mistake, new evidence, fraud, and illegality, the Complainant has failed to put forth any evidence or facts which demonstrate such reasons for reconsideration.

Counsel states that reconsideration should be granted only under very narrow circumstances, specifically when (1) a decision is based upon a palpably incorrect or irrational basis or (2) it is obvious that the decision-maker either did not consider, or failed to appreciate, the significance of probative, competent evidence. Counsel cites Duvin v. State of New Jersey, Department of Treasury, Public Employees' Retirement Sys., 76 N.J. 203 (1978), D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990) and Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996). Counsel argues that the Complainant failed to demonstrate such circumstances in his request for reconsideration.

Counsel argues that the Complainant incorrectly asserts that the GRC is manipulating the filing date of his complaint. Counsel contends the Complainant failed to put forth evidence in support of his assertion. Counsel also argues that the Complainant incorrectly asserts that he did not receive a denial of access from the Custodian. Counsel contends a denial of access was sent to the Complainant. Counsel further argues that the Complainant asserts that the Custodian's Statement of Information provides false information which indicated there were no documents responsive to the OPRA request. Counsel contends that, conversely, the Custodian has repeatedly stated that there are no documents available for public access because agency regulations provide that the requested records are non-public documents. Counsel states that the GRC properly determined that the Custodian lawfully denied the Complainant access to the requested records. Finally, Counsel states that the Complainant's reference to new evidence contained in GRC Complaint No. 2008-100 and 2008-21 have no relevance to the instant complaint.⁷

The Custodian's Counsel contends that the Complainant has failed to put forth any legitimate basis to justify reconsideration of the Council's Final Decision in this matter.

June 4, 2009

E-mail from the Complainant to the GRC. The Complainant states that he has submitted as an attachment to the e-mail a response to the opposition to the reconsideration filed by the Custodian's Counsel.

June 4, 2009

E-mail from Custodian's Counsel to the GRC. Counsel states that *N.J.A.C. 5:105-2.10*, does not provide for replies or responses to any opposition to be filed, therefore

⁷ The Complainant filed the same argument in support of his request for reconsideration in Sallie v. NJ Department of Banking and Insurance, GRC Complaint No. 2007-226 and Sallie v. NJ Department of Banking and Insurance, GRC Complaint No. 2007-227; therefore, the Custodian's Counsel states that it is often difficult to pinpoint the specific complaint to which the Complainant is referring.

the Complainant's response to the Custodian's opposition to the request for reconsideration should be rejected.

June 8, 2009⁸

E-mail from the GRC to the Complainant. The GRC informs the Complainant that the regulations do not provide for a response to the opposition to the request for reconsideration, therefore said response will not be considered.⁹

Analysis

Whether the Complainant has met the required standard for reconsideration of the Council's April 29, 2009 Final Decision?

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, *Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. *D'Atria, supra*, 242 N.J. Super. at 401. ‘Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.’ *Ibid.*” *In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey*, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of his request for reconsideration, the Complainant attached two (2) copies each of a one (1) page GRC Administrative Complaint Disposition and one (1) six

⁸ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

⁹ See *N.J.A.C. 5:105-2.10*.

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page letter to a GRC case manager. None of the Complainant's attachments are relevant to the instant complaint.

The Complainant failed to offer any credible proof in support of his allegations that there was fraud, illegality or mistake involved in the adjudication of this complaint. The Complainant states that he did not receive a denial of access from the Custodian; however, the evidence of record reveals the Complainant filed a Denial of Access Complaint with the GRC wherein the Complainant verified on September 10, 2007 that the date his request was denied by the Custodian was August 31, 2007. The Complainant further states that the Custodian falsely reported that there were no documents that were responsive to the Complainant's request. Again, the evidence of record reveals that there were records responsive to the Complainant's request, but they were denied based upon Department of Banking and Insurance regulations not abrogated by OPRA.

The Complainant also alleged as grounds for reconsideration new evidence that did not exist prior to the Council's decision in this matter, however, the Complainant failed to submit any new evidence in support of his request for reconsideration. The Complainant stated that since he filed the instant complaint he learned that the Custodian's Counsel submitted false documents and made false statements in another matter and therefore the Complainant concluded Counsel's veracity must be tainted in this matter. Aside from the Complainant's syllogism having no relevance to this matter, the Complainant failed to submit a scintilla of evidence to support his allegations.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. See Cummings, *supra*. The Complainant failed to do so. The Complainant has also failed to show that the Council's final decision in this matter is arbitrary, capricious or unreasonable. See D'Atria, *supra*.

Therefore, because the Complainant has failed to establish in his request for reconsideration of the Council's April 29, 2009 Final Decision that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and rendered an arbitrary, capricious or unreasonable decision, said request for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council find that because the Complainant has failed to establish in his request for reconsideration of the Council's April 29, 2009 Final Decision that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and rendered an arbitrary, capricious

or unreasonable decision, said request for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

August 4, 2009



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

FINAL DECISION

April 29, 2009 Government Records Council Meeting

Alfred M. Sallie, Sr.
Complainant

Complaint No. 2007-227

v.

NJ Department of Banking and Insurance
Custodian of Record

At the April 29, 2009 public meeting, the Government Records Council (“Council”) considered the April 22, 2009 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. Because the Custodian certified that the investigation of case #200700136 was still pending at the time of the Complainant’s request, and because *N.J.A.C. 11:17-2.15 (b) 6* provides that a licensee’s investigative files in any matter pending investigation are not public records, and because that regulation contains provisions not abrogated by OPRA pursuant to N.J.S.A. 47:1A-9.a., said provisions exempt the licensee’s investigative files from the definition of a government record disclosable under OPRA. Accordingly, the Custodian lawfully denied the Complainant access to records comprising case #200700136.
2. Because *N.J.A.C. 11:17-2.15 (b) 6* provides that a licensee’s investigative files in any completed investigation in which no formal disciplinary action was taken are not public records, and because that regulation contains provisions not abrogated by OPRA pursuant to N.J.S.A. 47:1A-9.a., said provisions exempt the licensee’s investigative files from the definition of a government record disclosable under OPRA. The Custodian therefore lawfully denied the Complainant access to such record.

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 29th Day of April, 2009

Robin Berg Tabakin, Chairwoman
Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: May 4, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 29, 2009 Council Meeting**

**Alfred M. Sallie, Sr.¹
Complainant**

GRC Complaint No. 2007-227

v.

**NJ Department of Banking and Insurance²
Custodian of Records**

Records Relevant to Complaint: Copies of, or inspection of, information regarding Ernest Scheidemann, Bridget Lydick, John D. Pogorelec, Jr., RLI Insurance Company confirmation #12057, case #200700316, Passaic County Surrogate Court.³

Request Made: August 30, 2007

Response Made: August 31, 2007⁴

Custodian: Gary Vogler

GRC Complaint Filed: September 26, 2007⁵

Background

September 5, 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.

August 31, 2007

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the first (1st) business day following receipt of such request and informs the Complainant that the records responsive to the Complainant's request are investigative files in a pending investigation or in a completed matter in which no formal disciplinary action was taken and, therefore, the records are not public government records pursuant to OPRA.

¹ No legal representation listed on record.

² Represented by DAG Kristine A. Maurer, on behalf of the New Jersey Attorney General.

³ The records requested are different in the Denial of Access Complaint than in the original request; however, this is the OPRA request set forth on the Complainant's request receipt provided to the GRC as an attachment to his Denial of Access Complaint form.

⁴ The request and response are dated August 30, 2007 on the Government Records Response Receipt; however, both parties acknowledge August 31, 2007 as the date of the Custodian's response.

⁵ The GRC received the Denial of Access Complaint on said date.

September 26, 2007

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching Complainant’s OPRA request receipt dated August 30, 2007.

In contrast to the record description set forth in his request, the Complainant states that the record he was denied is a “[C]opy of surety bond order allowing account 7-6-06 from Passaic Cty Surrogate” and “[S]upporting documents to surety bond.” The Complainant states the Custodian denied him access to the requested records because investigative or complaint files maintained by the Department of Banking and Insurance (“Department”) in any matter pending investigation or in any completed matter in which no formal disciplinary action was taken are non-public records pursuant to OPRA. The Complainant states that the Custodian’s response was deceitful because the Complainant could not find any reference to formal or informal disciplinary action.

October 2, 2007

Offer of Mediation sent to both parties.

October 5, 2007

The Complainant informs the GRC that his name is not correct as it appears on the mediation materials, but neither accepts nor declines mediation. The Custodian did not respond to the Offer of Mediation.

October 12, 2007

Request for the Statement of Information (“SOI”) sent to the Custodian.

October 18, 2007

Custodian’s Statement of Information (“SOI”) with the following attachments:

- Custodian’s Response to the Complainant’s OPRA request dated August 30, 2007
- Custodian’s certification dated October 15, 2007

The Custodian certifies that he received the Complainant’s OPRA request on August 30, 2007 and responded to said request on August 31, 2007.

The Custodian certifies that after receiving the Complainant’s OPRA request, personnel in the Department undertook a search for records that may have been responsive to said request. Moreover, the Custodian certifies that there is a fifty (50) year retention period for investigative case files in the enforcement section pursuant to the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that the aforementioned search uncovered a letter of complaint from the Complainant that was received by the Department in May 2007 alleging impropriety by two (2) licensees. The Custodian also certifies that, in the instant complaint, the Complainant requested records from case #200700316; however, case #200700136 was actually the number assigned to the Complainant’s matter, and the Department determined that this file was the target of the Complainant’s request. The

Custodian further certifies that the investigation of case #200700136 was still pending at the time of the Complainant's request.

The Custodian certifies that one of the licensees identified in the Complainant's request was the subject of an investigation conducted by the Department approximately ten (10) years ago. The Custodian avers that the Department took no formal disciplinary action in that matter.

The Custodian determines that the documents contained in case #200700136 and the one licensee identified in the Complainant's OPRA request are records responsive to the Complainant's request; however, the Custodian denies the Complainant access to said records in their entirety.

The Custodian cites to *N.J.A.C. 11:17-2.15 (b) 6* as a reason for denying the Complainant access to the records responsive to his request. This regulation provides that investigative files in any pending investigation or in any completed investigation in which no formal disciplinary action was taken by the Department are not public records as defined in OPRA.

The Custodian also cites N.J.S.A. 47:1A-3.a., which provides that records cannot be disclosed if they are part of a pending investigation where disclosure would be inimical to the public interest. The Custodian certifies that disclosure is inimical to the public interest, and draws upon dictum in Loigman v. Kimmelman, 102 N.J. 98, 109 (1986), as support for his position that confidentiality of investigative files is necessary because disclosure would impede the flow of information regarding allegations of improper misconduct, hamper the Department's ability to investigate allegations and impair the Department's mission to protect the public.

The Custodian certifies that the records the Complainant requested in his OPRA request are different than those listed in his Denial of Access Complaint because in the complaint the Complainant was seeking a surety bond order. However, the Custodian avers that *N.J.A.C. 11:17-2.15 (b) 6* and N.J.S.A. 47:1A-3.a. also proscribe disclosure of the surety bond, as well as any other records contained within the investigation file.

October 23, 2007

The Complainant's response to the Custodian's SOI. The Complainant questions the contact information on the SOI and states, "Vogler's status must be clarified or his certifications must be considered false and invalid." The Complainant also states that the Custodian did not list the records responsive to his request on the document index. The Complainant further states that he was denied access to records pursuant to N.J.S.A. 47:1a-3.a. because they are part of a pending investigation. The Complainant contends, however, that he had requested records which were open for public inspection before the investigation was commenced. The Complainant argues that such records must be disclosed under OPRA.

The Complainant states that, contrary to the assertions of Custodian's Counsel, the Complainant did not list records in his Denial of Access Complaint that were different than those set forth in his OPRA request. The Complainant argues that he just identified

the records in his complaint with more specificity. The Complainant asserts that although the Custodian understands the Complainant's request as one seeking documents from a case file, the Custodian tries to misconstrue the Complainant's request by subsequently stating the Complainant is seeking a copy of the case file. The Complainant states that the Custodian erroneously refers to Loigman v. Kimmelman, *supra*. The Complainant argues that the facts in Loigman differ from the facts in the instant complaint. Finally, the Complainant directs the GRC to instruct the Custodian to comply with several of the Complainant's directives.⁶

October 26, 2007

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel replies to the Complainant's response to the SOI. With respect to the Complainant's query regarding the Custodian's status Counsel states, "[t]here is nothing false, invalid or confusing about Vogler's status. He is the OPRA Records Custodian for the Department of Banking and Insurance. Period."

Counsel further states that the investigation file was designated as such in the document index because if the Custodian itemized the contents of the investigation file it would compromise the integrity of the investigation.

Counsel notes the discrepancy between the description of requested records in the Complainant's OPRA request and the description in the Complainant's response to the Custodian's SOI dated October 23, 2007. Counsel states that if the Complainant is seeking records from case file #200700136, they are exempt from disclosure pursuant to *N.J.A.C.* 11:17-2.15 (b) 6 and *N.J.S.A.* 47:1A-3.a. Counsel further asserts that if the Complainant is seeking disclosure of records that were public records before the investigation began, they do not exist.

Counsel states that the Custodian did not try to misconstrue the Complainant's request in order to deny him access to the requested records.⁷

November 1, 2007⁸

Letter from the Complainant to the GRC. The Complainant more emphatically restates the assertions he provided to the GRC in his response to the Custodian's SOI dated October 23, 2007. The Complainant wants the GRC to direct the Custodian to certify that certain names listed in his OPRA request do not appear in the Department's investigative case file as a means of resolving the instant complaint. The Complainant also alleges the Custodian is misrepresenting the Complainant's OPRA request to unlawfully deny him access to the requested records.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

⁶ The Complainant addresses other issues that are not applicable to the instant complaint.

⁷ The Custodian's Counsel addresses other issues that are not applicable to the instant complaint.

⁸ Other correspondence was received from the parties which is not relevant to this complaint or restates the facts/assertions already presented to the GRC.

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 also provides:

“...where it shall appear that the record or records that are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency, the right of access provided for in [OPRA]...may be denied if the inspection, copying, or examination of such record or records shall be inimical to the public interest; provided, however, that this provision shall nor be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced.” N.J.S.A. 47:1A-3.a.

OPRA further 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 or Executive Order of the Governor; Executive Order of the Governor ...” N.J.S.A. 47:1A-9.a.

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 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, it is undisputed between the parties that the Complainant filed his OPRA request on August 30, 2007 and the Custodian responded to said request on August 31, 2007.

The Complainant's request seeks to copy or inspect records relating to three (3) individuals and one (1) organization in the Department's case file #200700136. The Complainant subsequently, in his response to the Custodian's SOI, stated that he requested copies of records that were open for public inspection before the investigation commenced.

The evidence of record clearly reveals the Complainant's request was not for copies of records that were open for public inspection before the investigation commenced, but rather for records that constituted, in whole or in part, case file #200700136. The Custodian denied the Complainant access to the records responsive to his request because the Custodian certified that the records are exempt from disclosure pursuant to *N.J.A.C.* 11:17-2.15 (b) 6 and *N.J.S.A.* 47:1A-3.a.

It is unnecessary to analyze whether the requested records are inimical to the public interest pursuant to *N.J.S.A.* 47:1A-3.a. because the Custodian also relied upon the provisions of *N.J.A.C.* 11:17-2.15 (b) 6 to deny the Complainant access to the requested records. *N.J.A.C.* 11:17-2.15 (b) 6 provides as follows:

“The following licensee records are specifically determined to be nonpublic records in accordance with [OPRA]...**6. *Investigative files in any matter pending investigation, or in any completed investigation in which no formal disciplinary action was taken...***” (Emphasis added.)

Because the Custodian certified that the investigation of case #200700136 was still pending at the time of the Complainant's request, and because *N.J.A.C.* 11:17-2.15 (b) 6 provides that a licensee's investigative files in any matter pending investigation are not public records, and because that regulation contains provisions not abrogated by OPRA pursuant to *N.J.S.A.* 47:1A-9.a., said provisions exempt the licensee's investigative files from the definition of a government record disclosable under OPRA. Accordingly, the Custodian lawfully denied the Complainant access to records comprising case #200700136.

The Custodian determined that another record responsive to the Complainant's request was documentation that concerned one of the licensees named in the Complainant's letter of complaint. The Custodian certified that the licensee was the subject of an investigation conducted by the Department approximately ten (10) years ago in which the Department took no formal disciplinary action; therefore, the Custodian also denied the Complainant access to this record pursuant to the provisions of *N.J.A.C.* 11:17-2.15 (b) 6.

Accordingly, because *N.J.A.C.* 11:17-2.15 (b) 6 provides that a licensee's investigative files in any completed investigation in which no formal disciplinary action was taken are not public records, and because that regulation contains provisions not abrogated by OPRA pursuant to *N.J.S.A.* 47:1A-9.a., said provisions exempt the

licensee's investigative files from the definition of a government record disclosable under OPRA. The Custodian therefore lawfully denied the Complainant access to such record.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian certified that the investigation of case #200700136 was still pending at the time of the Complainant's request, and because *N.J.A.C. 11:17-2.15 (b) 6* provides that a licensee's investigative files in any matter pending investigation are not public records, and because that regulation contains provisions not abrogated by OPRA pursuant to N.J.S.A. 47:1A-9.a., said provisions exempt the licensee's investigative files from the definition of a government record disclosable under OPRA. Accordingly, the Custodian lawfully denied the Complainant access to records comprising case #200700136.
2. Because *N.J.A.C. 11:17-2.15 (b) 6* provides that a licensee's investigative files in any completed investigation in which no formal disciplinary action was taken are not public records, and because that regulation contains provisions not abrogated by OPRA pursuant to N.J.S.A. 47:1A-9.a., said provisions exempt the licensee's investigative files from the definition of a government record disclosable under OPRA. The Custodian therefore lawfully denied the Complainant access to such record.

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

April 22, 2009