



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

June 28, 2022 Government Records Council Meeting

Edwin Sheppard
Complainant
v.
County of Cape May
Custodian of Record

Complaint No. 2019-3

At the June 28, 2022 public meeting, the Government Records Council (“Council”) considered the June 21, 2022 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 because the Complainant notified the Office of Administrative Law on June 1, 2022 that he would not be participating in the hearing as he considered it “illegal” and thereafter failed to submit exceptions to the GRC in a timely manner, the Council should adopt the conclusion of the Honorable Catherine A. Tuohy, ALJ, in her June 2, 2022 Initial Decision, which provided “. . . the matter should be dismissed as [Complainant] has abandoned his denial of access complaint . . .”

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 June 2022

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 30, 2022



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 28, 2022 Council Meeting**

**Edwin Sheppard¹
Complainant**

GRC Complaint No. 2019-3

v.

**County of Cape May²
Custodial Agency**

Records Relevant to Complaint:

Item number 1: “Disbursements of \$32,000 in grant funds.”

Item number 2: “Disbursements of \$14,000 in grant funds.”

Item number 3: “Disbursements of \$47,000 in grant funds.”

Custodian of Record: Elizabeth Bozzelli

Requests Received by Custodian: April 23, 2018

Response Made by Custodian: May 2, 2018

GRC Complaint Received: January 3, 2019

Background

April 30, 2019 Council Meeting:

At its April 30, 2019 public meeting, the Government Records Council (“Council”) considered the April 23, 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, found that

[T]his complaint should be referred to the Office of Administrative Law for a determination of whether the Complainant’s objections to representation of the Custodian in this matter by Jeffrey R. Lindsay, Esquire, is valid, and if so, whether Mr. Lindsay should therefore withdraw or be removed for cause as counsel for the County of Cape May in the instant complaint. Moreover, based on the conflicting evidence in this matter, the GRC is unable to determine whether the Custodian unlawfully denied access to the requested records. As such, this complaint should also be referred to the Office of Administrative Law for a hearing to resolve the facts and determine whether the Custodian unlawfully denied access to the records relevant to the complaint, and if so, to order disclosure of said records and determine whether the Custodian and/or the Custodian’s Counsel knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality

¹ No legal representation listed on record.

² Represented by Russell L. Lichtenstein, Esq., Cooper Levenson (Atlantic City, NJ).

of the circumstances and is/are therefore personally subject to a civil penalty pursuant to N.J.S.A. 47:1A-11.

Procedural History

On May 2, 2019, the Council distributed its Interim Order to the parties. On September 4, 2019, the GRC transmitted the complaint to the Office of Administrative Law (“OAL”).

On July 30, 2020, the Honorable Kathleen M. Calemno, Administrative Law Judge (“ALJ”), rendered an Order on Motion Objecting to Representation, wherein she “**CONCLUD[ED]** that Jeffrey R. Lindsay should be recused from further participation in this matter,” and “**ORDER[ED]** that [the Complainant’s] objection to representation claim is **GRANTED**, but only to the extent that recusal of counsel for the custodian is appropriate for [the Complainant’s] Denial of Access Complaint.”

On February 19, 2021, the Honorable John S. Kennedy, ALJ, rendered an Order on Motion Objecting to Representation, wherein he “**CONCLUD[ED]** that Russell Lichtenstein, Esq., should be recused from further participation in this matter. If Lindsay should be recused for supplying Lichtenstein with [the Complainant’s] personal information, then Lichtenstein should be recused for receiving it.” ALJ Kennedy “**ORDER[ED]** that [the Complainant’s] objection to Mr. Lichtenstein’s representation of [the County of Cape May (“County”)] is **GRANTED**, but only to the extent that recusal of counsel for the custodian is appropriate in the pending appeal.”

On March 23, 2021, the Honorable Ellen Bass, Acting Director and Chief ALJ, rendered a Final Order on Interlocutory Review of Order Objecting to Representation, wherein she “**ORDERED** as follows: [t]he request that I reverse Judge Kennedy’s prior order is **GRANTED**. The question of whether Mr. Lichtenstein is a potential witness in this matter, and whether his recusal is warranted on that basis, is **REMANDED** to Judge Kennedy for further consideration, including receipt of a proper proffer of the need and relevancy of his testimony.”

On October 27, 2021, the Honorable Catherine A. Tuohy, ALJ, rendered an Order on Remand of Motion Objecting to Representation, wherein she “**CONCLUD[ED]** that [the Complainant] has not made a sufficient proffer that Mr. Lichtenstein’s testimony is relevant and probative of the issues presented in this case.” ALJ Tuohy “**ORDER[ED]** that [the Complainant’s] request to disqualify Mr. Lichtenstein as counsel for [the County] for being a witness in this case is **DENIED**, as Mr. Lichtenstein’s testimony is not probative and relevant to these proceedings.”

On February 11, 2022, ALJ Tuohy issued a Prehearing Order which, *inter alia*, scheduled a plenary hearing on June 1, 2022, at 9:30 a.m. via Zoom.

On April 27, 2022, ALJ Tuohy rendered an Order on Motion to Extend Discovery, Motion to Compel Discovery and Motion for Sanctions. ALJ Tuohy “**ORDERED** as follows: [the Complainant’s] motion for a discovery conference and an order to extend discovery is **DENIED**; [the County’s] motion to compel [the Complainant] to answer written discovery propounded on November 5, 2021, is **DENIED**; and [the Complainant’s] request for sanctions is **DENIED**.”

On May 31, 2022, ALJ Tuohy rendered an Order Granting Motion to Quash Subpoena and Denying Motion for Mistrial. ALJ Tuohy “**ORDERED** that [the County’s] motion to quash the subpoenas is **GRANTED**; and [the Complainant’s] motion for a mistrial is **DENIED**.”

On June 2, 2022, ALJ Tuohy rendered an Initial Decision. ALJ Tuohy “**CONCLUD[ING]** that the matter should be dismissed as [the Complainant] has abandoned his denial of access complaint and direct the Clerk to return the matter to the transmitting agency.” ALJ Tuohy thus “**ORDERED** that the Clerk return this matter to the GRC for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).”³

Analysis

Administrative Law Judge’s Initial Decision

“The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility.” In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989) (*certif. denied* 121 N.J. 615 (1990)). Therein, the court found that “. . . the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility.” The Appellate Division affirmed this principle, underscoring that, “under existing law, the [reviewing agency] must recognize and give due weight to the ALJ’s unique position and ability to make demeanor-based judgments.” Whasun Lee v. Bd. of Educ. of the Twp. of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. “When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ’s credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole.” Cavalieri v. Bd. of Tr. of Pub. Employees Ret. Sys., 368 N.J. Super. 527, 537 (App. Div. 2004).

The ultimate determination of the agency and the ALJ’s recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep’t of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings “is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor.” *Id.* at 443. Additionally, the sufficiency of evidence “must take into account whatever in the record fairly detracts from its weight”; the test is not for the courts to read only one side of the case and, if they

³ No party filed written exceptions in a timely manner. However, on June 15, 2022, at 7:09 p.m., the Complainant transmitted an e-mail to several employees of the OAL and the GRC. The purpose of the e-mail was ostensibly to ask if the ALJ’s Initial Decision had been transmitted to the parties because the Complainant asserted that he had not been notified by either the OAL or the GRC that the Interim Decision was transmitted to the GRC. The Complainant stated, “. . . [t]he clock does not start until I’m notified, people.” The Complainant used very disrespectful and insulting language clearly intended to be hurtful and infused the e-mail with unsubstantiated allegations which the GRC will not address. The Complainant also reaffirmed his refusal to have participated in the June 1, 2022 OAL hearing. The Complainant attached to the e-mail a copy of a “Motion for Stay Pending Appeal” dated May 21, 2002, and a letter addressed to the ALJ dated June 1, 2022, informing the ALJ that he refused to participate in the OAL hearing being held that date.

find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent's Hospital v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

On June 2, 2022, the Honorable Catherine A. Tuohy, ALJ, issued an Initial Decision in this matter. ALJ Tuohy's June 2, 2022 Initial Decision, set forth in full as "Exhibit A," found that:

This matter was scheduled for a hearing via Zoom on June 1, 2022, at 9:30 a.m. Petitioner was aware of the hearing date and emailed this tribunal at 9:30 a.m. the morning of June 1, 2022, that he would not be participating in the hearing as he considered it "illegal." Petitioner did not appear for the Zoom hearing. Respondent appeared with witnesses in attendance.

Accordingly, I **CONCLUDE** that the matter should be dismissed as petitioner has abandoned his denial of access complaint and direct the Clerk to return the matter to the transmitting agency.⁴

[Id. at 6.]

Here, ALJ Tuohy found that this complaint was scheduled for a hearing via Zoom on June 1, 2022, at 9:30 a.m. and that no stay of the proceedings had been issued. ALJ Tuohy also found that prior to the scheduled hearing, the Complainant e-mailed the OAL stating that the planned hearing was "illegal," and he would not "legitimized [the] illegal proceedings by participating in them." ALJ Tuohy also found that the Complainant did not appear for said hearing. ALJ Tuohy's conclusions are aligned and consistent with the submitted facts. As such, the GRC is satisfied that it can ascertain which facts ALJ Tuohy accepted and finds that those facts provide a reasonable basis for ALJ Tuohy's conclusions.

Therefore, because the Complainant notified the OAL on June 1, 2022 that he would not be participating in the hearing as he considered it "illegal" and thereafter failed to submit exceptions to the GRC in a timely manner, the Council should adopt the conclusion of the Honorable Catherine A. Tuohy, ALJ, in her June 2, 2022 Initial Decision, which provided ". . . the matter should be dismissed as [Complainant] has abandoned his denial of access complaint . . ."

Conclusions and Recommendations

The Executive Director respectfully recommends that because the Complainant notified the Office of Administrative Law on June 1, 2022 that he would not be participating in the hearing as he considered it "illegal" and thereafter failed to submit exceptions to the GRC in a timely manner, the Council should adopt the conclusion of the Honorable Catherine A. Tuohy, ALJ, in her June 2, 2022 Initial Decision, which provided ". . . the matter should be dismissed as [Complainant] has abandoned his denial of access complaint . . ."

Prepared By: John E. Stewart

June 21, 2022

⁴ The ALJ's **ORDER** was only pertinent to the OAL's Clerk, directing the Clerk to return the complaint back to the GRC for disposition.

EXHIBIT A



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. GRC 12470-19

AGENCY DKT. NO. 2019-3

EDWIN SHEPPARD,

Petitioner,

v.

COUNTY OF CAPE MAY,

Respondent.

No appearance by Edwin Sheppard, petitioner, pro se

Russell L. Lichtenstein, Esq., for respondent (Cooper Levenson, P.A. attorneys)

Record Closed: June 2, 2022

Decided: June 2, 2022

BEFORE **CATHERINE A. TUOHY, ALJ:**

STATEMENT OF THE CASE

Petitioner, Edwin Sheppard, (Sheppard), filed a denial of access complaint against the respondent, Cape May County, pursuant to N.J.S.A. 47:1A-1 et seq., the New Jersey Open Public Records Act (OPRA.) At issue is whether respondent knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

PROCEDURAL HISTORY

On January 3, 2019, petitioner filed a denial of access complaint with the Government Records Council (GRC.) During its meeting on April 30, 2019, the GRC found that the complaint should be referred to the Office of Administrative Law (OAL) for a fact-finding hearing to determine whether petitioner's objection to the representation of the custodian, Jeffrey Lindsay, Esq. was valid and whether there was a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. The GRC transmitted the complaint to the OAL, where it was filed on September 9, 2019, as a contested case pursuant to N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52: 14F-1 to 13.

By order, dated July 30, 2020, Administrative Law Judge (ALJ) Kathleen Calemno recused Jeffrey Lindsey, Esq. from further participation in the denial of access complaint based on an appearance of impropriety standard. Following the substitution of attorney of Russell Lichtenstein, Esq. of the Cooper Levenson law firm, for the County, Judge Calemno recused herself due to a conflict with his firm. The file was reassigned to ALJ John Kennedy. Petitioner then moved for the recusal of Russell Lichtenstein as counsel. By order, dated February 19, 2021, Judge Kennedy disqualified Mr. Lichtenstein based on an appearance of impropriety. Mr. Lichtenstein filed for interlocutory review of Judge Kennedy's order. By order, dated March 23, 2021, the Honorable Ellen Bass, Acting Director, reversed the order of Judge Kennedy as to the disqualification and remanded the matter for further consideration of whether Mr. Lichtenstein would be a fact witness. After Judge Kennedy's appointment to the Superior Court, the matter was assigned to me. A telephone conference was conducted on September 21, 2021, to discuss the proffer submissions. Petitioner submitted his proffer by email dated September 22, 2021. Mr. Lichtenstein responded by email letter, dated September 27, 2021.

By order, dated October 27, 2021, petitioner's request to disqualify Mr. Lichtenstein as counsel for respondent for being a witness in the case was denied as Mr. Lichtenstein's testimony was not probative and relevant to these GRC proceedings. Mr. Lichtenstein did not have anything to do with the production of any of the records in response to the

OPRA requests and was not involved in the preparation of the statement of information submitted.

By email communication sent December 16, 2021, at 9:48 p.m. petitioner Edwin Sheppard sent the following:

“Notice to Judge Tuohy to Preserve Evidence

Ed Sheppard was once forced to report members of the Tuohy family for creating a hostile work environment. All parties on this communication are hereby given notice to preserve all documents, phone records, emails, faxes, transcripts, and all other types of records, both personal and professional, related to or impacted by, or influenced by Ed Sheppard’s mentioned reporting of members of the Tuohy family. This includes, but is not limited to, all conflict-of-interest paperwork and/or disclosures Judge Tuohy may or may not have filed with the OAL prior to her accepting this case on her docket.”

In a telephone prehearing conference with the parties conducted on January 4, 2022, I advised Mr. Sheppard that I did not know what he was referring to in his “Notice to Preserve Evidence” but if he was seeking my recusal, he should file a motion supported by the requisite proofs in support of same. Mr. Sheppard indicated he would need twenty-one days, but if he needed thirty days, I would allow it. Mr. Sheppard did not file a motion for my recusal. Therefore, a prehearing order was issued.

A Prehearing Order (PHO) was entered February 11, 2022, directing that all discovery be completed by April 14, 2022. A plenary hearing was scheduled for June 1, 2022, at 9:30 a.m. via Zoom technology and a prehearing telephone conference was scheduled for May 16, 2022, at 3:00 p.m.

Petitioner emailed a motion April 13, 2022, at 11:16 p.m. and received April 14, 2022, requesting a discovery conference and order to extend discovery. Respondent on April 19, 2022, emailed a motion to compel petitioner to respond to written discovery propounded on November 5, 2021. Petitioner filed a response to same and moved for sanctions via email dated April 20, 2022. No good cause was shown as to why the discovery end date should be extended. More than two months had passed since the

PHO of February 11, 2022, was entered. Neither party took any action to bring outstanding discovery issues to the attention of this tribunal until the discovery end date of April 14, 2022, and thereafter. Therefore, petitioner's motion for a discovery conference and an order extending discovery was untimely, as was respondent's motion to compel petitioner to respond to discovery. Although petitioner also moved for sanctions against respondent, he provided no documentation in support of same. By order, dated April 27, 2022, petitioner's motion for a discovery conference and an order to extend discovery was denied; respondent's motion to compel petitioner to answer written discovery propounded on November 5, 2021, was denied; and petitioner's request for sanctions was denied. The order further directed that the matter would proceed as set forth in the PHO of February 11, 2022.

By emailed letter, dated May 5, 2022, petitioner filed a request for interlocutory review with Judge Bass. By emailed letter, dated May 17, 2022, Judge Bass advised petitioner that pursuant to N.J.A.C. 1:1 – 14.10 Motions for Interlocutory Review on procedural matters such as discovery should be made to the agency head and are not reviewable by her as director. Judge Bass further indicated to petitioner that "The tone of the remainder of your letter is so insulting and disrespectful to both Judge Tuohy and myself that I will not dignify it with a response."

By emailed letter, dated May 26, 2022, petitioner sought a stay from Judge Bass of her order of May 17, 2022, pending appellate review of that order. It is unknown whether petitioner has sought relief in the Appellate Division.

Respondent filed an email motion to quash purported subpoenas issued to more than fifteen individuals sent May 27, 2022. Petitioner filed emailed opposition thereto on May 31, 2022. Petitioner filed an email motion for a mistrial on May 31, 2022. By order, dated May 31, 2022, respondent's motion to quash the subpoenas was granted and petitioner's motion for a mistrial was denied. The order further directed that the matter would proceed to a hearing on June 1, 2022.

At 9:23 a.m. on June 1, 2022, petitioner sent an email to this tribunal indicating that the planned hearing at 9:30 a.m. was “illegal” and that he would not “legitimize these illegal proceedings by participating in them.”

Mr. Sheppard failed to appear via Zoom at the hearing. Respondent appeared with witnesses in attendance. Respondent requested that the matter be dismissed for petitioner’s refusal to participate.

FACTUAL FINDINGS

I **FIND** the following as **FACTS**:

This matter had been scheduled for a Zoom hearing on June 1, 2022, at 9:30 a.m. since the issuance of the February 11, 2022, PHO.

No stay of the proceedings had been issued.

At 9:23 a.m. on June 1, 2022, petitioner sent an email to this tribunal indicating that the planned hearing at 9:30 a.m. was “illegal” and that he would not “legitimize these illegal proceedings by participating in them.”

Petitioner did not appear for the zoom hearing at 9:30 a.m. on June 1, 2022.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Pursuant to N.J.A.C. 1:1-14.4(a) “If, after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the Clerk or judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge shall, direct the Clerk to return the matter to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).”

This matter was scheduled for a hearing via Zoom on June 1, 2022, at 9:30 a.m. Petitioner was aware of the hearing date and emailed this tribunal at 9:23 a.m. the morning of June 1, 2022, that he would not be participating in the hearing as he considered it "illegal." Petitioner did not appear for the Zoom hearing. Respondent appeared with witnesses in attendance.

Accordingly, I **CONCLUDE** that the matter should be dismissed as petitioner has abandoned his denial of access complaint and direct the Clerk to return the matter to the transmitting agency.

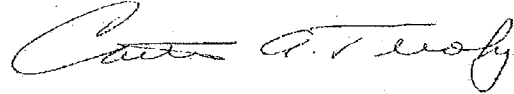
ORDER

It is **ORDERED** that the Clerk return this matter to the GRC for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).

I hereby **FILE** my initial decision with the **GOVERNMENT RECORDS COUNCIL** for consideration.

This recommended decision may be adopted, modified, or rejected by the **GOVERNMENT RECORDS COUNCIL**, who by law is authorized to make a final decision in this matter. If the Government Records Council does not adopt, modify, or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE GOVERNMENT RECORDS COUNCIL, 101 South Broad Street, PO Box 819, Trenton, New Jersey 08625-0819**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



June 2, 2022

DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency:

Date Mailed to Parties:

CAT/gd



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

INTERIM ORDER

April 30, 2019 Government Records Council Meeting

Edwin Sheppard
Complainant

Complaint No. 2019-3

v.

County of Cape May
Custodian of Record

At the April 30, 2019 public meeting, the Government Records Council (“Council”) considered the April 23, 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 this complaint should be referred to the Office of Administrative Law for a determination of whether the Complainant’s objections to representation of the Custodian in this matter by Jeffrey R. Lindsay, Esquire, is valid, and if so, whether Mr. Lindsay should therefore withdraw or be removed for cause as counsel for the County of Cape May in the instant complaint. Moreover, based on the conflicting evidence in this matter, the GRC is unable to determine whether the Custodian unlawfully denied access to the requested records. As such, this complaint should also be referred to the Office of Administrative Law for a hearing to resolve the facts and determine whether the Custodian unlawfully denied access to the records relevant to the complaint, and if so, to order disclosure of said records and determine whether the Custodian and/or the Custodian’s Counsel knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances and is/are therefore personally subject to a civil penalty pursuant to N.J.S.A. 47:1A-11.

Interim Order Rendered by the
Government Records Council
On The 30th Day of April 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: May 2, 2019



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
April 30, 2019 Council Meeting**

**Edwin Sheppard¹
Complainant**

GRC Complaint No. 2019-3

v.

**County of Cape May²
Custodial Agency**

Records Relevant to Complaint:

Item number 1: “Disbursements of \$32,000 in grant funds.”

Item number 2: “Disbursements of \$14,000 in grant funds.”

Item number 3: “Disbursements of \$47,000 in grant funds.”³

Custodian of Record: Elizabeth Bozzelli

Requests Received by Custodian: April 23, 2018

Response Made by Custodian: May 2, 2018

GRC Complaint Received: January 3, 2019

Background⁴

Requests and Response:

On April 23, 2018, the Complainant submitted two (2) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. On May 2, 2018, the seventh (7th) business day following receipt of said request, the Custodian’s Counsel responded in writing informing the Complainant that the records responsive to his requests were attached. Four (4) pdf documents were attached to the response: (1) OPRA Request 2475-18 & 2476-18, (2) OPRA Request 2477-18 & 2478-18, (3) OPRA Request 2479-18, and (4) OPRA Request 2480-18.⁵

¹ No legal representation listed on record.

² Represented by Jeffrey R. Lindsay, Esq. (Cape May Court House, NJ).

³ These items are not listed as “request items” because they were never specifically identified in the requests. The Complainant’s OPRA requests were overly broad requests which sought records related to State Wide Respite Grants accepted by Cape May County on January 24, 2017 (49-17) and February 27, 2018 (161-18). The requests contained identical language: “I request copies of any and all payments made to any and all vendors, contracted firms, caregivers, county employees, independent contractors, and/or the NJ Department of Human Services from this grant ... ” However, notwithstanding the overly broad nature of the requests, the Custodian decided to respond to the requests.

⁴ 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.

⁵ These appear to be agency tracking numbers assigned to the OPRA requests; however only two (2) requests formed the basis of this complaint, those identified as tracking number 2475-18 and tracking number 2476-18. All of the pdf documents were stored on a compact disc which is included in the GRC’s case file.

Denial of Access Complaint:

On January 3, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the records relevant to the complaint listed as items number 1 and 3 were never disclosed. The Complainant asserted that the records relevant to the complaint listed as item number 2 were incomplete.

The Complainant informed the GRC to “[s]ee attached summary, copy of response, email chain associated with the response.” The Complainant failed to attach a summary; however, he did attach an e-mail chain which reflected his reply to the response. In the e-mail chain, the Complainant expressed his belief that the Custodian failed to disclose to him all of the records responsive to his requests. In an e-mail to the Custodian’s Counsel dated May 15, 2018, the Complainant stated, “ ... it appears there are ... records missing from 2475-18 and 2478-18.” In the same e-mail he stated, “[the] large difference between monies accepted and ... monies paid out leads me to believe that there are records responsive to this request that you failed to provide.”

The majority of the content of the e-mails within the referenced chain contains criticism of the Custodian’s Counsel. The Complainant leveled accusations at the Custodian’s Counsel for what appear to be past interactions between the Complainant and Counsel. Since the GRC has no knowledge of the past interactions, it cannot relate same to the instant complaint. It is quite apparent though, from the content of a May 3, 2018 e-mail between the Complainant and Counsel, that the Complainant believes his reasonable expectation of privacy had been violated by the Custodian’s Counsel.

The Complainant attached two hundred fifty-one (251) pages of documents to the complaint. However, the Complainant failed to reference any of the pages of documents as an exhibit or exhibits, or otherwise specifically relate them to the complaint.

Statement of Information:

On January 14, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA requests on April 23, 2018. The Custodian certifies that the following records are responsive to the Complainant’s request:

- Records of payments made Statewide Respite January 1, 2017 to December 31, 2017, consisting of 119 pages.
- Records of authorizations for services to be paid by Statewide Respite Grant in 2017, consisting of 78 pages.
- Internal records used to verify sufficient funds are in account for payment in 2017, consisting of 5 pages.
- Non-responsive records for 2017 paid through Social Services Block Grant, consisting of 6 pages.
- Billing statements and vouchers for payments January 1, 2018 to April 20, 2018, consisting of 9 pages.
- Internal records used to verify sufficient funds are available for payment of services in 2018, consisting of 2 pages.

- Non-responsive records mistakenly produced; these are paid through Aging Respite, not Statewide Respite Grant for 2018, consisting of 3 pages.
- Non-responsive records for 2018 paid through Social Services Block Grant not Statewide Respite Grant, consisting of 11 pages.

The Custodian certified that all of the responsive records were disclosed to the Complainant. The Custodian's Counsel stated that the County did not withhold any records responsive to the Complainant's request. Counsel further stated that it is not clear how the Complainant determined the amounts of alleged missing disbursements and authorizations set forth in the complaint, but that the Complainant must have based his allegations of missing records upon a misunderstanding of the records.

Additional Submissions:

On January 14, 2019, the Complainant e-mailed the GRC. The Complainant stated that he noted that Elizabeth Bozzelli was listed in the SOI as the Custodian but that the Custodian's Counsel signed the SOI instead of the Custodian. The Complainant inquired as to the identity of the Custodian, i.e., whether the Custodian is Ms. Bozzelli or Counsel. The Complainant also stated that it is not a matter of his misunderstanding the records, but rather that the County did not provide the requested records. The Complainant also inquired as to the identity of Lori Harris, a person who was copied on the e-mail transmitting the SOI to the GRC. The Complainant stated that his personal information was included in the SOI and he is concerned that the information was improperly shared with Ms. Harris. The Complainant also informed the GRC that he objected to the Custodian's Counsel representing the Custodian in GRC Complaint No. 2016-195, and he is renewing his objection with respect to Counsel's representation in the instant complaint.

On January 15, 2019, the GRC replied to the Complainant's January 14, 2019 e-mail. The GRC advised the Complainant that the SOI listed Elizabeth Bozzelli as the Custodian and Mr. Lindsay as the Custodian's Counsel. The GRC copied the Custodian's Counsel on the e-mail, advising him that N.J.A.C. 5:105-2.4(a) requires the Custodian to sign the SOI. The GRC therefore asked Counsel to resubmit the appropriate pages of the SOI in compliance with the regulation. With respect to the Complainant's objection to Counsel's representation, the GRC informed the Complainant to follow the provisions set forth in N.J.A.C. 5:105-2.4(j).⁶ Finally, the GRC advised the Complainant that the GRC does not have any information concerning Lori Harris; however, based upon her e-mail address the Complainant was informed that it appears she is a Cape May County employee.

On January 15, 2019, the Complainant forwarded to the GRC a document dated October 17, 2018, together with proof that it was submitted as part of the Denial of Access Complaint. The October 17, 2018 submission states that it applies to OPRA Request tracking numbers 2475-18 and 2478-18.⁷ In the submission the Complaint stated that he is asking the GRC for the following relief:

⁶ The GRC provided the Complainant with a link to the GRC's website where the regulations may be found.

⁷ OPRA Request tracking number 2478-18 is not a request which formed a basis for the instant complaint.

- To order the Custodian to immediately provide the requested records in their entirety. The Complainant stated that he believes more records exist because when totaling the dollar amount of the disbursements in the response to 2475-18, they only add up to \$79,000. Since it was a \$111,180 grant, the Complainant asserted that the response failed to include records for roughly \$32,000. The Complainant also asserted that in addition to the \$32,000 there is another \$14,000 in which the records provided were incomplete.
- To fine the Custodian's Counsel for failure to comply with the law and provide the requested records, and for violating his reasonable expectation of privacy by giving out his personal contact information.
- To ban the Custodian's Counsel from participating in any of the Complainant's OPRA matters.
- To ban the Custodian's Counsel from "participating in any OPRA matter for any government entity ever again."

The Complainant further stated that the Custodian's Counsel had twice taken the personal contact information from an OPRA request he filed and provided it to a third party who had nothing to do with the OPRA request. The Complainant stated that his privacy information has been compromised, specifically his unlisted cell phone number and home address. As a result, the Complainant alleged that the third party is now stalking him.

On January 15, 2019, the GRC forwarded to the Custodian's Counsel the Complainant's October 17, 2018 submission. The GRC informed Counsel that the submission is part of the original complaint, and asked Counsel to have the Custodian supplement the SOI accordingly.

On January 21, 2019, the Complainant submitted an objection to Jeffrey R. Lindsay, Esq. as Counsel for the Custodian in this complaint. The Complainant stated that Counsel has twice taken the personal contact information from an OPRA request he filed and provided it to a third party who had nothing to do with the request. The Complainant stated that the Custodian's Counsel offered no apology to him, and for that reason the Complainant believes he will again disclose his personal information. The Complainant stated that if Mr. Lindsay is removed he will not have access to the Complainant's personal information and will not be in a position to disclose it to third parties. On January 30, 2019, the GRC replied to the Complainant, informing him that his concerns would be brought to the attention of the Council.

On February 11, 2019, the Custodian's Counsel forwarded to the Complainant via e-mail a legal certification prepared by Donna Groome, the Department Head of the County's Department of Human Services.⁸ Counsel stated that the certification will clarify the Complainant's misunderstandings of the records produced in response to his OPRA requests.⁹

⁸ The certification is attached as Exhibit A.

⁹ During the month of February 2019 there were other e-mails between the Complainant and the Custodian's Counsel upon which the GRC was copied. Those e-mails add nothing further to the substance of this complaint; Counsel assures the Complainant that all responsive records have been disclosed to him and the Complainant maintains that the Custodian has unlawfully denied him access to the records, either in whole or in part.

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].” Objections to representation are provided for in N.J.A.C. 5:105-2.4(j), which states in relevant part that “ ... [o]bjections 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.

Id.

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.]

In his January 21, 2019 e-mail containing his objections to Jeffrey R. Lindsay, Esq. as Counsel for the Custodian in this complaint, the Complainant properly captioned the complaint with the case name and number. The Complainant presented his objections to representation to the Council via e-mail to the GRC staff, and served all parties via delivery of copies of the e-mail to the Custodian and the Custodian's Counsel. The Complainant clearly identified Jeffrey Lindsay as the Custodian's representative to whom he was objecting, and set forth in detail the reasons for his objections. There was no response to the objections pursuant to N.J.A.C. 5:105-2.4(k).

The threshold issue in this complaint then, is whether the Complainant's objections to representation have merit. However, there is no mechanism provided for in N.J.A.C. 5:105, et seq. for the Council to act upon such objections to representation. It is clear though, in the interest of due process, that there should be a hearing to resolve the facts and settle the allegations made pursuant to the regulation.

Accordingly, it is necessary to refer this matter to the Office of Administrative Law ("OAL") for a determination of whether the Complainant's objections to representation of the Custodian in this matter by Jeffrey R. Lindsay, Esquire, is valid. And if so, whether Mr. Lindsay should therefore withdraw or be removed for cause as counsel for the County of Cape May in the instant complaint.

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 has alleged that the Custodian unlawfully denied him access to the records relevant to the complaint. Conversely, the Custodian certified that she disclosed to the Complainant all of the responsive records.

In Rivera v. City of Bayonne (Hudson), 2012-86, GRC Complaint No. 2012-86 (Interim Order January 29, 2013), the custodian stated that he disclosed to the complainant all of the requested records. The complainant, however, asserted that only some of the requested records were disclosed to him. Due to the conflicting evidence of record, the Council referred the complaint to the OAL for a hearing to resolve the facts and determine whether the custodian disclosed the requested records to the complainant.

Therefore, based on contradictory facts in the Custodian's and Complainant's submissions, there is conflicting evidence regarding whether the Custodian disclosed the requested records. The Administrative Procedures Act provides that the OAL "shall acquire jurisdiction over a matter only after it has been [determined] to be a contested case by an agency head and has been filed with the [OAL]" N.J.A.C. 1:1-3.2(a). Therefore, it is necessary to refer this matter to the

Office of Administrative Law for a hearing to resolve the facts and determine whether the Custodian disclosed the requested records in full or in part.

Accordingly, this complaint should be referred to the OAL for a determination of whether the Complainant's objections to representation of the Custodian in this matter by Jeffrey R. Lindsay, Esquire, is valid, and if so, whether Mr. Lindsay should therefore withdraw or be removed for cause as counsel for the County of Cape May in the instant complaint. Moreover, based on the conflicting evidence in this matter, the GRC is unable to determine whether the Custodian unlawfully denied access to the requested records. As such, this complaint should also be referred to the OAL for a hearing to resolve the facts and determine whether the Custodian unlawfully denied access to the records relevant to the complaint, and if so, to order disclosure of said records and determine whether the Custodian and/or the Custodian's Counsel knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances and is/are therefore personally subject to a civil penalty pursuant to N.J.S.A. 47:1A-11.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that this complaint should be referred to the Office of Administrative Law for a determination of whether the Complainant's objections to representation of the Custodian in this matter by Jeffrey R. Lindsay, Esquire, is valid, and if so, whether Mr. Lindsay should therefore withdraw or be removed for cause as counsel for the County of Cape May in the instant complaint. Moreover, based on the conflicting evidence in this matter, the GRC is unable to determine whether the Custodian unlawfully denied access to the requested records. As such, this complaint should also be referred to the Office of Administrative Law for a hearing to resolve the facts and determine whether the Custodian unlawfully denied access to the records relevant to the complaint, and if so, to order disclosure of said records and determine whether the Custodian and/or the Custodian's Counsel knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances and is/are therefore personally subject to a civil penalty pursuant to N.J.S.A. 47:1A-11.

Prepared By: John E. Stewart
Staff Attorney

April 23, 2017

EXHIBIT A

Edwin Sheppard	:	GOVERNMENT RECORDS COUNCIL
	:	STATE OF NEW JERSEY
Claimant,	:	COMPLAINT NO.: 2019-3
v.	:	
Cape May County	:	Certification of Donna Groome
Custodian.	:	

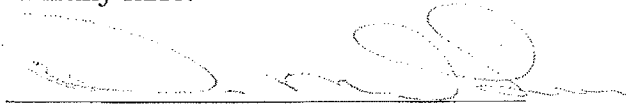
I, Donna Groome, hereby certifies as follows:

1. I have served as the Department Head of the Cape May County Department of Human Services since January 6, 2017 and, as such, have personal knowledge of the information contained herein.
2. I reviewed Mr. Sheppard's October 17, 2018 denial of access complaint for OPRA Requests 2475-18 and 2478-18 and provide this certification to clarify his misunderstanding of the Statewide Respite Care Records produced to him.
3. I do not agree with Mr. Sheppard's calculation of expenditures. The payments produced in response to the above OPRA requests also included back-up print-outs from our financial system. Without looking at Mr. Sheppard's detailed calculations, I can only assume that he double-counted payments as he was unfamiliar with the documentation that he was reviewing.
4. Here are my findings that have been verified with the Cape May County Department of Human Services fiscal unit, the Cape May County Treasurer's Office and he NJDHS, DoAS SRCP:

\$111,180.00	Resolved Grant Amount	
- 4,000.00	Estimated Client Cost Share that is not utilized for direct service or staff that was included in the grant application	
107,180.00	Actual grant ceiling without cost share	
49,767.81	Expenditures for direct care	
+ 9,197.23	Expenditures for staff salary	
+3,755.02	Expenditures for fringe for staff	
+1,498.32	Caregiver books for Health Fair and Disabilities Awareness Day from cost share	
64,218.38	Actual Total Expenditures (not the \$79,000 calculated by Mr. Sheppard)	
107,180.00	Actual grant ceiling	
- 64,218.38	Total expenditures	
\$42,931.62	Balance (underspent not \$32,000 calculated by Mr. Sheppard)	

5. The total amount of the grant is not up-fronted to the County of Cape May. The grant is a reimbursement with a portion of the amount up-fronted.
6. The NJ Department of Human Services, Division of Aging Services (NJDHS, DoAS), deemed that \$60,936 [\$64,218.38 (total expenditures) - \$3,283.42 (cost share received)] were allowable under the SRCP.
7. The total funds provided to the County of Cape May, according to the close-out email dated June 6, 2018 from the NJ DHS, DoAS, was \$62,510. The amount of \$1,574 was returned to the NJ DHS, DoAS on July 24, 2018.
8. Mr. Sheppard also indicated that there is approximately \$14,000 that had incomplete records with just a print-out of three checks being issued. It is unclear what he is referencing here. In reviewing the records produced the only document that I could identify relating to this amount is the "County of Cape May Detail Budget Transaction Inquiry By Account" print-out that lists 14 transfers with three column totals that total \$14,450.57.
9. The first and third sections relate to staffing the SRCP 2017. The first section indicates the amount transferred to offset the salary of the staff involved with the program. This total is \$9,197.23. The third section is similar and offsets the fringe costs of the staff involved in the program. This total is \$3,755.02. There are "2017 Salary and Wage Transfer Forms" and on the back of that form a corresponding "2017 Fringe Transfer Form" that totals \$12,952.25 that were included as part of the OPRA request. Authorizations are not utilized for salary and wage or fringe.
10. The second section is a payment to Barnes and Nobel for \$1,498.32. This payment was for caregiver support books utilized at a Health Fair and Disabilities Awareness Day to promote the SRCP. These books were an allowable expense from the cost share. The purchase of the books did not require authorizations.
11. Mr. Shepard asserts that there is missing documentation due to only having authorizations for approximately \$64,000. The total grant expenditures, with salary and wage and fringe transfers, was \$64,218.38. As a former provider of SRCP services Mr. Sheppard is aware that authorizations are higher than the actual service costs as the authorizations must take into consideration a fifth week, even though that rarely happens. Additionally, clients have many circumstances where they would not utilize the fully authorized service including: being admitted into the hospital, short-term rehabilitation, or having family visit. Additionally, authorizations are not required for salary and wage or fringe transfers or purchases to promote the SRCP from the cost share. The estimated authorizations for \$64,000 is not unreasonable based on the total actual expenditures, as well as, knowing that authorizations will not be totally accurate due to the above mentioned factors.
12. In my review of the records produced, as well as verifying the information contained therein with the Cape May County Department of Human Services fiscal unit, the Cape May County Treasurer's Office and the NJDHS, DoAS SRCP, I am confident that Mr. Sheppard's complaint is without merit.

I hereby certify that the foregoing statements made by me are true and accurate to the best of my knowledge. I understand that I am subject to punishment if any of the foregoing is willfully false.



Donna Groome

2/11/19
Date