



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

May 30, 2023 Government Records Council Meeting

Vincent Cricchio
Complainant

Complaint No. 2021-136

v.

City of Long Branch, Office of Planning and
Zoning (Monmouth)
Custodian of Record

At the May 30, 2023 public meeting, the Government Records Council (“Council”) considered the May 23, 2023 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 the Custodian has failed to establish in her request for reconsideration of the Council’s February 28, 2023 Final Decision 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 Custodian failed to establish that the complaint should be reconsidered based on mistake. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Custodian failed to show that the GRC mistakenly held the responses to the Complainant’s OPRa request were legally insufficient. Thus, the Custodian’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). Thus, the Council’s February 28, 2023 Final Decision remains in effect.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 30th Day of May 2023

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 6, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration

**Supplemental Findings and Recommendations of the Executive Director
May 30, 2023 Council Meeting**

**Vincent Cricchio¹
Complainant**

GRC Complaint No. 2021-136

v.

**City of Long Branch, Office of Planning & Zoning (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. All construction permits for 30 Monmouth Place since 1904 (Block 105 Lot 1)
2. All construction permits for [26] Monmouth Place (Block 105 Lot 19.03)
3. All construction permits for 420 Norwood Ave. from 1906 to 2014 (Block 105 Lot 10.02)
4. All Plats for [26] Monmouth Place (Block 105 Lot 19.02)
5. Most recent plat for 420 Norwood Ave. from 1906 to 2014 (Block 105 to 19.01)

Custodian of Record: Heather Capone

Request Received by Custodian: November 11, 2020

Response Made by Custodian: December 2, 2020; December 8, 2020

GRC Complaint Received: June 30, 2021

Background

February 28, 2023 Council Meeting:

At its February 28, 2023 public meeting, the Council considered the February 21, 2023 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 Custodian's responses to the Complainant's OPRA request were legally insufficient because she failed to respond to each request item contained in the request or assert whether such records exist. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013). The Custodian shall therefore provide the Complainant with a complete response to each request item providing records, provide a specific

¹ No legal representation listed on record.

² Represented by Brian P. Trelease, Esq., of Rainone, Coughlin, Minchello, LLC (Iselin, NJ).

lawful basis for those records to which she is denying access, or stating that no such records exist.

- The Custodian shall comply with conclusion No. 1 above within ten (10) business days from receipt of the Council's Final Decision. In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council's Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**

Procedural History:

On March 6, 2023, the Council distributed its Final Decision to all parties. On March 20, 2023, the Custodian filed a request for reconsideration of the Council's February 28, 2023 Final Decision based on a mistake.

The Custodian contended that the City of Long Branch's ("City") response was not insufficient. The Custodian argued that she e-mailed the Complainant between November 30, 2020 and May 21, 2021 providing responsive records. The Custodian contended she certified in the Statement of Information ("SOI") that the Complainant received all responsive records, and no records were denied. The Custodian argued that it was a mistake to hold that the City's response was insufficient.

On March 21, 2023, the Complainant e-mailed the GRC with copy to the Custodian, stating he stood by his complaint and maintained that the City should provide him with the requested records.

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 Custodian filed the request for reconsideration of the Council's Order dated February 28, 2023 on March 20, 2023, ten business (10) 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).]

Upon review, the Council should deny the Custodian’s request for reconsideration. In what appears to be the last e-mail from the City to the Complainant dated December 8, 2020, the body simply states, “please see attached”, with no indication whether the attached records comprised all remaining responsive records to the Complainant’s request. Pursuant to Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008) and Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013), the failure to respond to each item individually or definitively state that no responsive records exist results in an insufficient response. Whether the Custodian certified to the full response in the SOI is inapposite to whether the pre-complaint responses were sufficient under OPRA. Thus, the Custodian’s request for reconsideration amounts to a disagreement on the merits of the GRC’s decision.

Furthermore, the GRC notes that the Custodian refers to actions and correspondence between the parties while this complaint was in mediation. The GRC once again notes that pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications which occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

As the moving party, the Custodian 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 Custodian failed to establish that the complaint should be reconsidered based on mistake. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D’Atria, 242 N.J. Super. at 401. Specifically, the Custodian failed to show that the GRC mistakenly held the responses to the Complainant’s OPRA request were legally insufficient. Thus, the Custodian’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. Thus, the Council’s February 28, 2023 Final Decision remains in effect.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has failed to establish in her request for reconsideration of the Council's February 28, 2023 Final Decision 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 Custodian failed to establish that the complaint should be reconsidered based on mistake. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Custodian failed to show that the GRC mistakenly held the responses to the Complainant's OPRA request were legally insufficient. Thus, the Custodian'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). Thus, the Council's February 28, 2023 Final Decision remains in effect.

Prepared By: Samuel A. Rosado
Staff Attorney

May 23, 2023



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PHILIP D. MURPHY
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LT. GOVERNOR SHEILA Y. OLIVER
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FINAL DECISION

February 28, 2023 Government Records Council Meeting

Vincent Cricchio
Complainant

Complaint No. 2021-136

v.

City of Long Branch, Office of Planning &
Zoning (Monmouth)
Custodian of Record

At the February 28, 2023 public meeting, the Government Records Council (“Council”) considered the February 21, 2023 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 Custodian’s responses to the Complainant’s OPRA request were legally insufficient because she failed to respond to each request item contained in the request or assert whether such records exist. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013). The Custodian shall therefore provide the Complainant with a complete response to each request item providing records, provide a specific lawful basis for those records to which she is denying access, or stating that no such records exist.
2. **The Custodian shall comply with conclusion No. 1 above within ten (10) business days from receipt of the Council’s Final Decision. In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council’s Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**

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 28th Day of February 2023

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 6, 2023

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 28, 2023 Council Meeting**

**Vincent Cricchio¹
Complainant**

GRC Complaint No. 2021-136

v.

**City of Long Branch, Office of Planning & Zoning (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of:

1. All construction permits for 30 Monmouth Place since 1904 (Block 105 Lot 1)
2. All construction permits for [26] Monmouth Place (Block 105 Lot 19.03)
3. All construction permits for 420 Norwood Ave. from 1906 to 2014 (Block 105 Lot 10.02)
4. All Plats for [26] Monmouth Place (Block 105 Lot 19.02)
5. Most recent plat for 420 Norwood Ave. from 1906 to 2014 (Block 105 to 19.01)

Custodian of Record: Heather Capone

Request Received by Custodian: November 11, 2020

Response Made by Custodian: December 2, 2020; December 8, 2020

GRC Complaint Received: June 30, 2021

Background³

Request and Response:

On November 11, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 30, 2020, the Complainant requested an update on his request. That same day, Deputy Municipal Clerk Mary Moss responded to the Complainant stating that the request was due on December 1, 2020, and the City of Long Branch (“City”) Clerk’s Office was awaiting information from the Planning and Zoning Department.

On December 2, 2020, Zoning Officer Erik Brachman responded on the Custodian’s behalf in writing. Mr. Brachman stated that building a fence did not need a construction permit but did require zoning approval. Mr. Brachman stated he attached a copy of the zoning permit issued for

¹ No legal representation listed on record.

² Represented by Brian P. Trelease, Esq., of Rainone, Coughlin, Minchello, LLC (Iselin, 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.

Vincent Cricchio v. City of Long Branch, Office of Planning & Zoning (Monmouth), 2021-136 – Findings and Recommendations of the Executive Director

the property identified in request item Nos. 2 and 4. That same day, the Complainant replied to Mr. Brachman inquiring when he would receive the remaining records.

On December 8, 2020, Courtney Lopez responded in writing on the Custodian's behalf providing zoning permits for item Nos. 1, 3, and 5 as well as the zoning permit provided on December 2, 2020. On December 9, 2020, the Complainant replied to Ms. Lopez stating there were several records still missing, as none of the provided records were construction permits or plats.

Denial of Access Complaint:

On June 30, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that he was denied access to records that should have been provided. In particular, the Complainant asserted that he did not receive permits and documents dated before 2000 for item No. 1. Further, the Complainant argued that he failed to receive any responsive records for item Nos. 2 through 5.

Statement of Information:⁴

On March 9, 2022, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on November 11, 2020. The Custodian certified that various individuals with the City responded to the Complainant's OPRA request and subsequent inquiries between November 30, 2020, and December 8, 2020.

The Custodian maintained that the Complainant received responsive records to his OPRA request and the GRC should dismiss the matter.

Analysis

Sufficiency of Response

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 Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008), the Council held that ". . . [t]he Custodian's response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5(g)." See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013).

Here, the Complainant's OPRA request sought construction permits for three (3)

⁴ On July 12, 2021, the matter was referred to mediation. On February 23, 2022, the matter was referred back to the GRC for adjudication. Additionally, the Custodian included additional information regarding correspondence between the parties while this complaint was in mediation. Pursuant to the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq., communications that take place during the mediation process are not deemed to be public records subject to disclosure under OPRA. N.J.S.A. 2A:23C-2. All communications which occur during the mediation process are privileged from disclosure and may not be used in any judicial, administrative or legislative proceeding, or in any arbitration, unless all parties and the mediator waive the privilege. N.J.S.A. 2A:23C-4.

Vincent Cricchio v. City of Long Branch, Office of Planning & Zoning (Monmouth), 2021-136 – Findings and Recommendations of the Executive Director

properties, and plats for two (2) properties. On December 2, 2020, Mr. Brachman responded to the Complainant stating that for the property identified in item Nos. 2 and 4, a construction permit was not needed for building a fence. Instead, Mr. Brachman provided a copy of an approved zoning permit for the fence construction. However, Mr. Brachman did not definitively state whether any construction permits existed for the property, nor did he provide a response to the other request items. Furthermore, on December 8, 2020, Ms. Lopez provided zoning permits in connection with the properties identified in item Nos. 1, 3, and 5, but like Mr. Brachman she did not definitively state whether construction permits or plats existed for those properties. Thus, the Custodian's responses to the subject OPRA request were insufficient in accordance with Paff, GRC 2007-272.

As such, the Custodian's responses to the Complainant's OPRA request were legally insufficient because she failed to respond to each request item contained in the request or assert whether such records exist. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff, GRC 2007-272. See also Lenchitz, GRC 2012-265. The Custodian shall therefore provide the Complainant with a complete response to each request item providing records, provide a specific lawful basis for those records to which she is denying access, or stating that no such records exist.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's responses to the Complainant's OPRA request were legally insufficient because she failed to respond to each request item contained in the request or assert whether such records exist. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008). See also Lenchitz v. Pittsgrove Twp. (Salem), GRC Complaint No. 2012-265 (Interim Order dated August 27, 2013). The Custodian shall therefore provide the Complainant with a complete response to each request item providing records, provide a specific lawful basis for those records to which she is denying access, or stating that no such records exist.

2. **The Custodian shall comply with conclusion No. 1 above within ten (10) business days from receipt of the Council's Final Decision. In the circumstance where the records ordered for disclosure are not provided to the Complainant, the Council's Final Decision may be enforced in the Superior Court of New Jersey. N.J. Court Rules, R. 4:67-6; N.J.A.C. 5:105-2.9(c).**

Prepared By: Samuel A. Rosado
Staff Attorney

February 21, 2023