



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

January 30, 2015 Government Records Council Meeting

David Roundtree
Complainant

Complaint No. 2014-177

v.

Morris County
Custodian of Record

At the January 30, 2015 public meeting, the Government Records Council (“Council”) considered the December 9, 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, finds that:

1. The Council determines that the Doctrine of Necessity permits any Council members who may have a conflict of interest to participate in the adjudication of this complaint. Notwithstanding any conflicts of interest that may exist, the Complainant has specifically chosen to adjudicate the instant Denial of Access Complaint in this forum, there is a pressing public need to adjudicate these matters, the Council has unique expertise and experience which cannot be duplicated at any other forum, and the Council could not fulfill its statutory obligation to review and adjudicate this Denial of Access Complaint pursuant to N.J.S.A. 47:1A-7 if its members were required to recuse themselves. *See Sokolinski v. Woodbridge Twp.*, 192 N.J. Super. 101, 106 (App. Div. 1983); *Cranberry Lake Quarry Co. v. Johnson*, 95 N.J. Super. 495, 521 (App. Div. 1967); *Gunthner v. Planning Bd. of the Borough of Bay Head*, 335 N.J. Super. 452 (Law Div. 2000); *Allen v. Toms River Reg’l Bd. of Educ.*, 233 N.J. Super. 642, 647 (Law Div. 1989).
2. Because the dates identified in the Complainant’s Denial of Access Complaint were not supported by the voluminous evidence submitted by both parties and since no denial of access can be gleaned from same, this complaint is without merit and should be dismissed. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-7(e).

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 January, 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 4, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 30, 2015 Council Meeting**

**David Roundtree¹
Complainant**

GRC Complaint No. 2014-177

v.

**Morris County²
Custodial Agency**

Records Relevant to Complaint: N/A

**Custodian of Record: Thomas Zaccone
Request Received by Custodian: N/A
Response Made by Custodian: N/A
GRC Complaint Received: April 23, 2014**

Background³

Request and Response:

On January 2, 2014, the Complainant allegedly submitted an Open Public Records Act (“OPRA”) request to the Custodian.

Denial of Access Complaint:

On April 23, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant alleged that he submitted an OPRA request on “[a]prox.” January 2, 2014 and received a response on “[a]pprox” January 24, 2014. The Complainant also submitted as part of his complaint multiple OPRA requests and e-mail chains between himself and Custodian. However, neither the requests nor the responses conformed to the dates identified by the Complainant. Further, the Complainant did not advance an argument regarding those records to which access was purportedly denied.

Statement of Information:

On July 1, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian

¹ No legal representation listed on record.

² Represented by 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.

certified that he began receiving OPRA requests from the Complainant on June 10, 2013 and has been receiving same up to this date. To this end, the Custodian submitted two (2) bankers' boxes worth of material spanning that time frame.

Additional Submissions:

Subsequent to the filing of the SOI, the Complainant submitted responses via e-mail on July 7, July 8, July 9 and July 15, 2014. These e-mails contained a multitude of attachments to include OPRA requests not relevant to this complaint, arguments about Morris County's internal processes, election and ballot issues, etc.⁴

Analysis

Doctrine of Necessity

OPRA 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.

N.J.S.A. 47:1A-6.

The Ethics Law states, in turn, 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[.]

⁴ The GRC notes that it does not have the authority to adjudicate any extent issues/questions that may arise from either the Denial of Access Complaint process or that may be gleaned from records provided pursuant to OPRA requests, including but not limited to alleged misconduct, ethics violations, misconduct, violations of any other State or Federal statutes, possible failure to adhere to retention schedules, alteration of records, content of records, accuracy of records, disclosure of records otherwise exempt, *etc.* The GRC's sole purview is determining whether a complainant was unlawfully denied access to requested records. N.J.S.A. 47:1A-7(b).

N.J.S.A. 40A:9-22.5(d).

Further, 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. Id. 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 of whether a particular interest is sufficient to disqualify a board member is necessarily factual in nature and depends upon the circumstances in each case. Id. (citing Van Itallie v. Franklin Lakes, 28 N.J. 258, 268 (1958)). Overall, “[t]he 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.” Id. 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)). In general, “[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)). However, “[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. Twp. of East Brunswick, 68 N.J. Super. 435, 448 (App.Div.1961)).

When it is impossible to constitute a quorum, for example, 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. *See* Wyzykowski, 132 N.J. at 528; Griggs, 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 Twp., 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 Reg'l Bd. of Educ., 233 N.J. Super. 642, 647 (Law Div. 1989), 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 the defendant's budget, the council was to consider the matter. 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.

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

[W]ill 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. Id. 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 [would] be denied.” Id. Finally, the court determined that because 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 Bd. 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 present matter, the Complainant filed a Denial of Access Complaint against Morris County for adjudication before the Council. The choice of this forum, as opposed to Superior Court, is the Complainant’s prerogative under N.J.S.A. 47:1A-6. The Council, in turn, has the power to determine if a complaint is outside of its jurisdiction. *See* N.J.S.A. 47:1A-7(e).

Here, the Council notes that two (2) of the four (4) current members are recused from the complaints involving Morris County. However, the Council has unique expertise and experience which cannot be duplicated at any other forum. If these two (2) members were required to recuse themselves from the adjudication of complaints filed against the GRC due to potential conflicts of interest issues, the Council would lack the quorum necessary to fulfill its obligation, both under statute and to citizens of this State, to “receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian.” N.J.S.A. 47:1A-7(b).

Therefore, the Council determines that the Doctrine of Necessity permits any Council members who may have a conflict of interest to participate in the adjudication of this complaint. Notwithstanding any conflicts of interest that may exist, the Complainant has specifically chosen to adjudicate the instant Denial of Access Complaint in this forum, there is a pressing public need to adjudicate these matters, the Council has unique expertise and experience which cannot be duplicated at any other forum, and the Council could not fulfill its statutory obligation to review and adjudicate this Denial of Access Complaint pursuant to N.J.S.A. 47:1A-7 if its members were required to recuse themselves. *See* Sokolinski, 192 N.J. Super. at 106; Cranberry Lake Quarry Co., 95 N.J. Super. at 521; Gunthner, 335 N.J. Super. at 452; Allen, 233 N.J. Super. at 647.

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.

OPRA further provides that “[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may . . . file a complaint with the [GRC] . . .” Id.

Here, the Complainant filed this complaint alleging that he submitted an OPRA request on or about January 2, 2014 and received a response on or about January 24, 2014. As part of the SOI, the Custodian provided, in two (2) bankers’ boxes, a full universe of requests and responses from June 10, 2013 until the date of submission of the SOI. Thereafter, the Complainant provided several more submissions with additional OPRA requests and responses. The GRC reviewed all requests and responses submitted by both parties and were unable to locate either the dates identified by the Complainant. This matter was further complicated by the Complainant’s failure to properly utilize the GRC’s Denial of Access Complaint form to clearly set forth the facts and legal arguments of his complaint.⁵ Ultimately, the GRC could not glean the Complainant’s reason for filing the instant complaint because the voluminous amount of evidence submitted failed to support that the alleged OPRA request and response existed.

Thus, because the dates identified in the Complainant’s Denial of Access Complaint were not supported by the voluminous evidence submitted by both parties and since no denial of access can be gleaned from same, this complaint is without merit and should be dismissed. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-7(e).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

⁵ The GRC advised the Complainant, via e-mail on April 23, 2014, of the confusing nature of his complaints based on form alterations and cutting and pasting exhibits into the middle of the form.

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Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

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

December 9, 2014⁶

⁶ This complaint was prepared for adjudication at the Council's December 16, 2014 meeting, but could not be adjudicated due to lack of quorum.