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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

February 24, 2015 Government Records Council Meeting

John Martinez
Complainant
v.
Morris County Prosecutor's Office
Custodian of Record

Complaint No. 2014-2

At the February 24, 2015 public meeting, the Government Records Council ("Council") considered the February 17, 2015 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that the Complainant, in his request for reconsideration of the Council's September 30, 2014 Final Decision, failed to establish that 1) the Council's decision is based upon a "palpably incorrect or irrational basis"; or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on mistake, and extraordinary circumstances. The Complainant has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in determining the Custodian never received the Complainant's March 9, 2010 OPRA request. D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); *see* Valdes v. NJ Dep't of Education, GRC Complaint No. 2012-19 (April 2013), Bey v. State of New Jersey, Office of Homeland Sec. and Preparedness, GRC Complaint No. 2013-237 (February 2014). Thus, the Custodian's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 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 24th Day of February, 2015

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: February 26, 2015

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Reconsideration
Supplemental Findings and Recommendations of the Executive Director
February 24, 2015 Council Meeting

John Martinez[1] **GRC Complaint No. 2014-2**
Complainant

v.

Morris County Prosecutor's Office[2]
Custodial Agency

Records Relevant to Complaint: Hard copies of:

"Copies of the records which would reflect the application for and/or authorization given to Detectives [C.F.] and [M.R.] of the Morris County Prosecutor's Office to intercept by wire device the oral communications of JOHN MARTINEZ by confidential informer [R.F.] on March 2, 1999. This record(s) is required to exist pursuant to N.J.S.A. 2A:156A-4(c); 2A-156-8; and 2A:156A-9. The records are, or should be, in the possession of the Morris County Prosecutor pursuant to N.J.S.A. 2A:156A-23(d)."

Custodian of Record: Michelle Rhinesmith
Request Received by Custodian: March 9, 2010
Response Made by Custodian: N/A
GRC Complaint Received: January 6, 2014

Background

September 30, 2014 Council Meeting:

At its September 30, 2014 public meeting, the Council considered the September 23, 2014 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:

> The evidence of record supports that the Custodian never received the Complainant's OPRA request and there is no credible evidence in the record to contradict the Custodian's Statement of Information certification. Thus, the Custodian did not unlawfully deny access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. *See* Valdes v. N.J. Dep't of Educ., GRC Complaint No. 2012-19 (April 2013).

[1] No representation listed on record.
[2] Represented by Daniel O'Mullan, Esq. (Morristown, NJ).

Procedural History:

On October 3, 2014, the Council distributed its Order to all parties. On October 17, 2014, nine (9) business days later, the Complainant filed a request for reconsideration of the Council's September 30, 2014 Final Decision, based on mistake and extraordinary circumstances.

Analysis

Reconsideration

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. Further, N.J.A.C. 5:105-2.10(a)–(e) provides that the Council will provide all parties with written notification of its determination regarding the request for reconsideration.

In the matter before the Council, the Complainant submitted his request for reconsideration of the Council's Order dated September 30, 2014 on October 17, 2014, nine (9) days from the issuance of the Council's Order.

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, 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 S. Jersey, Inc. for a Renewal Certificate of Approval to Continue to Construct, Operate and Maintain a Cable Tel. Sys. in the City of Atl. City, Cnty. of Atl., State of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

As the moving party, the Complainant is required to establish either of the criteria set forth above: 1) the Council's decision is based upon a "palpably incorrect or irrational basis"; or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See* Cummings, 295 N.J. Super. at 384.

The Complainant argued that the certified mail receipt is sufficient proof to show that the Custodian received his OPRA request dated March 9, 2010. The Complainant claimed that the

Council "failed to recognize" that the Morris County Mail Room, which stamped his certified mail receipt, receives all mail directed to any Morris County public office. Thus, the Complainant contended, it is the responsibility of the Morris County Mail Room to ensure that all such correspondence reaches its intended recipient.

The Complainant's argument cannot hold against prevailing case law. The Complainant cited Valdes v. NJ Dep't of Education, GRC Complaint No. 2012-19 (April 2013) as analogous to the current circumstances. There, the complainant included a certified mail receipt stamped "State of NJ – Capital Post Office." Additionally, in Bey v. State of New Jersey, Office of Homeland Sec. and Preparedness, GRC Complaint No. 2013-237 (February 2014), the complainant also provided a certified mail receipt stamped "Capital Post Office." In Bey and Valdes, the Council found that there was no way to know that the complainants' OPRA requests reached their intended destinations based solely upon the certified mail receipt, since the Capital Post Office handles incoming mail for all State agencies, and not just the Department of Education or the Office of Homeland Security and Preparedness. The Council therefore held that because the receipts only indicated that the Capital Post Office received the OPRA requests, *vis a vis* the custodians or even their respective agencies, they are insufficient to show that the custodians in fact received the requests.

In the current matter, just as the Capital Post Office is the "hub" for correspondence delivered to State public offices, the Complainant asserted that all mail delivered to Morris County public offices are first received by the Morris County Mail Room. *Ergo*, the Morris County Mail Room is a separate entity from the Morris County Prosecutor's Office. Because the Complainant's certified mail receipt identified only the Morris County Mail Room as the recipient, it too is insufficient to show that the Custodian received the OPRA request.

As the moving party, the Complainant was required to establish either of the criteria set forth above: 1) the Council's decision is based upon a "palpably incorrect or irrational basis"; or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See* Cummings, 295 N.J. Super. at 384. The Complainant failed to establish that the complaint should be reconsidered based on mistake, and extraordinary circumstances. The Complainant has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in determining the Custodian never received the Complainant's March 9, 2010 OPRA request. D'Atria, 242 N.J. Super. at 401; *see* Valdes, GRC No. 2012-39, Bey, 2013-237. Thus, the Complainant's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find the Complainant, in his request for reconsideration of the Council's September 30, 2014 Final Decision, failed to establish that 1) the Council's decision is based upon a "palpably incorrect or irrational basis"; or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on mistake, and extraordinary circumstances. The Complainant has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in determining the Custodian never received

the Complainant's March 9, 2010 OPRA request. D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); *see* Valdes v. NJ Dep't of Education, GRC Complaint No. 2012-19 (April 2013), Bey v. State of New Jersey, Office of Homeland Sec. and Preparedness, GRC Complaint No. 2013-237 (February 2014). Thus, the Custodian's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Samuel A. Rosado
Staff Attorney

Approved By: Dawn R. SanFilippo
Deputy Executive Director

February 17, 2015

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

September 30, 2014 Government Records Council Meeting

John Martinez
Complainant
v.
Morris County Prosecutor's Office
Custodian of Record

Complaint No. 2014-2

At the September 30, 2014 public meeting, the Government Records Council ("Council") considered the September 23, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that the evidence of record supports that the Custodian never received the Complainant's OPRA request and there is no credible evidence in the record to contradict the Custodian's Statement of Information certification. Thus, the Custodian did not unlawfully deny access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. *See* Valdes v. N.J. Dep't of Educ., GRC Complaint No. 2012-19 (April 2013).

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 September, 2014

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: October 3, 2014

STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL

Findings and Recommendations of the Executive Director
September 30, 2014 Council Meeting

John Martinez[1] **GRC Complaint No. 2014-2**
Complainant

v.

Morris County Prosecutor's Office[2]
Custodial Agency

Records Relevant to Complaint: Hard copies of:

"Copies of the records which would reflect the application for and/or authorization given to Detectives [C.F.] and [M.R.] of the Morris County Prosecutor's Office to intercept by wire device the oral communications of JOHN MARTINEZ by confidential informer [R.F.] on March 2, 1999. This record(s) is required to exist pursuant to N.J.S.A. 2A:156A-4(c); 2A-156-8; and 2A:156A-9. The records are, or should be, in the possession of the Morris County Prosecutor pursuant to N.J.S.A. 2A:156A-23(d)."

Custodian of Record: Michelle Rhinesmith
Request Received by Custodian: March 9, 2010
Response Made by Custodian: N/A
GRC Complaint Received: January 6, 2014

Background[3]

Request and Response:

On March 9, 2010, the Complainant submitted an Open Public Records Act ("OPRA") request to Michael M. Rubbinaccio[4] ("Mr. Rubbinaccio") at the Morris County Prosecutor's Office ("MCPO") seeking the above-mentioned records. On May 30, 2012, the Complainant submitted a written letter to Robert A. Bianchi ("Mr. Bianchi") at the MCPO, stating that he had not received a response to his March 9, 2010 OPRA request. There is no evidence in the record demonstrating that the Custodian responded to the Complainant's request.

[1] No legal representation listed on record.
[2] Daniel O'Mullan, Esq. (Morristown, 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 Custodian alleged that Mr. Rubbinaccio was not a prosecutor at the time of the request. *See infra* pg. 2.

Denial of Access Complaint:

On January 6, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant argued that the records sought are required to exist pursuant to statute and that he did not receive a response from the Custodian.

The Complainant included a photocopy of the certified mail return receipt ("receipt") for his OPRA request. The "County of Morris Mail Room" is stamped on the receipt's signature line, and the date of delivery as "March 11, 2010." The receipt also identified the address of the "County of Morris Mail Room" as the same as the Custodian's: P.O. Box 900, Morristown, NJ 07963-0900.

Additionally, the Complainant included a letter he wrote to Mr. Bianchi at the MCPO. In the March 30, 2012 letter, the Complainant informed Mr. Bianchi that he never received a response to his March 9, 2010 OPRA request. Further, the Complainant enclosed a copy of his request in the letter to Mr. Bianchi. The Complainant also claimed the Attorney General's Office informed him that the MCPO likely possessed the records sought.

Statement of Information:

On January 24, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she never received the Complainant's OPRA request. After she received the Denial of Access Complaint, the Custodian certified that she conducted a search for the request, but found nothing responsive.

The Custodian acknowledged the Complainant's certified mail return receipt, but stated that the "Morris Court Mailroom," not the MCPO, stamped the receipt. Moreover, the Custodian certified that at the time the Complainant submitted his request, Mr. Rubbinaccio was not a prosecutor with the MCPO. Finally, the Custodian noted that the current matter comes nearly four (4) years after the Complainant submitted his OPRA request.

Additional Submissions:

On or around February 3, 2014, the Complainant submitted a written letter to the GRC, in response to the Custodian's SOI. The Complainant disputed the Custodian's contention that she never received the Complainant's OPRA request. The Complainant argued that his return receipt and subsequent letter in 2012 are evidence enough that the Custodian received the Complainant's OPRA request.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise

exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Valdes v. N.J. Dep't of Educ., GRC Complaint No. 2012-19 (April 2013), the complainant filed a complaint after not receiving a response to his OPRA request. As part of his Denial of Access Complaint, the complainant included a certified mail return receipt stamped "State of NJ – Capital Post Office." The Council determined that the custodian did not unlawfully deny access to the complainant's OPRA request because same was never received. The Council reasoned that "the Custodian did not sign the receipt and there is no indication that DOE received the request, only that the State received it . . . it is entirely possible that the Custodian never received the OPRA request." Id. at 4. *See also* Bey v. State of New Jersey, Office of Homeland Security & Preparedness, GRC Complainant No. 2013-237 (February 2014) (complainant's certified mail return receipt sufficient only to show that the State received the request, not the custodian).

Here, the Complainant submitted a certified mail return receipt stamped "County of Morris Mail Room." Similar to the analysis in Valdes, the Custodian here did not sign the receipt and there is no evidence in the record refuting her certification. Additionally, the Custodian certified that Mr. Rubbinaccio, the addressee for the OPRA request, was not with the MCPO at the time of submission. Finally, there's no evidence in the record to show that the Custodian received the Complainant's letter dated May 30, 2012.

Therefore, the evidence of record supports that the Custodian never received the Complainant's OPRA request and there is no credible evidence in the record to contradict the Custodian's SOI certification. Thus, the Custodian did not unlawfully deny access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. *See* Valdes, GRC No. 2012-19.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the evidence of record supports that the Custodian never received the Complainant's OPRA request and there is no credible evidence in the record to contradict the Custodian's Statement of Information certification. Thus, the Custodian did not unlawfully deny access to the Complainant's OPRA request. N.J.S.A. 47:1A-6. *See* Valdes v. N.J. Dep't of Educ., GRC Complaint No. 2012-19 (April 2013).

Prepared By: Samuel A. Rosado, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

September 23, 2014