



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

February 26, 2020 Government Records Council Meeting

Edwin Sheppard
Complainant
v.
Cape May County
Custodian of Record

Complaint No. 2017-179

At the February 26, 2020 public meeting, the Government Records Council (“Council”) considered the February 19, 2020 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 the Complainant has failed to establish in his request for reconsideration of the Council’s June 25, 2019 Interim Order that either 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 a mistake, fraud or illegality. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. The core of the Complainant’s request for reconsideration is his dispute of the representation of the County. In his motion, the Complainant has documented numerous dissatisfactions and accusations of wrongdoing against the GRC, its staff and their practices. The Complainant’s accusations however, all stem from his dispute of the County’s representation by Mr. Lindsay. The GRC has recommended that examination of the Complainant’s objection to Mr. Lindsay’s counsel requires a legal proceeding before a court. Because the parties in the matters are the same, the GRC recommends that the instant complaint should be referred to OAL in conjunction with Sheppard v. Cape May Cnty., GRC Complaint no. 2016-195 (Interim Order dated May 21, 2019), and Sheppard v. Cape May Cnty., GRC Complaint No. 2019-3 (Interim Order dated April 30, 2019). Thus, the Complainant’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); 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).

Interim Order Rendered by the
Government Records Council
On The 26th Day of February 2020

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 28, 2020

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
Supplemental Findings and Recommendations of the Executive Director
February 26, 2020 Council Meeting

Edwin Sheppard¹
Complainant

GRC Complaint No. 2017-179

v.

Cape May County²
Custodial Agency

Records Relevant to Complaint: Electronic Copies of: “any and all communications between Cape May County [(“County”)] and the Attorney General’s Office regarding HomeCare Specialists [(“HCS”)] and the party responsible to conduct clinical assessments and/or plans of care between 4/27/16 and 10/28/16. This includes copies of any and all documents sent along with the communications.”

Custodian of Record: Elizabeth Bozzelli

Request Received by Custodian: March 3, 2017

Response Made by Custodian: March 8, 2017

GRC Complaint Received: September 8, 2017

Background

June 25, 2019 Council Meeting:

At its June 25, 2019 public meeting, the Council considered the June 25, 2019 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 determined that:

1. This matter should be referred to the Office of Administrative Law (“OAL”) for a determination on whether the Complainant’s objection to representation of the Custodian by Jeffrey R. Lindsay, Esq. is valid. And if so, whether Mr. Lindsay should therefore withdraw or be removed for cause as Counsel for the County in the instant complaint. N.J.A.C. 5:105-1, et seq.; N.J.A.C. 1:1-5.3; Sheppard v. Cape May Cnty., GRC Complaint No. 2016-195 (Interim Order dated May 21, 2019); Sheppard v. County of Cape May, GRC Complaint No. 2019-3 (Interim Order dated April 30, 2019).

¹ No legal representation listed on record.

² Represented by Jeffrey R. Lindsay, Esq. (Cape May Court House, N.J.) Previously represented by James B. Arsenault, Jr., Esq. (Cape May Court House, N.J.)

2. The Council defers analysis of whether the Custodian unlawfully denied access to the responsive records pending the outcome of the Office of Administrative Law's determination on the Complainant's objections to representation.
3. 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 outcome of the Office of Administrative Law's determination on the Complainant's objection to representation.

Procedural History:

On June 25, 2019, the Council distributed its Interim Order to all parties.

On July 11, 2019 the Complainant filed a request for reconsideration of the Council's June 25, 2019 Interim Order based on a mistake, fraud, and illegality.

On December 11, 2019, the Custodian confirmed receipt of the motion for reconsideration. No opposition to the motion has been filed.

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

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's Order dated June 25, 2019 on July 11, 2019, sixteen (16) 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).]

At the core of the Complainant’s request for reconsideration is his dispute with the County’s legal representative, Jeffrey Lindsay, Esq. Complainant is objecting to Mr. Lindsay’s representation of the County in this matter because he alleges that Lindsay violated his privacy interests under OPRA. Complainant also makes various accusations against the GRC and Council staff for improperly handling his complaint as it relates to the counsel issue. Because the GRC has discretionary authority under the Administrative Procedures Act to order an administrative hearing for further development of a factual record in a matter, the referral to the Office of Administrative Law (“OAL”) here for a hearing to review Complainant’s objections to legal representation is appropriate. Thus, no error was committed in the decision to have Complainant’s attorney conduct claims reviewed in the context of an administrating hearing in the OAL.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: either 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 a mistake, fraud, or illegality. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D’Atria, 242 N.J. Super. at 401. Accordingly, 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.

Because the parties and legal issues in this complaint are the same as in Sheppard v. Cape May Cnty., GRC Complaint no. 2016-195 (Interim Order dated May 21, 2019), and Sheppard v. Cape May Cnty., GRC Complaint No. 2019-3, two contested cases which are pending hearing in the OAL presently, this complaint should be consolidated with those cases upon transmittal.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant has failed to establish in his request for reconsideration of the Council’s June 25, 2019 Interim Order that either 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 a mistake, fraud or illegality. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. The core of the Complainant’s request for reconsideration is his dispute of the representation of the County. In his motion, the Complainant has documented numerous dissatisfactions and accusations of wrongdoing against the GRC, it’s staff and their practices. The Complainant’s accusations however, all stem from his dispute of the

County's representation by Mr. Lindsay. The GRC has recommended that examination of the Complainant's objection to Mr. Lindsay's counsel requires a legal proceeding before a court. Because the parties in the matters are the same, the GRC recommends that the instant complaint should be referred to OAL in conjunction with Sheppard v. Cape May Cnty., GRC Complaint no. 2016-195 (Interim Order dated May 21, 2019), and Sheppard v. Cape May Cnty., GRC Complaint No. 2019-3 (Interim Order dated April 30, 2019). Thus, the Complainant's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); 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: Brandon Garcia
Case Manager

January 21, 2019³

³ This complaint was prepared for adjudication at the Council's January 28, 2020 meeting, but could not be adjudicated due to lack of quorum.



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LT. GOVERNOR SHEILA Y. OLIVER
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INTERIM ORDER

June 25, 2019 Government Records Council Meeting

Edwin Sheppard
Complainant

Complaint No. 2017-179

v.

Cape May County
Custodian of Record

At the June 25, 2019 public meeting, the Government Records Council (“Council”) considered the June 18, 2019 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. This matter should be referred to the Office of Administrative Law for a determination on whether the Complainant’s objection to representation of the Custodian by Jeffrey R. Lindsay, Esq., is valid. And if so, whether Mr. Lindsay should therefore withdraw or be removed for cause as Counsel for the County in the instant complaint. N.J.A.C. 5:105-1, et seq.; N.J.A.C. 1:1-5.3; Sheppard v. Cape May Cnty., GRC Complaint No. 2016-195 (Interim Order dated May 21, 2019)
2. The Council defers analysis of whether the Custodian unlawfully denied access to the responsive records pending the outcome of the Office of Administrative Law’s determination on the Complainant’s objection to representation.
3. 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 outcome of the Office of Administrative Law’s determination on the Complainant’s objection to representation.

Interim Order Rendered by the
Government Records Council
On The 25th Day of June 2019

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: June 27, 2019

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**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
June 25, 2019 Council Meeting**

**Edwin Sheppard¹
Complainant**

GRC Complaint No. 2017-179

v.

**Cape May County²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of: “any and all communications between Cape May County [(“County”)] and the Attorney General’s Office regarding HomeCare Specialists [(“HCS”)] and the party responsible to conduct clinical assessments and/or plans of care between 4/27/16 and 10/28/16. This includes copies of any and all documents sent along with the communications.”

Custodian of Record: Elizabeth Bozzelli

Request Received by Custodian: March 3, 2017

Response Made by Custodian: March 8, 2017

GRC Complaint Received: September 8, 2017

Background³

Request and Response:

On March 1, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On March 3, 2017, Michele Morrissey disseminated the subject OPRA request to On March 8, 2017, former County Counsel James B. Arsenault, Jr. (“Mr. Arsenault”), on behalf of the Custodian, responded in writing providing responsive records with redactions. The Custodian asserted that the redactions were made to withhold material protected under either the attorney-client privilege and/or work product doctrine.

On March 13, 2017, the Complainant responded to the Custodian via e-mail, asserting that the redactions should not have been made. The Complainant first asserted that no communications between the County and Deputy Attorney General Labinot Berljolli (“DAG Berljolli”) should

¹ No legal representation listed on record.

² Represented by Jeffrey R. Lindsay, Esq. (Cape May Court House, NJ). Previously represented by James B. Arsenault, Jr., Esq. (Cape May Court House, 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

have been redacted because there was no attorney-client relationship between the parties. Additionally, the Complainant stated that the County was not seeking legal advice from DAG Berljolli, but instead business advice on whether to terminate the HCS contract and potentially testifying. The Complainant asserted that these reasons do not justify redactions. The Complainant also noted that some of the e-mails redacted as containing legal advice copy non-attorneys.

On March 13, 2017, Mr. Arsenault responded to the Complainant. Mr. Arsenault contended that the communications between himself as counsel and various County personnel as well as between himself and DAG Berljolli would qualify under the privilege and/or work product doctrine as he is representing the County as counsel. Mr. Arsenault stated that he stood by the redactions made to the e-mails. The Complainant replied that same day, requesting that Mr. Arsenault spend additional time to review the objections raised in his prior e-mail.

On March 15, 2017, Mr. Arsenault responded to the Complainant. Mr. Arsenault stated that he reviewed the Complainant's objections a second time and maintained that the basis for the redactions are justified. Mr. Arsenault stated that the County stands by its response of March 8, 2017.

On July 26, 2017, the Complainant e-mailed Mr. Arsenault, stating that he received new information regarding the redacted communications. The Complainant stated that he was giving Mr. Arsenault the opportunity to provide the communications without redactions by 5:00 p.m. the next day. The Complainant added that should he not receive the unredacted records within the allotted time, he would file a complaint with the Government Records Council ("GRC").

On July 27, 2017, Mr. Arsenault responded to the Complainant, stating that he was unaware of any new information that would affect the redactions to the provided communications. Mr. Arsenault also stated that he reviewed the responsive records again to determine if any of the redactions could be released. Mr. Arsenault stated that upon review he is confident that each redaction was appropriate under OPRA and prevailing caselaw. Mr. Arsenault also stated that the review revealed that some of the redactions also qualify under the inter-agency or intra-agency advisory, consultative or deliberative ("ACD") material exemption.

Denial of Access Complaint:

On September 8, 2017, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant initially asserted that Mr. Arsenault provided no evidence that any of the redactions would qualify under the ACD privilege. The Complainant contended that the burden of proof lies with Mr. Arsenault to justify the exemptions claimed.

Next, the Complainant argued that there was no attorney-client relationship between Mr. Arsenault and DAG Berljolli, therefore the privilege could not apply. Additionally, the Complainant asserted that the communications between Mr. Arsenault and County employees regarding pertained to a business decision and would be unprotected by the privilege. The Complainant provided three (3) bases for this claim:

The Complainant first argued that under N.J.S.A. 40-1 to -13 (“Title 40”), and the HCS contract, all information and communications should be public. The Complainant asserted that the redactions made to the communications as well as an attachment to an e-mail from a Sarah Maloney pertained to the County’s discussions on HCS’s service issues. Therefore, the Complainant contended that Title 40 and the HCS contract obligated the County to inform HCS of these issues and allow twenty (20) days to correct. The Complainant asserted that this was not done, and thus should be granted full access to e-mail communications that would contain this information. The Complainant asserted that the County should not be allowed to make privileged information that they should have provided long before.

The Complainant next argued that the privilege should not apply because the protection is reserved only for legal advice. The Complainant asserted that Mr. Arsenault is assigning the privilege to any communication he receives because he is licensed attorney. The Complainant noted that in HPD Labs., Inc. v. Clorox Co., 202 F.R.D. 410 (D.N.J. 2001), the court held that, “a non-lawyer’s statements do not automatically become privileged simply because, at some point, that person interacted with or learned from an attorney.” The Complainant also asserted that in Paff v. Cape May Cnty. Prosecutor’s Office, the court claimed that Mr. Arsenault, representing the County, inappropriately applied the privilege to responsive records.⁴ The Complainant also referenced Commodity Futures Trading Comm’n v. Weintraub, 471 U.S. 343 (1985) to contend that business-related communications are not protected under the privilege. The Complainant contended that the County’s discussions on whether to terminate HCS’s contract were business related and not legal related, and therefore do not qualify under the privilege.

Lastly, the Complainant asserted that Mr. Arsenault has previously acknowledged that many of the redacted communications were not privileged. The Complainant referenced Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414 (3d Cir. 1991) to support the argument that the privilege is waived when privilege information is disclosed third parties. The Complainant argued that DAG Berlajolli was a third party, and when Mr. Arsenault shared communications with himself and County personnel, those communications were no longer privileged.

The Complainant argued that Mr. Arsenault did not provide evidence to support the claims of privilege beyond his word. The Complainant argued that in an e-mail to DAG Berlajolli, Mr. Arsenault admitted that most of the redacted e-mails should have been provided unredacted in response to an earlier OPRA request that is the subject of Sheppard v. Cape May Cnty., GRC Complaint No. 2016-195. The Complainant accused Mr. Arsenault of concealing the existence of responsive records from the previous request, and therefore has little credibility in the current matter.

Additionally, the Complainant attached an unredacted copy of an e-mail chain which Mr. Arsenault redacted as part of his response. The Complainant asserted that the text of the e-mail did not qualify for either attorney-client privilege or the work product doctrine. The Complainant argued that he provided Mr. Arsenault several opportunities to review his redactions and correct his errors. The Complainant asserted that Mr. Arsenault’s refusal to do so is evidence of a knowing and willful unlawful denial of access.

⁴ The Complainant did not provide a full citation to this matter and could not be ascertained.

The Complainant also argued that the public interest in providing the records unredacted outweighs any claimed exemption or privilege.

Statement of Information:

On October 11, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on March 3, 2017. The Custodian certified that County personnel searched their inboxes for responsive material. The Custodian also certified that Mr. Arsenault ran a server-wide search for responsive e-mails. The Custodian certified that Mr. Arsenault responded in writing on her behalf on March 8, 2017, providing 196 pages of responsive records, with redactions made to protect attorney-client privilege, work product doctrine, and/or constituted ACD material. N.J.S.A. 47:1A-1.1; Executive Order No. 26 (Gov. McGreevey, 2002) (“EO 26”).

Additional Submissions:

On October 20, 2017, the Complainant submitted a reply to the Custodian’s SOI. The Complainant first argued that the Item No. 9 Index within the SOI is missing information regarding the retention schedule for the requested communications. Next, the Complainant asserted that the matter should fast-tracked because the Custodian failed to put forth evidence supporting the redactions made to the e-mails and because the Custodian failed to refute or deny the arguments made in the Denial of Access Complaint.

On October 23, 2017, Mr. Arsenault e-mailed to the GRC in response to the Complainant’s reply. Mr. Arsenault stated that the County denies that any concession or admission was made regarding the matter, and that the County substantively responded to the Denial of Access Complaint in good faith. The Complainant responded that same day, restating the lack of retention schedule information within the Custodian’s SOI and Mr. Arsenault’s failure to address issue.

On November 14, 2017, the GRC e-mailed the Custodian, requesting that she provide the information missing from the Item No. 9 Index. On November 16, 2017, the Custodian responded in writing, providing a revised Item No. 9 Index containing the retention schedule as requested.

Miscellaneous

While the current matter was pending, the Complainant filed an objection to representation in Sheppard, GRC 2016-195 against the Custodian’s Counsel, Jeffrey R. Lindsay, Esq. (“Counsel”), who was also representing the County in that matter.⁵ N.J.A.C. 5:105-2.3(i). The Complainant asserted that Counsel improperly disseminated personal information to third parties while the matter was being adjudicated. On May 21, 2019, the Council held that the matter should be sent to the Office of Administrative Law (“OAL”) to determine whether the Complainant’s objection to representation should be granted.

⁵ The Complainant also filed an objection to representation in Sheppard v. Cnty. of Cape May, GRC Complaint No. 2019-3 (Interim Order dated April 30, 2019).

Analysis

Objections to Representation

The Administrative Procedures Act (APA or the Act), N.J.S.A. 52:14B-1 to -31, establishes the process and procedures by which administrative agencies carry out their regulatory functions. Administrative agencies possess wide latitude [under the Act] in selecting the appropriate procedures to effectuate their regulatory duties and statutory goals.” St. Barnabas Medical Center v. N.J. Hosp. Rate Setting Comm’n, 250 N.J. Super. 132, 142 (App. Div. 1991); Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313, 333 (1984); In re the Petition By Controlled Cable Corp., 95 N.J. 473, 485 (1984); In re Kallen, 92 N.J. 14, 24–25 (1983); Texter v. Dep’t of Human Serv., 88 N.J. 376, 385 (1982); Bd. of Educ. of City of Plainfield v. Cooperman, 209 N.J. Super. 174, 207 (App. Div. 1986) (modified, 105 N.J. 587, 523 (1987)). Administrative agencies effectuate out their regulatory responsibilities through rulemaking, adjudication of contested cases, and informal administrative action. Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm’n, 234 N.J. 150, 161 (2018); In re Carberry, 114 N.J. 574, 584-85, (1989); In re Unif. Admin. Procedural Rules, 90 N.J. at 93-94 (1982).

GRC regulations promulgated under the APA and OPRA provide “procedures for the consideration of complaints filed pursuant to [OPRA].” N.J.A.C. 5:105-1.1. This includes a process for challenging a complainant’s or custodian’s legal representative. N.J.A.C. 5:105-2.3(i)-(j), N.J.A.C. 5:105-2.4(j)-(k). Specifically:

Objections to a party's representative by another party, and a party's response thereto, to the complaint must be in writing, presented to the Council, served on all parties, and include:

1. The Council's case reference name and number;
2. Clear identification of the representative in question; and
3. A detailed explanation of the reasons for the objections, or conversely the response to such objections.

[N.J.A.C. 5:105-2.3(i).]

A party may respond to any challenge to its representative within five business days of receipt of the challenge.

[N.J.A.C. 5:105-2.3(j).]

Notwithstanding the process set forth above, the remainder of the regulations is silent on the mechanism by which the Council has the authority to render a decision on disqualification of a party’s representative. The Uniform Administrative Procedure Rules address such an issue. Specifically, the OAL may address issues of attorney conduct and disqualify them accordingly:

The Uniform Administrative Procedure Rules specifically address issues of attorney conduct and disqualify them accordingly:

In any case where the issue of an attorney's ethical or professional conduct is raised, the judge before whom the issue has been presented shall consider the merits of the issue raised and make a ruling as to whether the attorney may appear or continue representation in the matter. The judge may disqualify an attorney from participating in a particular case when disqualification is required by the Rules of Professional Conduct or the New Jersey Conflict of Interest Law. If disciplinary action against the attorney is indicated, the matter shall be referred to the appropriate disciplinary body.

[N.J.A.C. 1:1-5.3.]

On January 2, 2019, the Complainant, regarding Sheppard, GRC 2016-195, filed an objection to representation against Counsel. The Complainant asserted that Counsel has twice taken the Complainant's personal contact information from an OPRA request and disseminated same to a third party with no connection with said OPRA request. The Complainant also contended that in response to a request for a status update from the GRC, Counsel copied a non-County employee who had not signed a formal letter of representation and thus had no right to be included in the correspondence. The Complainant asserted that Counsel continued to copy the third party to subsequent correspondence despite the Complainant removing the third party's e-mail address. The Complainant contended that the above actions represented a violation of the Complainant's reasonable expectation of privacy under N.J.S.A. 47:1A-1.

The Complainant asserted that Counsel has not apologized or shown remorse for his actions or acknowledge that said actions were improper. The Complainant therefore asserted that the only remedy is to remove the Counsel as representation to protect his personal information. The Complainant added that the County has other members readily available to replace as representation, therefore the objection will not place an undue burden on the Custodian.

On January 4, 2019, Counsel responded to the Complainant's objection to representation. Counsel asserted that the employee in question was outside counsel representing the County. Counsel contended that the objection was outside the jurisdiction of the GRC under N.J.S.A. 47:1A-7(b). Additionally, Counsel stated that the Complainant's objection was wholly without merit, and even if it were, a motion to disqualify counsel was not an appropriate remedy at law.

On January 6, 2019, the Complainant replied to Counsel's correspondence. The Complainant noted that N.J.A.C. 5:105-2.3(i) specifically allows for an objection to representation. Thus, the Complainant argued that Counsel's claim that the objection was outside the GRC's jurisdiction was baseless.

Next, the Complainant reiterated that N.J.S.A. 47:1A-1 provides protection of personal information contained in government records. The Complainant argued that Counsel has disseminated his personal information on two (2) occasions to third parties who had no apparent connection with his OPRA request. The Complainant noted that the Custodian continued to add a third party to communications between himself, the GRC, and Counsel despite removing the third party's e-mail address in subsequent correspondence.

At its May 21, 2019 public meeting, the Council found that the matter should be sent to the OAL to determine whether to grant the Complainant's objection to representation. In the current matter, the Complainant did not formally object to representation. However, because the parties are the same, the matter should be sent to the OAL in conjunction with Sheppard, GRC 2016-195.

Accordingly, this matter should be referred to the OAL for a determination on whether the Complainant's objection to representation of the Custodian by Jeffrey R. Lindsay, Esq., is valid. And if so, whether Mr. Lindsay should therefore withdraw or be removed for cause as Counsel for the County in the instant complaint. N.J.A.C. 5:105-1, et seq.; N.J.A.C. 1:1-5.3; Sheppard, GRC 2016-195.

Unlawful Denial of Access

The Council defers analysis of whether the Custodian unlawfully denied access to the responsive records pending the outcome of the OAL's determination on the Complainant's objection to representation.

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 outcome of the OAL's determination on the Complainant's objection to representation.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. This matter should be referred to the Office of Administrative Law for a determination on whether the Complainant's objection to representation of the Custodian by Jeffrey R. Lindsay, Esq., is valid. And if so, whether Mr. Lindsay should therefore withdraw or be removed for cause as Counsel for the County in the instant complaint. N.J.A.C. 5:105-1, et seq.; N.J.A.C. 1:1-5.3; Sheppard v. Cape May Cnty., GRC Complaint No. 2016-195 (Interim Order dated May 21, 2019)
2. The Council defers analysis of whether the Custodian unlawfully denied access to the responsive records pending the outcome of the Office of Administrative Law's determination on the Complainant's objection to representation.
3. 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 outcome of the Office of Administrative Law's determination on the Complainant's objection to representation.

Prepared By: Samuel A. Rosado
Staff Attorney

June 18, 2019