



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 23, 2013 Government Records Council Meeting

Mayor Randy George
Complainant

Complaint No. 2012-127

v.

NJ Department of Environmental Protection
Custodian of Record

At the July 23, 2013 public meeting, the Government Records Council (“Council”) considered the July 16, 2013 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 Complainant has failed to establish in his request for reconsideration of the Council’s May 28, 2013 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 has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. 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 South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 23 Day of July 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 26, 2013

**-STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***Reconsideration*
Supplemental Findings and Recommendations of the Executive Director
July 23, 2013 Council Meeting**

**Mayor Randy George¹
Complainant**

GRC Complaint No. 2012 - 127

v.

**NJ Dept. of Environmental Protection
Custodial Agency**

Records Relevant to Complaint: Electronic copies of the following:

1. Authorization in accordance with the contract between Skylands Manor and the State of New Jersey, where it states that “[a] tenant shall not advertise any activity involving and/or affecting the Premises in any manner or form without first obtaining approval of the Landlord.” When was this permission granted?²
2. Written approval and lease amendment from the Landlord justifying that not operating a restaurant was in the best interest of the public.³
3. Each audit since Frungillo Caterers took over the Manor House at Skylands.

Custodian of Record: Mathew J. Coefer⁴
Request Received by Custodian: April 23, 2012
Response Made by Custodian: April 25, 2012
GRC Complaint Received: April 26, 2012

Background

May 28, 2013: Council Meeting

At its May 28, 2013 public meeting, the Council considered the May 21, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the

¹ No legal representation listed on record.

² The Complainant encloses a copy of an advertisement downloaded from www.groupon.com for Skylands Manor.

³ The Complainant states that he frequents the Skylands Manor and has never seen a restaurant. The Complainant also states that the lease agreement provides: “[t]enant shall provide the services...described in this Lease. Tenant shall not change the scope of the Concession and Center without first submitting to Landlord a comprehensive written justification for and description of the proposed change and obtaining the Landlord’s express written approval thereof. Landlord’s approval shall be based upon the Landlord’s determination that the proposed change is in the best interest of the public...”

⁴ Mark Collier, Esq., Deputy Attorney General, Division of Law & Public Safety, R.J. Hughes, Justice Complex, 25 Market Street, PO Box 093, Trenton, NJ 08625-0093

parties. The Council voted unanimously to adopt the entirety of said findings and recommendations.

The Council, therefore, found that: the Custodian's actions were proper in treating the Complainant's request as a non-OPRA request because the Complainant directed his request to, the wrong State agency, the Office of the Governor and not DEP. See N.J.S.A. 47:1A-5(g) and Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009).

Procedural History

On April 23, 2012, the Complainant submitted an Open Public Records Act ("OPRA") request to the Office of the Governor seeking the above listed records.⁵ On April 25, 2012, the day the request was received, the Custodian responded in writing denying the Complainant's request as an invalid OPRA request because it was directed to the Governor's Office and not the NJ Department of Environmental Protection ("DEP").⁶ The Custodian, however, stated that the DEP would treat the request as a non-OPRA request. On April 25, 2013 in response to Item No. 2, the Custodian identified and disclosed a copy of a lease to the Complainant. The Custodian further stated that NJDEP did not have any records responsive to request Items No. 1 or No. 3.

On May 28, 2013 the Council approved the May 21, 2013 findings and recommendations of the Executive Director. On June 11, 2013, the Council distributed its Final Decision to all parties.

On June 20, 2013 the Complainant filed a request for reconsideration of the Council's May 28, 2013 Final Decision based on a mistake. The Custodian did not file an objection or response Complainant's request for reconsideration.

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).

On June 20, 2013, seven (7) days from the issuance of the Council's May 28, 2013 Order the Complainant filed the request for reconsideration.

⁵ The Complainant copied the New Jersey Department of Environmental Protection, and others, in his request to the Governor's Office.

⁶ The Custodian certified in the Statement of Information that he received the Complainant's request on April 25, 2012.

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, *supra*, 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 South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of his request for reconsideration, the Complainant restates the language of his original request to wit: [p]lease consider this an OPRA request. Further, he takes exception to the Custodian’s comment that “the NJDEP denies this request as an invalid OPRA request.” The Complainant fails to allege any “mistake” on the part of the Council.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: 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. *See Cummings*, *supra*. The Complainant failed to do so. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See D’Atria*, *supra*.

Moreover the Custodian, despite claiming that the request was a non-OPRA request, forwarded all responsive documents in the NJ Department of Environmental Protection’s custody to the Complainant. In so doing, the Custodian satisfied both the letter and the intent of OPRA. The legislative intent of OPRA is that, "government records shall be readily accessible for inspection, copying, or examination by the citizens of the state, with certain exceptions, for the protection of the public interest." Paff v. Perth Amboy City Council, 2006 N.J. Super. Unpub. LEXIS 1306 (*citing* N.J.S.A. 47:1A-1). Having received the requested documents, the Complainant’s request is moot.

The Complainant’s request for reconsideration should be denied because he failed to meet the requisite standards for reconsideration. *See Cummings*, *supra*; D’Atria, *supra*; Comcast, *supra*.

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 May 28, 2013 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 has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. 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 South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Dawn R. SanFilippo, Esq.
Senior Attorney

Approved By: Brandon D. Minde, Esq.
Executive Director

July 16, 2013



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

May 28, 2013 Government Records Council Meeting

Mayor Randy George
Complainant

Complaint No. 2012-127

v.

New Jersey Department of Environmental Protection
Custodian of Record

At the May 28, 2013 public meeting, the Government Records Council (“Council”) considered the May 21, 2013 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’s actions were proper in treating the Complainant’s request as a non-OPRA request because the Complainant directed his request to, the wrong State agency, the Office of the Governor and not Department of Environmental Protection. *See N.J.S.A. 47:1A-5(g) and Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009).*

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 May, 2013

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 11, 2013



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 28, 2013 Council Meeting**

**Mayor Randy George¹
Complainant**

GRC Complaint No. 2012-127

v.

**New Jersey Department of Environmental Protection²
Custodian of Records**

Records Relevant to Complaint: Electronic copies of the following³

1. Authorization in accordance with the contract between Skylands Manor and the State of New Jersey, where it states that “[a] tenant shall not advertise any activity involving and/or affecting the Premises in any manner or form without first obtaining approval of the Landlord.” When was this permission granted?
2. Written approval and lease amendment from the Landlord justifying that not operating a restaurant was in the best interest of the public.⁴
3. Each audit since Frungillo Caterers took over the Manor House at Skylands.

Request Made: April 23, 2012

Response Made: April 25, 2012

GRC Complaint Filed: April 26, 2012⁵

Background⁶

Request and Response:

On April 23, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Office of the Governor seeking the above listed records.⁷ On April 25, 2012, the

¹ No legal representation listed on record.

² Matthew J. Coefer, Custodian of Records. Represented by Deputy Attorney General Mark Collier.

³ The Complainant encloses a copy of an advertisement downloaded from www.groupon.com for Skylands Manor.

⁴ The Complainant states that he frequents the Skylands Manor and has never seen a restaurant. The Complainant also states that the lease agreement states “[t]enant shall provide the services...described in this Lease. Tenant shall not change the scope of the Concession and Center without first submitting to Landlord a comprehensive written justification for and description of the proposed change and obtaining the Landlord’s express written approval thereof. Landlord’s approval shall be based upon the Landlord’s determination that the proposed change is in the best interest of the public...”

⁵ The GRC received the Denial of Access Complaint on said date.

⁶ 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.

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same business day following receipt of said request, the Custodian responded in writing denying the Complainant's request as an invalid OPRA request because it was directed to the Governor's Office and not the NJ Department of Environmental Protection ("DEP").⁸ The Custodian also states that the DEP will treat this request as a non-OPRA request on the basis that the matter is germane to DEP's records. The Custodian further states that NJDEP does not have any records responsive to request Item No. 1 or No. 3. Lastly, the Custodian states that DEP does maintain a copy of the lease agreement responsive to request Item No. 2. On April 25, 2012, the Custodian disclosed a copy of the responsive lease agreement in a separate e-mail.

Denial of Access Complaint:

On April 26, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserts that he wrote a letter to the Governor's Office stating "please consider this an OPRA request." The Complainant disputes the Custodian's response to his request which states that "the NJDEP denies this request as an invalid OPRA request." The Complainant contends that it is hard to believe that the responsive records do not exist and, if they do not exist, then an investigation should be launched as to why such records do not exist.

Statement of Information:

On May 18, 2012, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that the NJDEP received the Complainant's request on April 25, 2012. The Custodian also certifies that the DEP was an agency copied on the request that was directed to the Office of the Governor. The Custodian further certifies that the request was referred from the DEP's Office of the Commissioner to the Office of Record Access. The Custodian additionally certifies that he contacted Ms. Marci Green of the DEP's Office of Leases to discuss the request and identify any responsive records. The Custodian asserts that after reviewing the request, the Complainant sought four (4) records: 1) copy of the Advertisement Authorization; 2) copy of the written approval justifying restaurant and change proposal; 3) copy of the Amended Lease Agreement and 4) copy of each DEP Audit since Frungilio Caterers took over the Manor.

The Custodian certifies that Ms. Green informed him that DEP only has a copy of the amended lease agreement responsive to request Item No. 2 and that the other requested records do not exist. The Custodian certifies that on April 25, 2012, the Custodian issued a Government Records Request Form response to the Complainant's request. The Custodian argues that DEP does not consider the Complainant's request to be a valid OPRA request because it was not directed to the DEP.

The Custodian also argues that "a request for access to a government records shall be in writing, hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian." N.J.S.A. 47:1A-5(g). The Custodian contends that the Complainant's

⁷ The Complainant copies the New Jersey Department of Environmental Protection in his request to the Governor's Office.

⁸ The Custodian certified in the Statement of Information that he received the Complainant's request on April 25, 2012.

Mayor Randy George v. New Jersey Department of Environmental Protection, 2012-127 – Findings and Recommendations of the Executive Director

request clearly was addressed to the Office of the Governor, a distinct agency and authority. The Custodian certifies that his response denied the request as an invalid OPRA request and cited that the DEP will treat the request as a non-OPRA request. The Custodian certifies that the DEP does not have responsive records for request Item Nos. 1 and 3. The Custodian also certifies that the record responsive to request Item No. 2 was e-mailed to the Complainant on April 25, 2012.

Analysis⁹

Valid OPRA Request

OPRA provides “[a] request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian.” N.J.S.A. 47:1A-5(g).

In Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), the Appellate Division held that although requestors shall continue to use public agencies’ OPRA request forms when making requests, no custodian shall withhold such records if the written request for such records, not presented on the official form, contains the requisite information prescribed in the section of OPRA requiring custodians to adopt a form. *Id.* In effect, this permits requesters to write their own correspondence that requests records from a custodian, as long as the request properly invokes OPRA.

Furthermore, Renna holds that “where the requestor fails to produce an equivalent writing that raises issues as to the nature or substance of the requested records, the custodian may require that the requestor complete the form generated by the custodian pursuant to N.J.S.A. 47:1A-5(g).” “A request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian.” *Id.*

On April 23, 2012, the Complainant submitted an OPRA request to the Office of the Governor seeking records related to the Skylands Manor. The Complainant copied DEP on his OPRA request. The Custodian responded to the Complainant’s OPRA request stating that he will treat the Complainant’s request as a non-OPRA request because it was directed to the Office of the Governor and not DEP. The Custodian argued in the SOI that the Complainant’s request was invalid because it was clearly directed to the Office of the Governor and not DEP.

OPRA states that a request shall be conveyed to the appropriate custodian. Here, although the Complainant copied DEP on his request, the Complainant’s OPRA request was clearly directed to the Office of the Governor and not DEP. The Complainant’s copying of DEP on his request to the Office of the Governor did not direct his request to DEP. If the Complainant sought records from DEP, he should have filed his OPRA request with that state agency.

⁹ There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

Therefore, the Custodian's actions were proper in treating the Complainant's request as a non-OPRA request because the Complainant directed his request to, the wrong State agency, the Office of the Governor and not DEP. See N.J.S.A. 47:1A-5(g) and Renna, supra.

In his Denial of Access Complaint, the Complainant requested the Council to investigate why the responsive records to his request do not exist. However, the Council does not have the authority to conduct such investigations as to what records should exist. See N.J.S.A. 47:1A-7(b), which delineates the Council's powers and duties, the GRC does not have the authority to regulate the manner in which a Township maintains its files or which records a Township must maintain. See Kwanzaa v. Dept of Corrections, GRC Complaint No. 2004-167 (March 2005) (the GRC does not have authority over the content of a record); Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004) (the GRC does not have the authority to adjudicate the validity of a record); Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003)(the integrity of a requested record is not within the GRC's authority to adjudicate); Toscano v. NJ Dept of Labor, GRC Complaint No. 2005- 59 (September 2005) (the GRC does not have authority over the condition of records provided by a Custodian).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian's actions were proper in treating the Complainant's request as a non-OPRA request because the Complainant directed his request to, the wrong State agency, the Office of the Governor and not DEP. See N.J.S.A. 47:1A-5(g) and Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009).

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

May 21, 2013