



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**March 27, 2018 Government Records Council Meeting**

Larry S. Loigman, Esq.  
Complainant

Complaint No. 2016-84

v.

Lakewood Fire Company No. 1 (Ocean)  
Custodian of Record

At the March 27, 2018 public meeting, the Government Records Council (“Council”) considered the March 20, 2018 Supplemental Findings and Recommendations of the Council Staff 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 should lift the abeyance order and proceed with adjudication of the complaint. Verry v. Franklin Fire Dist. No. 1 (Somerset), 230 N.J. 285 (2017). The Council should thus address whether Mr. Colangelo properly responded to the Complainant’s OPRA request seeking meeting minutes for 2014, 2015, and 2016; financial statements for the same time frame; check registers; and Lakewood Fire Company No. 1’s By-Laws.
2. Lakewood Fire Company No. 1 is not a “public agency” for purposes of OPRA pursuant to Verry v. Franklin Fire Dist. No. 1 (Somerset), 230 N.J. 285 (2017). Based on this, Mr. Colangelo lawfully denied access to the Complainant’s OPRA request because he was under no obligation to respond to an OPRA request submitted directly to the Lakewood Fire Company No. 1. N.J.S.A. 47:1A-6. Further, because no unlawful denial of access occurred, the Council should decline to address the previously deferred knowing and willful issue.
3. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the LFC is not a “public agency” under OPRA in accordance with Verry v. Franklin Fire Dist. No. 1 (Somerset), 230 N.J. 285 (2017), and no unlawful denial of access occurred. Therefore, the Complainant is not a prevailing party and is not entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51.



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 27<sup>th</sup> Day of March, 2018

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: March 29, 2018**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Council Staff  
March 27, 2018 Council Meeting**

**Larry S. Loigman, Esq.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-84**

v.

**Lakewood Fire Company No. 1 (Ocean)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of:

1. Minutes of each meeting (whether membership, executive board, trustees, or line officers) for 2014, 2015, and 2016 (to date of request).
2. Financial statements showing receipts, expenditures, income, or investments for 2014, 2015, and 2016 (to date of request).
3. Check registers showing each check issued for 2014, 2015, and 2016 (to date of request).
4. Lakewood Fire Company No. 1 (“LFC”) By-Laws (including all amendments and revisions).

**Custodian of Record:** Anthony Colangelo  
**Request Received by Custodian:** March 3, 2016  
**Response Made by Custodian:** March 7, 2016  
**GRC Complaint Received:** March 14, 2016

**Background**

**May 23, 2017 Council Meeting:**

At its May 23, 2017 public meeting, the Council considered the May 16, 2017 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. The instant complaint should be held in abeyance until the New Jersey Supreme Court has ruled in Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-196 (Interim Order dated April 29, 2014). Such an action will benefit all parties and give the GRC an adequate opportunity to apply the Supreme Court’s ultimate decision properly to this complaint.

---

<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Alexander Pavliv, Esq., of Pavliv & Rihacek, LLC (Howell, NJ).

2. The Council defers analysis of whether the [Mr. Colangelo] knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the New Jersey Supreme Court’s final ruling.
3. The Council defers analysis of whether the Complainant is a prevailing party, pending the New Jersey Supreme Court’s final ruling.

Procedural History:

On May 24, 2017, the Council distributed its Interim Order to all parties. On August 7, 2017, the Supreme Court majority affirmed the GRC’s decision in part and modified in part. Verry v. Franklin Fire Dist. No. 1 (Somerset), 230 N.J. 285 (2017).

**Analysis**

**Abeyance of Complaint**

At its May 23, 2017 meeting, the Council held the instant complaint in abeyance, pending the outcome of Verry. Thereafter, on August 7, 2017, the Supreme Court released a majority decision affirming Verry, GRC 2013-196 in part and modifying in part. In affirming the GRC’s ruling, the majority Court held that defendant had an obligation to disclose, or obtain from a member fire company and subsequently disclose, those records “necessary to the [defendant’s] performance of its responsibilities.” Id. at 304. The Court reasoned that:

[Defendant] supervises the [Millstone Valley Fire Department (“MVFD”)] and has certain responsibilities under OPRA to provide public access to records relating to that supervision . . . In order for a fire district's commissioners to perform the oversight function expected by the legislative mandate, a fire district must have authority to review basic documents relating to the internal organization and functioning of volunteer squads working with that district. In this instance, the documents requested from the MVFD must be either on file with the District or subject to the District's demand for production.

[Id.]

While the Supreme Court affirmed the Council’s ruling regarding disclosure of the responsive records, the majority disagreed that MVFD was itself a “public agency” for purposes of OPRA and thus modified accordingly.

Accordingly, the Council should lift the abeyance order and proceed with adjudication of the complaint. Verry, 230 N.J. 285. The Council should thus address whether Mr. Colangelo properly responded to the Complainant’s OPRA request seeking meeting minutes for 2014, 2015, and 2016; financial statements for the same time frame; check registers; and LFC’s By-Laws.

## Public Agency

OPRA defines a public agency as:

Any of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority, commission, instrumentality or agency. The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.

[N.J.S.A. 47:1A-1.1.]

In Paff v. N.J. State Firemen's Ass'n, 431 N.J. Super. 278 (June 13, 2013), the Appellate Division reversed a Law Division decision holding that the Firemen's Association ("Association") was not a "public agency" and remanded the complaint to trial court for further proceedings. The Court provided a comprehensive history of the Association, which was established in 1885 by a group of "incorporated local firemen's relief associations, whose mission was to provide assistance to indigent firefighters and their families." Id. at 279. However, the Association "changed over time, as a result of mandatory statutes, Department of Banking and Insurance regulations, and a judicial decision, Szabo v. N.J. State Firemen's Ass'n, 230 N.J. Super. 265 (Ch. Div.1988)." Id. at 280. Notwithstanding that the Court had previously turned away from the "government function" test found in The Times of Trenton Pub. Corp. v. Lafayette Yard Cmty. Development Corp., 368 N.J. Super. 425 (Apr 30, 2004) in favor the "creation" test in Fair Share Hous. Ctr, Inc. v. N.J. State League of Municipalities, 207 N.J. 489 (2011), the Court chose to apply both tests here.

The Firemen's Ass'n, Court noted that, as discussed in League of Municipalities, 207 N.J. 489, OPRA lacked a "government function" test, but that "[w]hile proof of governmental function is not necessary to qualify an entity as a public agency, the Court [in League of Municipalities] did not preclude the possibility that such proof would be relevant and perhaps sufficient to qualify the entity." Id. at 289. See also Sussex Commons Ass'n, LLC v. Rutgers, the State Univ., 210 N.J. 531 (2012) (holding that Rutgers Law Clinic did not perform a government function and was not controlled by either Rutgers or any other government agency). The Court thus determined that the Association was a "public agency" under OPRA, reasoning that it "owes its existence to state law, which authorized its creation, granted it powers, including powers over local associations, and barred the creation of a competing state association." Firemen's Ass'n, 431 N.J. Super. at 290 (citing N.J.S.A. 43:17-41). The Court noted that the Association's financial activities implicated OPRA's aim to shed light on the fiscal affairs of government because it received substantial tax revenues, it had authority to assure those funds were properly spent, and it both disbursed funds and oversaw such disbursement by local groups. Id. The Court further reasoned that the Association served numerous government functions in addition to the receipt and management of

tax revenues, including providing welfare benefits to a significant number of public servants and regulating the activities of other corporate entities. Id. at 291.

Regarding fire districts and member fire companies, the Court addressed their relationship and “public agency” designation in Verry, 230 N.J. 285. There, the Court affirmed the Council’s decision that MVFD’s by-laws and constitution were disclosable. However, the Court shifted the duty of disclosure to the Franklin Fire District No. 1 (“FFD”). The Court reasoned that the FFD was required to obtain and/or disclose records “necessary to the [FFD’s] performance of its responsibilities.” Id. at 304. Thus, the Court concluded that “MVFD was a non-profit association and, while supervised by the [FFD], was not a [‘]public agency[‘] as defined by OPRA.” Id. at 302.

In reaching this conclusion, the Court reasoned that the Legislature only designated fire districts as “a body corporate” in N.J.S.A. 40A:14-70. Based on the omission of “political subdivision” from that statute, the Court concluded that the Legislature did not intend to identify fire districts as political subdivisions, and determined them to be merely instrumentalities. The Court thus viewed member fire companies as an “instrumentality of an instrumentality,” which OPRA does not define as a “public agency.” Id. at 301.

The Court further determined that the contract between the FFD and MVFD established under N.J.S.A. 40A:14-70.1(b) did not establish a relationship falling within the “public agency” definition. Id. The Court held that regardless of which portion of N.J.S.A. 40A:14-70.1(b) applied to MVFD, “neither supports a conclusion that the MVFD itself has become a [‘]public agency[‘] under OPRA, subject directly and independently to OPRA demands.” Id.

In the instant complaint, Mr. Colangelo denied the Complainant’s OPRA request and has subsequently maintained that LFC is not a “public agency” for purposes of OPRA. Conversely, the Complainant contended that LFC was a “public agency” and cited to Stern v. Lakewood Volunteer Fire Dep’t, 2015 N.J. Super. Unpub. LEXIS 255 (February 6, 2015) (aff’d 2016 N.J. Super. Unpub LEXIS 2612 (App. Div. 2016)). However, the GRC is bound by Verry, 230 N.J. 285, and thus the Complainant’s claim is not meritorious.

Further, the Court’s decision in Verry, 230 N.J. 285 controls this complaint as to a fire district member company’s “public agency” status. Specifically, the evidence of record supports that LFC is a member company of the Lakewood Fire District (“LFD”). See Colangelo’s Statement of Information dated April 15, 2016. Further, the evidence of record supports that the Complainant submitted his OPRA request (on behalf of an unidentified client) directly to the LFC, who denied the request asserting that it was not a “public agency.” The Verry Court clarified that the member fire companies do not fall within the definition of a “public agency” because they are an “instrumentality of an instrumentality . . .” Id.

Further, Verry creates a roadmap for individuals seeking to obtain records under OPRA from an volunteer company situated within a fire district. That road map consists of submitting the OPRA request to the fire district, which will then have to determine whether the records sought relate to their supervisory duties over the member fire company. Finally, the fire district must obtain and/or disclose those records falling within their supervisory purview. Here, Verry supports

Mr. Colangelo's denial that the LFC is not a "public agency" directly subject to OPRA. Further, the LFC was not obligated to respond to a direct OPRA request; the Complainant instead should have submitted his OPRA request directly to LFD, who would have then been tasked with obtaining and disclosing records from the LFC where applicable. Thus, the GRC is satisfied that Mr. Colangelo lawfully denied the OPRA request on the basis that the LFC was not a "public agency" under OPRA.

Accordingly, LFC is not a "public agency" for purposes of OPRA pursuant to Verry, 230 N.J. at 301-302. Based on this, Mr. Colangelo lawfully denied access to the Complainant's OPRA request because he was under no obligation to respond to an OPRA request submitted directly to the LFC. N.J.S.A. 47:1A-6. Further, because no unlawful denial of access occurred, the Council should decline to address the previously deferred knowing and willful issue.

### **Prevailing Party Attorney's Fees**

OPRA 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: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . . ; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council . . . . A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

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

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Court held that a complainant is a "prevailing party" if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. Id. at 432. Additionally, the Court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Supreme Court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7<sup>th</sup> ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . ." Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason, that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, 387 N.J. Super. at 429; see, e.g., Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

[Mason at 73-76 (2008).]

The Court in Mason, further held that:

[R]equestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) “a factual causal nexus between plaintiff's litigation and the relief ultimately achieved”; and (2) “that the relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, cert denied (1984).

[Id. at 76.]

The Complainant, an attorney licensed in New Jersey, filed the instant complaint based on an OPRA request submitted on behalf of an unidentified client. Therein, the Complainant requested that the Council reject Mr. Colangelo's argument that the LFC was not a “public agency” for purposes of OPRA and compel disclosure of the requested records. Throughout the pendency of this complaint, Mr. Colangelo maintained that the LFC was not a “public agency” for purposes of OPRA. The Council initially abeyed this complaint to afford the Supreme Court time to decide Verry, 230 N.J. 285, which was released on August 7, 2017. Based on the Court's decision, the GRC has found that Mr. Colangelo's denial of access was lawful because the LFC is not a “public agency” for purposes of OPRA. Thus, the Complainant is not a prevailing party subject to an award of attorney's fees.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters, 387 N.J.



Super. at 432. Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 51. Specifically, the LFC is not a “public agency” under OPRA in accordance with Verry, 230 N.J. 285, and no unlawful denial of access occurred. Therefore, the Complainant is not a prevailing party and is not entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51.

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that:

1. The Council should lift the abeyance order and proceed with adjudication of the complaint. Verry v. Franklin Fire Dist. No. 1 (Somerset), 230 N.J. 285 (2017). The Council should thus address whether Mr. Colangelo properly responded to the Complainant’s OPRA request seeking meeting minutes for 2014, 2015, and 2016; financial statements for the same time frame; check registers; and Lakewood Fire Company No. 1’s By-Laws.
2. Lakewood Fire Company No. 1 is not a “public agency” for purposes of OPRA pursuant to Verry v. Franklin Fire Dist. No. 1 (Somerset), 230 N.J. 285 (2017). Based on this, Mr. Colangelo lawfully denied access to the Complainant’s OPRA request because he was under no obligation to respond to an OPRA request submitted directly to the Lakewood Fire Company No. 1. N.J.S.A. 47:1A-6. Further, because no unlawful denial of access occurred, the Council should decline to address the previously deferred knowing and willful issue.
3. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Specifically, the LFC is not a “public agency” under OPRA in accordance with Verry v. Franklin Fire Dist. No. 1 (Somerset), 230 N.J. 285 (2017), and no unlawful denial of access occurred. Therefore, the Complainant is not a prevailing party and is not entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 51.

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

March 20, 2018



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO Box 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

CHARLES A. RICHMAN  
*Commissioner*

**INTERIM ORDER**

**May 23, 2017 Government Records Council Meeting**

Larry S. Loigman, Esq.  
Complainant

Complaint No. 2016-84

v.

Lakewood Fire Company No. 1 (Ocean)  
Custodian of Record

At the May 23, 2017 public meeting, the Government Records Council (“Council”) considered the May 16, 2017 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:

1. The instant complaint should be held in abeyance until the New Jersey Supreme Court has ruled in Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-196 (Interim Order dated April 29, 2014). Such an action will benefit all parties and give the GRC an adequate opportunity to apply the Supreme Court’s ultimate decision properly to this complaint.
2. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the New Jersey Supreme Court’s final ruling.
3. The Council defers analysis of whether the Complainant is a prevailing party, pending the New Jersey Supreme Court’s final ruling.

Interim Order Rendered by the  
Government Records Council  
On The 23<sup>rd</sup> Day of May, 2017

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: May 24, 2017**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
May 23, 2017 Council Meeting**

**Larry S. Loigman, Esq.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-84**

v.

**Lakewood Fire Company No. 1 (Ocean)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of:

1. Minutes of each meeting (whether membership, executive board, trustees, or line officers) for 2014, 2015, and 2016 (to date of request).
2. Financial statements showing receipts, expenditures, income, or investments for 2014, 2015, and 2016 (to date of request).
3. Check registers showing each check issued for 2014, 2015, and 2016 (to date of request).
4. Lakewood Fire Company No. 1 (“LFC”) By-Laws (including all amendments and revisions).

**Custodian of Record:** Anthony Colangelo  
**Request Received by Custodian:** March 3, 2016  
**Response Made by Custodian:** March 7, 2016  
**GRC Complaint Received:** March 14, 2016

**Background**<sup>3</sup>

**Request and Response:**

On March 3, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request (ostensibly on behalf of an unidentified client) to Anthony Colangelo seeking the above-mentioned records. On March 7, 2016, Mr. Colangelo responded in writing, stating that the LFC is a non-profit organization and not a “public agency” for purposes of OPRA.

**Denial of Access Complaint:**

On March 14, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed Mr. Colangelo’s response

---

<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Alexander Pavliv, Esq., of Pavliv & Rihacek, LLC (Howell, NJ).

<sup>3</sup> 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.

Larry S. Loigman, Esq. v. Lakewood Fire Company No. 1 (Ocean), 2016-84 – Findings and Recommendations of the Executive Director

that the LFC was not a “public agency” under OPRA. The Complainant stated that the Law Division refuted the same argument from LFC in Stern v. Lakewood Volunteer Fire Dep't, 2015 N.J. Super. Unpub. LEXIS 255 (February 6, 2015). The Complainant stated that in Stern, the court held that the LFC and all companies within the Lakewood Fire District (“LFD”) umbrella were subject to OPRA. The Complainant stated that the court reasoned that the companies performed a government function and were under the control of the membership and fiscal control of LFD. The Complainant thus contended that Mr. Colangelo knowingly and willfully denied access to his OPRA request.

#### Statement of Information:

On April 15, 2016, LFC’s Counsel filed an incomplete, unsigned Statement of Information (“SOI”). Therein, Counsel stated that the Complainant, a past LFD Commissioner, was a participant in Stern, 2015 N.J. Super. Unpub. LEXIS 255. Counsel further stated that the records requested are the exact records at issue in Stern. Counsel also took issue with the Complainant’s failure to state that defendants in Stern filed an appeal of the court’s decision. Counsel thus argued that the Complainant submitted the instant complaint in bad faith and is collaterally and judicially estopped because the complaint is identical to Stern.

Counsel next argued that the LFC is not a “public agency” for purposes of OPRA under the “creation test” established in Brooks v. Tabernacle Rescue Squad, 2015 N.J. Super. Unpub. LEXIS 1584 (App. Div. 2015). Counsel asserted that LFC, like the defendant in Brooks, is composed of volunteers, who govern themselves, elect their own officers, and receive substantial financial support from the Township of Tabernacle (more than LFC receives). Counsel argued that based on the foregoing, a similar analysis rejecting the “government function” test should apply here. Counsel noted that the LFC was incorporated long before the LFD, which also supports two (2) professional fire companies with civil service employees.

Counsel contended that, as in Brooks, 2015 N.J. Super. Unpub. LEXIS 1584, the LFC is a non-profit corporation that perform community services and should not be subject to OPRA where those services are similar to government functions but with no direct control by a government entity. Counsel asserted that the LFC and similarly situated volunteer organizations that perform a beneficial community service are not exposed to the burden of OPRA.<sup>4</sup>

#### Additional Submissions:

On April 17, 2016, the Complainant submitted a letter brief to the GRC. Therein, the Complainant refuted LFC Counsel’s argument that he was precluded from filing the instant complaint because he was asked to certify to certain facts in an unrelated court case over a year ago. The Complainant asserted that Counsel provided no supporting case law or evidence to substantiate his claim.

Moreover, the Complainant contended that Counsel erroneously argued that filing an appeal effectively nullified the court’s decision in Stern. The Complainant noted that Stern

---

<sup>4</sup> The GRC returned the incomplete SOI on April 21, 2016, and provided Mr. Colangelo until April 26, 2016, to submit a completed copy. Mr. Colangelo did not respond to the GRC’s correspondence.

Larry S. Loigman, Esq. v. Lakewood Fire Company No. 1 (Ocean), 2016-84 – Findings and Recommendations of the Executive Director

remains in full force. *See* Pressler, *N.J. Court Rules* (Gann 2016), Comment, N.J. Court Rules R. 2:9-5(a) (citation omitted). The Complainant further presumed that the Appellate Division would affirm Stern with little difficulty, based on its prior decision in Verry v. Franklin Fire Dist. No. 1, 2016 N.J. Super. Unpub. LEXIS 569 (App. Div. 2016).

Finally, the Complainant argued that the GRC should not accept LFC's SOI submission because it was incomplete. As an alternative, the Complainant asserted that the GRC should simply decide against the LFC on the merits. The Complainant argued that LFC presented no facts suggesting that Stern, 2015 N.J. Super. Unpub. LEXIS 255, was decided in error; thus, the LFC is a "public agency" that is subject to the provisions of OPRA.

## Analysis

### Abeyance of Complaint

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 Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-196 (Interim Order dated April 29, 2014), the Council adjudicated the issue of whether Millstone Valley Fire Department ("MVFD"), a member volunteer fire company of Franklin Fire District No. 1 ("FFD"), was subject to OPRA. The Council held that MVFD was a "public agency" for purposes of OPRA because it "serve[d] a governmental function under the supervision and control of the Franklin Fire District No. 1 . . ." Id. at 7 (*citing* Paff v. NJ State Firemen's Ass'n, 431 N.J. Super. 278 (App. Div. 2013) *and distinguishing* Carrow v. Borough of Newfield (Gloucester), GRC Complaint No. 2012-111 (February 2013)). The FFD requested reconsideration, which the GRC denied. Verry, GRC 2013-196 (Interim Order dated February 24, 2015). Thereafter, the FFD filed an appeal of the Council's decision, wherein the Appellate Division affirmed and remanded. Verry, 2016 N.J. Super. Unpub. LEXIS 569. However, prior to the Council addressing the complaint on remand, the New Jersey Supreme Court certified the entire matter "on its own motion." 226 N.J. 206 (2016).

Here, the Complainant filed his complaint to challenge Mr. Colangelo's denial, where he asserted that LFC was not a "public agency" for purposes of OPRA. The Complainant argued that such a denial was contrary to the recent trial court's decision in Stern, 2015 N.J. Super. Unpub. LEXIS 255 (*aff'd* 2016 N.J. Super. Unpub. LEXIS 2612 (2016)). In the SOI, LFC's Counsel argued that the facts of this case are related to Brooks, 2015 N.J. Super. Unpub. LEXIS 1584 (holding that the rescue squad was not a "public agency" under OPRA because it did not meet the "creation test" criteria).

The Administrative Procedures Act gives the GRC broad latitude to effectuate the purposes of OPRA. N.J.S.A. 52:14B-1 et seq. In considering all the issues presented, as well as the overriding question of LFC's status as a "public agency," the instant complaint should be held in abeyance, pending the Supreme Court's decision in Verry, GRC 2013-196. This is

notwithstanding that the Appellate Division affirmed by unpublished decision the trial court's decision in Stern, 2016 N.J. Super. Unpub LEXIS 2612. Adjudication of the complaint at this time would likely cause all parties more time, effort, and additional cost than is reasonably necessary because of the Supreme Court's pending decision. Any decision to the contrary would lead to additional litigation via appeals, reconsiderations, *etc.*, and implicates unnecessary costs for all parties. Additionally, by holding the complaint in abeyance, the GRC will avoid unnecessary adjudication and conserve precious public resources. The GRC is thus satisfied that abeyance is the most acceptable course of action at this time for all parties involved.

Accordingly, the instant complaint should be held in abeyance until the Supreme Court has ruled in Verry, GRC 2013-196. Such an action will benefit all parties and give the GRC an adequate opportunity to apply the Supreme Court's ultimate decision properly to this complaint.

### **Knowing & Willful**

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, pending the Supreme Court's final ruling.

### **Prevailing Party Attorney's Fees**

The Council defers analysis of whether the Complainant is a prevailing party, pending the Supreme Court's final ruling.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The instant complaint should be held in abeyance until the New Jersey Supreme Court has ruled in Verry v. Franklin Fire Dist. No. 1 (Somerset), GRC Complaint No. 2013-196 (Interim Order dated April 29, 2014). Such an action will benefit all parties and give the GRC an adequate opportunity to apply the Supreme Court's ultimate decision properly to this complaint.
2. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the New Jersey Supreme Court's final ruling.
3. The Council defers analysis of whether the Complainant is a prevailing party, pending the New Jersey Supreme Court's final ruling.

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

May 16, 2017