

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**James Kellinger¹
Complainant**

GRC Complaint No. 2012-193

v.

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

Records Relevant to Complaint: Regarding the criminal case – State v. Stephen F. Sharp, Bergen Case Number 08003467:

1. Expert report by physical scientist, Dr. Kurt H. Becker of Stevens Institute of Technology.
2. Defense expert report by civil engineer, Mr. Steven Schorr.

Custodian of Record: Frank Puccio, Esq.
Request Received by Custodian: May 16, 2012
Response Made by Custodian: May 22, 2012
GRC Complaint Received: June 25, 2012

Background³

May 28, Council 2013:

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 parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that: the Custodian lawfully denied the Complainant access to the responsive expert reports because said reports are criminal investigatory records. The Custodian has carried her burden of proving that the records are not required to be “made, maintained or kept on file” and the records are held by a law enforcement agency and pertain to a criminal investigation. See N.J.S.A. 47:1A-1.1.

¹ No legal representation listed on record.

² Represented by James M. Carbone, Esq. of Carbone & Faase Attorneys at Law (Ridgewood, NJ).

³ The parties may have submitted additional correspondence or made additional statements/asserations in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Exectutive Director the submissions necessary and relevant for the adjudication of this complaint.

Procedural History:

On June 10, 2013 the Council distributed its May 28, 2013 Final Decision to all parties. On June 24, 2013 the Complainant filed a request for reconsideration requesting that the Council reconsiders its May 28, 2013, Final Decision, based on mistake and an illegality. On July 2, 2013 the Custodian submitted an objection to the 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).

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's Order dated May 28, 2013 on June 24, 2013, ten (10) business 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, *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 motion for reconsideration, the Complainant submitted a Request for Reconsideration on the GRC form together with a page and a half of arguments. The Complainant acknowledges that the Bergen County Prosecutor was not required to make either of the reports which he seeks a copy of. The Complainant, however, asserts that once made,

the reports were required to be maintained. The Complainant also argues that the Bergen County Prosecutor's office is the Custodian of Court Records. Finally, the Complainant contends that because the contents of each of the reports were exposed at trial any purpose for not producing them is "vacated." The Complainant does not provide any additional relevant legal or factual support for his motion for reconsideration.

On July 2, 2013, the Custodian filed a reply brief in opposition to the Complainant's motion for reconsideration. The Custodian argues that the Complainant's motion for reconsideration fails to provide any new facts or legal arguments and further fails to meet the standards for reconsideration.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: 1) that 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, has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See D'Atria, supra*. Thus, the Complainant's request for reconsideration should be denied. *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 Final Decision 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 Counsel

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

July 16, 2013