



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

July 26, 2016 Government Records Council Meeting

Joan and Steven Baroczi
Complainant
v.
NJ State Police
Custodian of Record

Complaint No. 2015-149

At the July 26, 2016 public meeting, the Government Records Council (“Council”) considered the July 19, 2016 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 Complainants were neither the requestor of the records relevant to the complaint nor the requestor’s legal representatives, the Complainants have no standing to pursue an action for unlawful denial of access to said records. Therefore, this complaint is materially defective and must be dismissed. N.J.S.A. 47:1A-6; Maxam (dba The North Country Gazette) v. Bloomfield Twp. Dep’t of Health & Human Serv. (Essex), 2013-302 (October 2014). *See also* DeYoung v. Borough of Folsom (Atlantic), GRC Complaint No. 2015-311 (November 2015); Trump Entm’t, Inc. v. Stockton Univ., Docket No. ATL-L-1048-15 (May 18, 2016).

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 July 26th Day of July, 2016

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: July 29, 2016



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 26, 2016 Council Meeting**

**Joan and Steven Baroczi¹
Complainant**

GRC Complaint No. 2015-149

v.

**NJ State Police²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of the polygraph examination results for M.B.,³ conducted on May 15, 2013, at the New Jersey State Police (“NJSP”) Kingwood Station by Detective Terry Tennant.

Custodian of Record: Marco Rodriguez
Request Received by Custodian: November 5, 2014
Response Made by Custodian: November 10, 2014
GRC Complaint Received: May 28, 2015

Background⁴

Request and Response:

On November 5, 2014, Gaetano M. De Sapio, Esq.,⁵ submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 10, 2014, the Custodian responded in writing, denying access to the responsive record under the criminal investigatory exemption. N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On May 28, 2015, the Complainants filed a Denial of Access Complaint with the Government Records Council (“GRC”). Complainants provided no arguments as to why they disputed the Custodian’s denial of access.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Adam Robert Gibbons.

³ The OPRA request contained the name of a minor, which the GRC is abbreviating to protect the minor’s identity. Additionally, the OPRA request contained a case number that the GRC did not include for the same reason.

⁴ 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.

⁵ In his OPRA request, Mr. De Sapio did not indicate that he was making the request on behalf of Complainants.

Statement of Information:

On June 16, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the subject OPRA request on November 5, 2014. The Custodian certified that his search included making an inquiry in the “Records Management System.” The Custodian affirmed that the System identified a case and provided notes indicating that the NJSP conducted a polygraph test. The Custodian certified that he responded in writing on November 10, 2014, denying access to the responsive record under the criminal investigatory exempt.

The Custodian contended that the responsive record met both prongs of the criminal investigatory exemption: 1) no statute, regulation, executive order, or court decision mandated the creation of polygraph tests; and 2) the record related to a criminal investigation. Specifically, the Custodian affirmed that NJSP conducted a polygraph test of M.B. in response to an investigation into a threatening message left on a bathroom wall a high school. The Custodian also noted that polygraph tests are solely investigative and are not generally admissible as evidence. State v. A.O. 198 N.J. 69, 83 (2008); State v. Kavanaugh, 52 N.J. 7 (1968).

Moreover, the Custodian argued that the record is also exempt under N.J.A.C. 13:94-1.5(a), which exempts access to “law enforcement records pertaining to juveniles charged as a delinquent . . .” The Custodian stated that M.B. was sixteen at the time of the polygraph test; thus, all records pertaining to his criminal investigation are exempt under the foregoing regulation. N.J.S.A. 47:1A-9(a).

Additional Submissions:

On July 21, 2015, Complainants e-mailed the GRC, disputing that the responsive record was still exempt under the criminal investigatory exemption. Complainants argued that Trooper Adam Polhemus made the “investigatory record” public at an August 26, 2013 Board of Education meeting by discussing the results of M.B.’s polygraph test in a disciplinary hearing. Complainants also argued that the criminal case was dismissed in 2013 and that they were never given access to the polygraph results. Complainants noted that their attorney sought the results on three (3) occasions as part of discovery but never received them.

Analysis

OPRA provides that “[a] person who is denied access to a government record by the custodian of the record . . . may . . . file a complaint with the Government Records Council . . . [t]he right to institute any proceeding under this section shall be solely that of the requestor.” N.J.S.A. 47:1A-6 (emphasis added).

In Maxam (dba The North Country Gazette) v. Bloomfield Twp. Dep’t of Health & Human Serv. (Essex), 2013-302 (October 2014), the Council determined that because the complainant was neither the requestor of the records relevant to the complaint nor the requestor’s legal representative, she has no standing to pursue an action for unlawful denial of access pursuant to N.J.S.A. 47:1A-6. See also DeYoung v. Borough of Folsom (Atlantic), GRC Complaint No. 2015-311 (November 2015)(holding that the complainant had no standing to file

a complaint based on another individual's OPRA request); Trump Entm't, Inc. v. Stockton Univ., Docket No. ATL-L-1048-15 (May 18, 2016)(holding that plaintiff had no standing to file an action based on a request made by one of its attorneys without identifying that he submitted the request on behalf of or worked for plaintiff).

Here, Complainants alleged that the Custodian unlawfully denied them records that Mr. DeSapio sought via an OPRA request received on November 5, 2014. There is nothing in the evidence of record to indicate that Ms. DeSapio submitted the request directly on behalf of Complainants. Further, Complainants filed the complaint without legal representation.

The Council's previous decision in Maxam, GRC 2013-302, is applicable here. Specifically, Complainants filed the instant action based on another individual's OPRA request. Further, although decided during the pendency of this complaint, the Council's decision in DeYoung, GRC 2015-311, is instructive because it is exactly on point with the facts here. Ultimately, both OPRA and precedential case law support that only a requestor who was denied access to a government record has standing to pursue an action for unlawful denial of access.

Accordingly, because Complainants were neither the requestor of the records relevant to the complaint nor the requestor's legal representatives, the Complainants have no standing to pursue an action for unlawful denial of access to said records. Therefore, this complaint is materially defective and must be dismissed. N.J.S.A. 47:1A-6; Maxam, GRC 2013-302. *See also* DeYoung, GRC 2015-311; Trump, Docket No. ATL-L-1048-15.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because Complainants were neither the requestor of the records relevant to the complaint nor the requestor's legal representatives, the Complainants have no standing to pursue an action for unlawful denial of access to said records. Therefore, this complaint is materially defective and must be dismissed. N.J.S.A. 47:1A-6; Maxam (dba The North Country Gazette) v. Bloomfield Twp. Dep't of Health & Human Serv. (Essex), 2013-302 (October 2014). *See also* DeYoung v. Borough of Folsom (Atlantic), GRC Complaint No. 2015-311 (November 2015); Trump Entm't, Inc. v. Stockton Univ., Docket No. ATL-L-1048-15 (May 18, 2016).

Prepared By: Frank F. Caruso
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July 19, 2016