



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

November 30, 2010 Government Records Council Meeting

Thomas Caggiano
Complainant

Complaint No. 2010-212; 2010-213

v.

New Jersey Government Records Council
Custodian of Record

At the November 30, 2010 public meeting, the Government Records Council (“Council”) considered the September 13, 2010 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 evidence of record shows that the instant Denial of Access Complaints are without any reasonable factual basis. N.J.S.A. 47:1A-7.e.
2. Because the evidence of record indicates that the Complainant in these complaint commenced the instant complaints “in bad faith, solely for the purpose of harassment[;]” the Complainant’s continuous, repetitive filings of OPRA requests and Denial of Access Complaints is “in bad faith, solely for the purpose of harassment,” the Complainant’s Denial of Access Complaints herein should therefore be dismissed as frivolous pursuant to N.J.S.A. 47:1A-7.e. Caggiano v. Borough of Stanhope, GRC Complaint Nos. 2007-20, 2007-21, 2007-22, 2007-23 (Consolidated)(September 2007); Caggiano v. Borough of Stanhope, GRC Complaint No. 2007-161 (October 2007); Caggiano v. Borough of Stanhope, GRC Complaint No. 2007-182 (October 2007).
3. Because the Complainant has specifically chosen to adjudicate the instant Denial of Access Complaints in this forum, and because the Council finds that there is a pressing public need to adjudicate these matters, and because the Council has unique expertise and experience which cannot be duplicated at any other forum, and because due to quorum issues the Council herein could not fulfill its statutory obligation to review and adjudicate these Denial of Access Complaints pursuant to N.J.S.A. 47:1A-7 if any members were required to recuse themselves from the adjudication of these matters because of conflicts of interest issues, the Council determines that the Doctrine of Necessity permits any Council members who may have a conflict interest to participate in the adjudication of these matters, notwithstanding any conflicts of interest that may exist. Gunthner v.



Planning Board of the Borough of Bay Head, 335 N.J. Super. 452 (Law Div. 2000); Allen v. Toms River Regional Board of Educ., 233 N.J. Super. 642, 647 (Law Div.1989).

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 November, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Stacy Spera, Secretary
Government Records Council

Decision Distribution Date: December 3, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 30, 2010 Council Meeting**

**Thomas Caggiano¹
Complainant**

GRC Complaint No. 2010-212; 2010-213²

v.

**New Jersey Government Records Council³
Custodian of Records**

Records Relevant to Complaint: Various

Request Made: Various⁴

Response Made: Various

Custodian: Catherine Starghill, Executive Director

GRC Complaint Filed: May 11, 2010 and August 12, 2010, respectively.

Background

January 21, 2004

Judgment of the Honorable John Mulhern, Municipal Court of Hampton and Stillwater in the matter of State of New Jersey v. Thomas Caggiano, Docket Nos. S-2003-083-1910 and S-2003-084-1910. Judge Mulhern issues a Judgment of Conviction for harassment violations and prohibiting Thomas Caggiano from having any contact with the Sussex County Soil Conservation District except through counsel.

October 21, 2007

The Executive Director of the GRC, Catherine Starghill, Esq., files a criminal harassment complaint against the Complainant in Mercer County Municipal Court captioned State of New Jersey v. Thomas Caggiano, at Docket No. S-2007-075464. The basis of this harassment complaint was the Complainant's transmission of threatening pornographic material to the Executive Director.

October 29, 2007

Order of the Honorable Neil H. Schuster, J.S.C., granting the GRC a temporary civil restraining order against the Complainant, providing in pertinent part as follows:

¹ No legal representation listed on record.

² Due to the commonality of parties and issues, the Council has consolidated these matters for adjudication.

³ Represented by DAG Debra Allen, on behalf of the NJ Attorney General.

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

“[Thomas Caggiano is temporarily enjoined and restrained from] calling, e-mailing or faxing plaintiff Government Records Council members and employees.”

December 3, 2008

Judgment of the Honorable Craig U. Dana, J.M.C., Joint Municipal Court of the Townships of Green, Fredon, Hampton and the Borough of Andover. Judge Dana issues a Judgment of Conviction for harassment and trespass violations prohibiting Thomas Caggiano from having any contact with any present or former employee or official of the Borough of Stanhope except that Mr. Caggiano may mail his tax and utility payments to the Borough and he may call 911 if he has an emergency.

May 7, 2009

Order of the Honorable Maria M. Sypek, J.S.C., granting the GRC’s motion for a permanent injunction against the Complainant, providing in pertinent part as follows:

“[Thomas Caggiano] is permanently enjoined and restrained from calling, e-mailing or faxing plaintiff or its members or employees. Defendant may only communicate with plaintiff by regular mail.”

May 22, 2009

Judgment of the Honorable Judge Louis Sancinito, Trenton Municipal Court. Judge Sancinito issues a Judgment of Conviction finding for harassment against Thomas Caggiano in the matter of State of New Jersey v. Thomas Caggiano, Docket No. S2007-75464, and sentencing the Complainant to 30 days in jail⁵ and a \$500 fine.

May 26, 2009

Letter from John Tonelli, Supreme Court of New Jersey, Advisory Committee on Judicial Conduct, to the Complainant. Mr. Tonelli advises the Complainant that, after reviewing the Complainant’s voluminous submissions, the Committee has found no basis for a charge of improper judicial conduct and declines to institute formal disciplinary proceedings.

March 18, 2010

Order of the Honorable Thomas V. Manahan, P.J.Cr., Superior Court of New Jersey, Criminal Division. On the Court’s own motion, Judge Manahan dismisses the numerous Affidavits of Probable Cause filed by the Complainant in various municipal courts in Morris and Sussex Counties. Judge Manahan also dismisses additional Affidavits of Probable Cause filed up to and including March 18, 2010, which the Complainant filed in the Towns of Morristown and Newton which are pending review and which name numerous government officials, including the Sussex County Prosecutor and Municipal and Superior Court Judges, among others.

⁵ The jail sentence was suspended.

March 21, 2010

The Complainant's first (1st) OPRA request. The Complainant requests in writing various records relevant to this complaint.⁶

April 7, 2010

Custodian's response to the Complainant's first (1st) OPRA request. The Custodian responds in writing to the Complainant's OPRA request. The Custodian states that with regard to the requested copies of six (6) exhibits the Complainant provided to the GRC during the public comment section of the July 25, 2007 Council meeting, and with regard to the request for a copy of The Cag Report and CD that the Complainant provided to the Council, the Superior Court of New Jersey, Appellate Division has previously held that a complainant could not have been denied access to a requested record if he already had in his possession at the time of the OPRA request the document he sought pursuant to OPRA, and, further, that requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. Bart v. City of Paterson Housing Authority, 413 N.J. Super. 609 (App. Div. 2008).

The Custodian further states that with regard to the request for an audio recording of the July 25, 2007 Council meeting, no responsive record exists.

The Custodian also states that with regard to the request for e-mail addresses of all GRC Council members, the agency restraining order entered by Judge Neil Schuster, J.S.C., on January 29, 2008 prohibits the Complainant from contacting the GRC staff and Council members in any way other than by U.S. Mail.

May 11, 2010

The Complainant files the first (1st) Denial of Access Complaint with the Government Records Council ("GRC"), attaching the following:⁷

- Letter from John Tonelli, Supreme Court of New Jersey, Advisory Committee on Judicial Conduct, to the Complainant dated May 26, 2009
- Order of the Honorable Thomas V. Manahan, P.J.Ct., in the matter of Municipal Court Complaints of Thomas Caggiano⁸
- Letter from the Custodian to the Complainant dated April 7, 2010
- Letter from John Tonelli, Supreme Court of New Jersey, Advisory Committee on Judicial Conduct, to the Complainant dated April 21, 2010

⁶ The GRC notes that the Complainant failed to provide the Council with a copy of this OPRA request.

⁷ The Complainant attached additional materials which are not relevant to the adjudication of these complaints.

⁸ In the Statement of Reasons accompanying the Judge's Order, the Judge notes that the Court "has determined that no probable cause exists to issue a warrant or a summons. The Court finds that the affidavits [of Thomas Caggiano] lack a showing [of] probable cause to believe that the offenses alleged were committed and that the numerous defendants committed any offenses. The pleadings, even given a liberal interpretation, do not support a claim of any of the criminal charges which are sought to be lodged."

- Unsigned forms of Orders submitted by the Complainant to Judge Ostrer in the Complainant's appeal of Docket No. S2007-0754644.

The Complainant declines mediation of this complaint.

August 12, 2010

The Complainant's second (2nd) OPRA request. On an official GRC Request for Reconsideration form, the Complainant requests in writing various records relevant to the instant matter. The GRC notes that the Complainant's request for records was encompassed within a five (5) page request for reconsideration of an unspecified prior complaint, which itself enclosed an eleven (11) page document which contained a disjointed, rambling argument regarding multiple unrelated issues.

August 13, 2010

Custodian's response to the Complainant's second (2nd) OPRA request. The Custodian responds in writing to the Complainant's OPRA request. With regard to the Complainant's request for the custodian's name, e-mail address, telephone number address and fax number, the Custodian states that this request is invalid under OPRA as it seeks information rather than a specific identifiable government record.

With regard to the Complainant's request for a copy of the mp3 recording of the hearing in the GRC during the time frame April 2010 to July 31, 2010, a copy of the minutes on the agenda wherein the Denial of Access Complaint was made against the GRC, the Custodian states that no records responsive to this request item exist.

With regard to the Complainant's request for various handwritten notes which he provided to the GRC, the Custodian states that records responsive are enclosed.

With regard to the Complainant's request for copies of all e-mail and correspondence the GRC had with the Division of Law and communications with the Borough of Stanhope and/or Judge Bozonelis, the Custodian states that the request is broad and unclear, and requires the Custodian to conduct research; the request is therefore invalid under OPRA.

August 23, 2010

The Complainant files the second (2nd) Denial of Access Complaint with the Government Records Council ("GRC"), attaching the following:

- Request for reconsideration from the Complainant to the GRC dated August 12, 2010
- Letter from the Custodian to the Complainant dated August 13, 2010

The Complainant declines mediation of this complaint.

August 25, 2010

Letter from the Honorable John A. Paparazzo, Netcong Borough Municipal Court Judge to the Complainant.⁹ Judge Paparazzo states that due to the Complainant's threatening, harassing, and inappropriate telephone calls to the Borough of Netcong Municipal Court, the Complainant may no longer contact the Court office by telephone, fax or e-mail. Judge Paparazzo further states that the Complainant may only contact the Netcong Borough Municipal Court by letter sent via U.S. Mail to Judge Paparazzo. Judge Paparazzo also states that any further contact by the Complainant to the Court Administrator will be immediately forwarded to the Chief of Police, Netcong Police Department.

Analysis

Whether the Denial of Access Complaints filed by the Complainant are frivolous?

OPRA provides that:

“If any party declines mediation or if mediation fails to resolve the matter to the satisfaction of all parties, the council shall initiate an investigation concerning the facts and circumstances set forth in the complaint. The council shall make a determination as to whether the complaint is ... frivolous or without any reasonable factual basis. If the council shall conclude that the complaint is ... frivolous, or without factual basis, it shall reduce that conclusion to writing and transmit a copy thereof to the complainant and to the records custodian against whom the complaint was filed.” [Emphasis added]. N.J.S.A. 47:1A-7.e.

N.J.S.A. 2A:15-59.1, the Frivolous Litigation Act, states in pertinent part that:

“In order to find that a complaint, counterclaim, cross-claim or defense of the nonprevailing party was frivolous, the judge shall find on the basis of the pleadings, discovery, or the evidence presented that ... [t]he complaint, counterclaim, cross-claim or defense was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury[.]” [Emphasis added]. N.J.S.A. 2A:15-59.1.b.(1).

⁹ The Complainant submitted a copy of Judge Paparazzo's letter to the GRC as part of a facsimile transmission to the GRC dated August 29, 2010. This facsimile transmission, and other transmissions which occurred on July 24, 2010 and July 26, 2010, August 23, 2010, August 27, 2010, and August 31, 2010, are in direct contravention of the permanent restraining order issued by Judge Sypek against the Complainant. Pursuant to *N.J.A.C. 1:1-15.2(a)* and (b), the GRC takes judicial notice of these facts.

A claim constitutes frivolous litigation if “judging the [claimant's] conduct as a whole,” the claim “was brought in bad faith, for the purpose of delay and harassment.” Deutch & Shur, P.C. v. Roth, 284 N.J. Super. 133, 139 (Law Div.1995).

In Deutch, the defendant retained the plaintiff attorneys to represent him in an action to recover insurance proceeds. The defendant lied under oath about four convictions of insurance fraud and lost the case, then refused to pay the plaintiffs’ fees. The plaintiffs filed an action to recover and the defendant did not answer. A default judgment was entered and a levy was placed on the defendant's property. The defendant then had the judgment vacated and filed a counterclaim alleging legal malpractice. The trial court granted the plaintiffs' motion to strike the defendant's counterclaim and granted summary judgment to the plaintiffs. The court granted plaintiffs' motion for fees and costs under N.J.S.A. 2A:15-59.1. In doing so, the court found that the defendant had prosecuted his counterclaim to delay and harass and had no basis for believing that he had somehow been wronged by plaintiffs. Deutch, supra, 284 N.J. Super. at 139. The court further found that the only purpose of the defendant’s counterclaim was to “scare” the plaintiff into compromise or make collection more expensive. *Id.*

With regard to the definition of “bad faith,” the Superior Court of New Jersey, Appellate Division has held that:

[w]e regard “malice” (explicit in N.J.S.A. 2A:15-59.1b and implicit in R. 1:4-8(a)) and “bad faith” to be related, but not necessarily identical concepts. Dictionary definitions of malice require an animus that is lacking in the concept of bad faith. However, the Supreme Court has held when describing the elements of tortious interference with business, that malice, an element of the tort, “is not used in the literal sense requiring ill will toward the plaintiff,” but instead “malice is defined to mean that the harm was inflicted intentionally and without justification or excuse.” Printing Mart v. Sharp Electronics, 116 N.J. 739, 751, 563 A.2d 31 (1989) (quoting Restatement (Second) of Torts Chapter 37 at 5 (introductory note) and citing Rainier's Dairies v. Raritan Valley Farms, Inc., 19 N.J. 552, 563, 117 A.2d 889 (1955)). We adopt the latter definition when construing the term malice in the present context... Moreover, we note that the bad faith necessary for sanctions here can be demonstrated, as stated in N.J.S.A. 2A:15-59.1b, if litigation was used in bad faith “solely for the purpose of harassment, delay or malicious injury.” Port-O-San Corp. v. Teamsters Local Union No. 863, Welfare & Pension Funds, 363 N.J. Super. 431, 438 (App. Div. 2003).

The evidence of record indicates that the Complainant in these complaints commenced the instant complaints “in bad faith, solely for the purpose of harassment [.]”

The Complainant has a long history before the Council of filing Denial of Access Complaints against various state and local agencies.¹⁰ Since 2004, the Complainant herein has filed 82 Denial of Access Complaints before the Council, excluding the instant matters. Of these, 17 were duplicate cases¹¹ and 13 were administratively disposed of as invalid OPRA requests.¹² Moreover, the Council takes judicial notice¹³ that many of these complaints bear sequential docket numbers and were filed on the same day or within a matter of days against the same agency or agencies.¹⁴ The Council takes further notice that the Complainant herein has filed four (4) OPRA requests to date in 2010 with the GRC.

The Council takes further judicial notice of the website maintained by the Complainant at www.thomascaggiano.com, which contains more than 100 references to the Government Records Council, its counsel and its staff in highly pejorative terms, as well as hundreds of disparaging or belittling references to state and local government and officials and employees thereof. A review of the Complainant's website discloses that it contains the Complainant's lengthy recitation of the various complaints and orders to show cause which he has filed against numerous state and local agencies and employees thereof in local, state and federal courts. Moreover, the Complainant has posted on his website the facts of the dismissals of such proceedings at every level of local, state and federal judiciary, and evinces his displeasure at such dismissals, as well as his stated intention to continue filing similar proceedings. The Complainant has also posted on his website copies of complaints he has filed with the Supreme Court of New Jersey, Advisory Committee on Judicial Conduct against local and state judges who have dismissed the Complainant's suits.

The evidence of record, including the Complainant's website and materials he has provided directly to the GRC, clearly show the Complainant's intention to use the judicial processes in bad faith, to harass and annoy state agencies and their officials and employees. The evidence of record also clearly shows that the Complainant is undeterred

¹⁰ These include the Borough of Stanhope, the Sussex County Prosecutor's Office, the Sussex County Soil Conservation District, the New Jersey Department of Agriculture, the New Jersey Department of Law and Public Safety, Division of Consumer Affairs, the Township of Green Municipal Court and the New Jersey Government Records Council.

¹¹ Caggiano v. Borough of Stanhope (Sussex), GRC Complaint Nos. 2006-28, -29, -30, -31, -32, -33, -34, -35, -36, -37, -38, -39, -40, -41, -42, -43, -47.

¹² Caggiano v. Borough of Stanhope (Sussex), GRC Complaint Nos. 2007-27, -28, -29, -30, -31, -32, -33, -34, -35, -36, -37, -38, -39.

¹³ Pursuant to *N.J.A.C. 1:1-15.2(a)* and (b), official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. The Appellate Division has held that it was appropriate for an administrative agency to take notice of an appellant's record of convictions, because judicial notice could have been taken of the records of any court in New Jersey, and appellant's record of convictions were exclusively in New Jersey. See Sanders v. Division of Motor Vehicles, 131 N.J. Super. 95 (App.Div. 1974).

¹⁴ Caggiano v. Borough of Stanhope (Sussex), GRC Complaint Nos. 2006-226, -227, -228, -229, -230, -231, -232, -233, -234, -235; 2006-27, -28, -29, -30, -31, -32, -33, -34, -35, -36, -37, -38, -39, -40, -41, -42, -43, -47; 2007-20, -21, -22, -23, -24, -25, -26, -27, -28, -29, -30, -31, -32, -33, -34, -35, -36, -37, -38, -39, -40, -43, -44, -45, -46, -47, -48.

in this purpose by the dismissal of his complaints, and that the Complainant continues to intend to harass and annoy state agencies by filing complaints solely for the purpose of harassment. Moreover, the Complainant's continued contact with the GRC by facsimile transmissions, in direct contravention of the permanent restraining order entered against him by Judge Sypek, and which specifically prohibits the Complainant from so contacting the GRC, its members or staff, indicates the Complainant's continuing intention to violate said order and to harass and annoy the GRC, its members and staff.

Regarding the OPRA requests which form the basis of the instant complaints, there are no material issues of fact to be decided herein. The evidence of record shows specifically that either no records responsive to the requests exist, or that the Complainant is already in possession of the records requested and/or is requesting particular records in direct contravention of Judge Sypek's permanent restraining order which prohibits the Complainant from contacting the GRC in any manner other than by U.S. mail.

The Council therefore concludes from the evidence of record that the Denial of Access Complaints herein are without any reasonable factual basis. N.J.S.A. 47:1A-7.e.

The evidence of record is therefore abundantly clear that the Complainant has used the records request and Denial of Access Complaint processes afforded him under OPRA to harass state and local agencies and the officials and employees thereof. The evidence of record clearly shows that the Complainant filed the instant complaints with the intent to harass the GRC, its members and staff. The evidence is also clear that the Complainant intends to continue to use the request and complaint process afforded him under OPRA in bad faith, to harass and annoy state and local agencies, their employees and officials. Moreover, the number and frequency of the OPRA requests the Complainant has made and Denial of Access Complaints he has filed provide further support for the conclusion that the Complainant's continuous, repetitive filing of OPRA requests and Denial of Access Complaints is "in bad faith, solely for the purpose of harassment[.]" Caggiano v. Borough of Stanhope, GRC Complaint Nos. 2007-20, 2007-21, 2007-22, 2007-23 (Consolidated)(September 2007); Caggiano v. Borough of Stanhope, GRC Complaint No. 2007-161 (October 2007); Caggiano v. Borough of Stanhope, GRC Complaint No. 2007-182 (October 2007).

The Complainant's Denial of Access Complaints herein should therefore be dismissed as frivolous pursuant to N.J.S.A. 47:1A-7.e.

Whether the Doctrine of Necessity permits the Government Records Council to render a decision in the instant matter?

N.J.S.A. 47:1A-6 provides in pertinent part that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- ° institute a proceeding to challenge the custodian's decision by filing an action in Superior Court which shall be heard in the vicinage

where it is filed by a Superior Court Judge who has been designated to hear such cases because of that judge's knowledge and expertise in matters relating to access to government records; or

° in lieu of filing an action in Superior Court, file a complaint with the Government Records Council established pursuant to ... [N.J.S.A.].47:1A-7.

The right to institute any proceeding under this section shall be solely that of the requestor. Any such proceeding shall proceed in a summary or expedited manner.

The Ethics Law, N.J.S.A. 40A:9-22.5(d), provides in pertinent part that:

“[no] local government officer or employee shall act in his official capacity in any matter where he, a member of his family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence in judgment[.]” N.J.S.A. 40A:9-22.5(d).

Wyzykowski v. Rizas, 132 N.J. 509, 523 (1993) describes the common law conflict of interest rule as follows:

“[a] public official is disqualified from participating in judicial or quasi-judicial proceedings in which the official has a conflicting interest that may interfere with the impartial performance of his duties as a member of the public body.” Wyzykowski, *supra*, 132 N.J. at 523 (*citing Scotch Plains-Fanwood Bd. of Educ. v. Syvertsen*, 251 N.J. Super. 566, 568 (App.Div.1991)).

According to Wyzykowski, the Ethics Law further “refined the definition of a conflict of interest.” *Id.* at 529.

The determination whether a particular interest is sufficient to disqualify a board member is necessarily factual in nature and depends upon the circumstances in each case. Wyzykowski, *supra*, 132 N.J. at 523 (*citing Van Itallie v. Franklin Lakes*, 28 N.J. 258, 268 (1958)). The bottom line is dictated by a practical feel of the situation absent controlling authority. “The question will always be whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty.” *Ibid.* It is not necessary to demonstrate actual proof of dishonesty because only the potential for conflict is necessary. *Id.* at 524 (*citing Aldom v. Borough of Roseland*, 42 N.J. Super. 495, 503 (App.Div.1956)). “A conflicting interest arises when a public official has an interest not shared in common with the other members of the public.” *Id.* (*citing Griggs v. Borough of Princeton*, 33 N.J. 207, 220-21, (1960)). Alternatively, “[t]here cannot be a conflict of interest where there does not exist, realistically, contradictory desires tugging the official in opposite directions.” *Id.* (*citing LaRue v. Township of East Brunswick*, 68 N.J. Super. 435, 448 (App.Div.1961)).

When it is impossible to constitute a quorum, however, disqualified members may, of necessity, have to vote, but this departure from the disqualification rule should be narrowly circumscribed and only invoked if there is some compelling reason justifying its use. Wyzykowski v. Rizas, *supra*, 132 N.J. at 528; Griggs v. Borough of Princeton, *supra*, 33 N.J. at 221. Generally speaking, the doctrine of necessity is utilized when a pressing public need exists, and it would be detrimental to the public's well-being to bar the disqualified members from participating in a vote. Sokolinski v. Woodbridge Tp., 192 N.J. Super. 101, 106 (App.Div.1983); Cranberry Lake Quarry Co. v. Johnson, 95 N.J. Super. 495, 521 (App.Div.1967).

In Allen v. Toms River Regional Board of Educ., 233 N.J. Super. 642, 647 (Law Div.1989), this court summarized the appellate decisions dealing with those instances in which conflicts left the public body with inadequate membership to constitute a quorum, and identified cases in which the court found the circumstances dictated that members in conflict should be permitted to sit.

In Allen, the plaintiff township and boroughs were the constituent members of a council which advised the defendant regional Board of Education. *Id.* at 644-45. Due to a vote against defendant's budget, the council was to consider the budget. *Id.* at 644. However, four members of the council had conflicts of interest regarding their involvement with the Board of Education, which affected the ability of the membership to reach a quorum. *Id.* However, members of plaintiff township and one plaintiff borough obtained an order to show cause seeking to compel the Board to engage in consultation with the membership. *Id.* at 645.

The court examined the history of the doctrine of necessity in New Jersey and held that the doctrine:

“will be invoked in those circumstances in which there is a pressing public need for action (that is, the matter cannot be laid aside until another date), there is no alternative forum which can grant the same relief and the body is unable to act without the members in conflict taking part.” *Id.* at 651.

The court noted that “[t]he public clamor with respect to the proposed budget is documented in the record[,]” as was “[t]he public insistence that there be a review by the governmental authorities[.]” *Id.* The court also noted that the budget was large and would have a significant impact on all of the taxpayers in the constituent municipalities. Moreover, although the applicable statute provided for a review of the budget before the Commissioner of Education, the court determined that such review did “not allow for the public input which would be received by each of the governing bodies so that direct public involvement will be denied. *Id.* The statutory scheme for the budget process evinces an intention not only to give the public the first say by way of its vote but also additional participation before the governing body and the board of education in reshaping the budget in the event it is defeated.” *Id.* Finally, the court determined that since the council could not achieve a quorum with four of its seven members in conflict, it was only by authorizing those four members to act that the council could fulfill its

statutory obligation to review and certify the amount necessary to be appropriated and address an issue of substantial importance in which the citizenry has a right to participate. *Id.*

In Gunthner v. Planning Board of the Borough of Bay Head, 335 N.J. Super. 452 (Law Div. 2000), the plaintiff sought to develop property contiguous to a yacht club. He filed a development application with the defendant planning board, but filed an order to show cause seeking to disqualify seven of the Board's members from voting on said application, stating that they had a conflict of interest because they were members of the yacht club. *Id.* at 458-59. However, the Law Division held that the doctrine of necessity permitted the challenged Board members to rule on the application because there was a pressing public need and it would have been detrimental to the public's well-being to bar the disqualified members, because to do so would have resulted in an automatic acceptance of the application. *Id.* at 464.

In the matter before the Council, the Complainant has chosen to file the instant Denial of Access Complaints against the GRC for adjudication before the Council. The choice of forum is, of course, the Complainant's prerogative under N.J.S.A. 47:1A-6. However, in so doing, the Complainant has also specifically raised in the Denial of Access Complaints the issue of a possible conflict of interest on the part of the Executive Director in adjudicating these matters.¹⁵ Moreover, members of the Council may have a possible conflict of interest arising from the characterizations of them which the Complainant has made on the Complainant's website.¹⁶

However, the Council notes that there is no satisfactory alternative forum in which these Denial of Access Complaints may be adjudicated. The Council has unique expertise and experience with these matters and with the Complainant's history before the Council, which cannot be duplicated at any other forum. If members of the Council were required to recuse themselves from the adjudication of these matters due to potential conflicts of interest issues, the Council could not fulfill its statutory obligation to review and adjudicate these Denial of Access Complaints due to a lack of quorum.

Therefore, because the Complainant has specifically chosen to adjudicate the instant Denial of Access Complaints in this forum, and because the Council finds that there is a pressing public need to adjudicate these matters, and because the Council has unique expertise and experience which cannot be duplicated at any other forum, and because due to quorum issues the Council herein could not fulfill its statutory obligation to review and adjudicate these Denial of Access Complaints pursuant to N.J.S.A. 47:1A-7 if any members were required to recuse themselves from the adjudication of these matters because of conflicts of interest issues, the Council determines that the Doctrine of Necessity permits any Council members who may have a conflict interest to participate in the adjudication of these matters, notwithstanding any conflicts of interest that may exist. Gunthner v. Planning Board of the Borough of Bay Head, 335 N.J. Super. 452 (Law Div.

¹⁵ Although the Executive Director presents proposed Findings and Recommendations to the Council for adjudication, the Executive Director is not a voting member of the Council. N.J.S.A. 47:1A-7.

¹⁶ See discussion, *supra*, at page 7.

2000); Allen v. Toms River Regional Board of Educ., 233 N.J. Super. 642, 647 (Law Div.1989).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The evidence of record shows that the instant Denial of Access Complaints are without any reasonable factual basis. N.J.S.A. 47:1A-7.e.
2. Because the evidence of record indicates that the Complainant in these complaint commenced the instant complaints “in bad faith, solely for the purpose of harassment[;]” the Complainant’s continuous, repetitive filings of OPRA requests and Denial of Access Complaints is “in bad faith, solely for the purpose of harassment,” the Complainant’s Denial of Access Complaints herein should therefore be dismissed as frivolous pursuant to N.J.S.A. 47:1A-7.e. Caggiano v. Borough of Stanhope, GRC Complaint Nos. 2007-20, 2007-21, 2007-22, 2007-23 (Consolidated)(September 2007); Caggiano v. Borough of Stanhope, GRC Complaint No. 2007-161 (October 2007); Caggiano v. Borough of Stanhope, GRC Complaint No. 2007-182 (October 2007).
3. Because the Complainant has specifically chosen to adjudicate the instant Denial of Access Complaints in this forum, and because the Council finds that there is a pressing public need to adjudicate these matters, and because the Council has unique expertise and experience which cannot be duplicated at any other forum, and because due to quorum issues the Council herein could not fulfill its statutory obligation to review and adjudicate these Denial of Access Complaints pursuant to N.J.S.A. 47:1A-7 if any members were required to recuse themselves from the adjudication of these matters because of conflicts of interest issues, the Council determines that the Doctrine of Necessity permits any Council members who may have a conflict interest to participate in the adjudication of these matters, notwithstanding any conflicts of interest that may exist. Gunthner v. Planning Board of the Borough of Bay Head, 335 N.J. Super. 452 (Law Div. 2000); Allen v. Toms River Regional Board of Educ., 233 N.J. Super. 642, 647 (Law Div.1989).

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September 13, 2010