



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

February 26, 2020 Government Records Council Meeting

Aakash Dalal
Complainant

Complaint No. 2018-72

v.

Bergen County Prosecutor's Office
Custodian of Record

At the February 26, 2020 public meeting, the Government Records Council ("Council") considered the January 21, 2020 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 complaint should thus be referred to the Office of Administrative Law for a determination on the Complainant's objection to representation and appropriate action as applicable. N.J.A.C. 5:105-1, et seq.; N.J.A.C. 1:1-5.3.
2. For the purpose of efficacy, this complaint should be referred to the Office of Administrative Law for a determination as to whether the Custodian unlawfully denied access to the responsive records. N.J.S.A. 47:1A-6. Should the Office of Administrative Law find that an unlawful denial of access occurred, it shall order disclosure and determine whether the Custodian knowing and willfully denied access to same.

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**

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

**Aakash Dalal¹
Complainant**

GRC Complaint No. 2018-72

v.

**Bergen County Prosecutor's Office²
Custodial Agency**

Records Relevant to Complaint: Hardcopies via regular mail of:

1. All letters, e-mails, or other written communications, dated between March 2, 2012 and present, sent by any Bergen County Prosecutor's Office ("BCPO") employees, including, but not limited to, former Bergen County Prosecutors John Molinelli and Gurbir Grewal, to the Office of Attorney Ethics ("OAE") or any OAE employees regarding Office of Attorney Ethics v. Martin Delaney, Esq.
2. All records memorializing any communications, during and between March 2, 2012 and present, between any BCPO employees, including but not limited to, former Bergen County Prosecutors John Molinelli and Gurbir Grewal, and OAE or any OAE employees regarding Office of Attorney Ethics v. Martin Delaney, Esq.

Custodian of Record: Thomas McGuire

Request Received by Custodian: January 28, 2018

Response Made by Custodian: February 5, 2018

GRC Complaint Received: April 20, 2018

Background³

Request and Response:

On January 24, 2018, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On February 5, 2018, Counsel, on behalf of the Custodian responded in writing, denying access to the request pursuant to N.J.S.A. 47:1A-9. Counsel stated that the Complainant's request seeks documents exempt from disclosure under N.J. Court Rules, R. 1:20-9. Specifically, Counsel stated that R. 1:20-9(a) renders all

¹ No legal representation listed on record.

² Represented by Michael P. Marotta, Esq., of Florio, Perrucci, Steinhardt & Cappelli, LLC (Rochelle, 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.

documents related to the OAE, specifically records of an investigation and documents provided to the OAE, as confidential and not subject to disclosure.

Denial of Access Complaint:

On April 20, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant initially asserted that BCPO illegally transferred the handling of his OPRA request to Counsel, who the Complainant contended was representing Assistant Prosecutor Martin Delaney, Esq. (“AP Delaney”) in the OAE investigation. The Complainant asserted that Counsel did not have the authority to respond to OPRA requests received by BCPO, or that BCPO would be bound by determinations made by him. The Complainant asserted that by delegating the OPRA request to Counsel, the BCPO created a conflict of interest in protecting their colleague over their obligations under OPRA.

The Complainant also asserted that R. 1:20-9 only applies to the OAE Director and does not create a new privilege for custodial agencies. The Complainant also asserted that the rule does not prohibit third parties from disclosing information and records related to attorney ethics proceedings. The Complainant contended that Paff v. Byrnes, 385 N.J. Super. 574, 579-80 (App. Div. 2006), supports the contention that R. 1:20-9(a) could not be claimed by a third party to withhold OAE related records.

The Complainant contended that BCPO violated OPRA and that the GRC should order disclosure of the records. Additionally, the Complainant asserted that the violation was knowing and willful and the Custodian should be sanctioned accordingly.

Statement of Information:

On May 25, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on January 28, 2018. The Custodian certified that the search involved a review of BCPO’s electronic databases by its IT department. The Custodian certified that Counsel responded on his behalf in writing on February 5, 2018.

The Custodian maintained that the denial was lawful pursuant to OPRA’s preservation of exemptions stemming from other state or federal statutes, regulations, or Court rules. N.J.S.A. 47:1A-9. The Custodian asserted that until an ethics investigation is completed, “the disciplinary matter and all written records gather and made pursuant to these rules shall be kept confidential by the Director[.]” R. 1:20-9. The Custodian asserted that the OAE investigation at issue was ongoing as of the date of the SOI. The Custodian thus contended that the documents sought by the Complainant were confidential, citing Paff v. Dir., Office of Atty. Ethics, 399 N.J. Super. 632 (September 28, 2007).

The Custodian also argued that the Complainant’s reliance on Byrnes was misplaced. The Custodian asserted that the Appellate Division held that R. 1:20-9 was inapplicable where the township attorney waived his rights to confidentiality pursuant to a municipal ordinance requiring disclosure as a condition of employment. The Custodian asserted that no such waiver has occurred in this matter, therefore reliance on R. 1:20-9(a) was proper.

The Custodian also asserted that the records were arguably protected from disclosure pursuant to OPRA as part of AP Delaney's personnel records under N.J.S.A. 47:1A-10.

The Custodian added that one of the withheld documents ("Carbone Letter"), qualified as attorney-client privileged communications under N.J.S.A. 47:1A-1.1, as it was written from BCPO's former counsel and addressed to OAE pertaining to the investigation. The Custodian also stated that the Honorable Gurbir S. Grewal, Esq., Bergen County's Prosecutor at the time, AP Delaney, and the Custodian were copied on the letter, and marked confidential.

Regarding the Complainant's request for "records memorializing any communication", the Custodian argued that that portion of the request was overly broad and seeks non-existent records, citing Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012).

The Custodian maintained that the denial of access was lawful, and that even if the GRC disagreed, there was no knowing and willful violation as the Custodian acted in good faith.

Lastly, the Custodian asserted that BCPO did not illegally transfer the handling of the Complainant's OPRA request, as Counsel's firm, "Florio, Perrucci, Steinhardt & Cappelli, LLC" ("FPSC") provides general legal services for BCPO. The Custodian contended that FPSC provided legal advice and occasionally drafted and disseminated OPRA responses on BCPO's behalf. The Custodian asserted that allegations of a conflict of interest were incorrect, asserting that BCPO denied the Complainant's OPRA request, and not AP Delaney's personal representation. Furthermore, the Custodian contended that these allegations were irrelevant to the issue of access to public records.

Additional Submissions:

On June 20, 2018, the Complainant submitted a response to the Custodian's SOI. Initially, the Complainant objected to FPSC's representation in the matter as they also represent AP Delaney in the underlying OAE investigation. The Complainant attached a letter submitted to OAE, where Counsel asserted that FPSC represented AP Delaney in the investigation. The Complainant asserted that R.P.C. 1.10 outlines the rule prohibiting a firm's representation to a client when any one of its attorney's have a conflict of interest with said client. The Complainant argued that FPSC cannot act as AP Delaney's client in an OAE investigation while also providing general services to BCPO, including responses to OPRA requests. The Complainant also contended that as AP Delaney's "personal attorney," he could not respond to an OPRA request where the subject matter of that request pertains to the basis for his representation to AP Delaney.

Additionally, the Complainant contended that BCPO's reliance on R. 1:20-9(a) was misplaced. The Complainant asserted that the Director at OAE held confidentiality privilege, rather than the township holding the records in question. The Complainant also argued that even if R. 1:20-9(a) applied to parties other than the OAE Director, the confidentiality privilege was waived when the Carbone Letter was copied to parties not involved in the OAE investigation. The Complainant asserted that records protected under R. 1:20-9(a), "may be disclosed by the Director if: (1) the respondent has waived or breached confidentiality."

The Complainant asserted that the Custodian failed to show any privileged communications between BCPO's former counsel, who authored the Carbone Letter, and AP Delaney. The Complainant also contended that because the Carbone Letter was sent to OAE, a third party, any claim of attorney-client privilege was waived. The Complainant also asserted that the Honorable Gurbir S. Grewal, Esq. had an opposing interest in the OAE investigation, but was also copied on the Carbone Letter.

The Complainant then contended that the withheld records were not personnel records as defined under N.J.S.A. 47:1A-10, as they were disseminated outside of BCPO. The Complainant contended that records constituting personnel records were those created and maintained by public agencies and officials for internal purposes. The Complainant asserted that because the investigation concerning AP Delaney's misconduct was headed by the OAE and not BCPO, the records created in the course of the investigation were not covered by the personnel records exemption.

Lastly, the Complainant requested that the GRC conduct an *in camera* review of the withheld records to resolve whether they are exempt from disclosure as attorney-client privileged communications and/or personnel records under OPRA.

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. 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 are 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.

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.]

Here, the Complainant has objected to FPSC's representation, asserting that the firm's representation of AP Delaney in an OAE investigation creates a conflict of interest, particularly when the subject of the OPRA request pertains to said investigation. The Custodian responded that FPSC provides BCPO with general legal services, including responding to and disseminating OPRA requests. The Custodian therefore maintained that BCPO denied the Complainant's OPRA request, and not AP Delaney's firm.

To settle this issue, adjudicative facts are needed and are best determined in the context of an administrative hearing. There, an administrative law judge will hear testimony of the parties' witnesses and make credibility determinations based on the respective testimonies. Referral of the matter to the Office of Administrative Law ("OAL") therefore ensures that due process principles will be effectuated.

Accordingly, this complaint should thus be referred to the OAL for a determination on the Complainant's objection to representation and appropriate action as applicable. N.J.A.C. 5:105-1, et seq.; N.J.A.C. 1:1-5.3.

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.

Here, the Complainant argued that the Custodian unlawfully denied him access to the responsive records under the confidentiality provisions for documents created in the course of an OAE investigation. N.J.S.A. 47:1A-9(b); R. 1:20-(a). The Complainant also objected to the claim that the records were exempt under the personnel and attorney-client privilege exemptions. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10. In the SOI, the Custodian contended that he lawfully denied access to the responsive records based on the relevant statutes, court rules, and case law provided for in his response and SOI. However, and for purposes of efficacy, the OAL should address this issue once it has determined the objection to representation issue.

Therefore, and for the purpose of efficacy, this complaint should be referred to the OAL for a determination as to whether the Custodian unlawfully denied access to the responsive records. N.J.S.A. 47:1A-6. Should the OAL find that an unlawful denial of access occurred, it shall order disclosure and determine whether the Custodian knowing and willfully denied access to same.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. This complaint should thus be referred to the Office of Administrative Law for a determination on the Complainant’s objection to representation and appropriate action as applicable. N.J.A.C. 5:105-1, *et seq.*; N.J.A.C. 1:1-5.3.
2. For the purpose of efficacy, this complaint should be referred to the Office of Administrative Law for a determination as to whether the Custodian unlawfully denied access to the responsive records. N.J.S.A. 47:1A-6. Should the Office of Administrative Law find that an unlawful denial of access occurred, it shall order disclosure and determine whether the Custodian knowing and willfully denied access to same.

Prepared By: Samuel A. Rosado
Staff Attorney

January 21, 2020⁴

⁴ This complaint was prepared for adjudication at the Council’s January 28, 2020 meeting, but could not be adjudicated due to a lack of quorum.