



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

February 27, 2008 Government Records Council Meeting

Joseph E. Murray, Esq.
Complainant

Complaint No. 2006-169

v.

Township of Warren
Custodian of Record

At the February 27, 2008 public meeting, the Government Records Council (“Council”) considered the February 20, 2008 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. While the Custodian’s Counsel responded in writing to the Complainant’s August 14, 2006 OPRA request in a timely manner pursuant to N.J.S.A. 47:1A-5.g., the Custodian inaccurately cited to N.J.S.A. 10:4-12(b)(5) as the reason for denial because OPMA only works to exempt closed session minutes (and not in their entirety). However, the Custodian Counsel’s denial of access was lawful pursuant N.J.S.A. 47:1A-5.i. because the requested records are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 as information which, if disclosed, would give an advantage to competitors or bidders.
2. The Custodian Counsel’s assertion that a custodian does not need to supply a requestor with a detailed denial is inaccurate pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-6. In order to comply with OPRA, the statute is clear that a denial must be specific and must be sufficient to prove that a custodian’s denial is authorized by OPRA.
3. The Complainant failed to achieve the desired result of disclosure of a requested record since the records are exempt from disclosure because they contain information which, if disclosed, would give an advantage to competitors or bidders pursuant to N.J.S.A. 47:1A-1.1. The Complainant, therefore, is not entitled to prevailing party attorney’s fees. See Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and NJ Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166, 175 (App. Div. 2007).



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 27th Day of February, 2008

Robin Berg Tabakin, Vice Chairman
Government Records Council

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

Kathryn Forsyth
Government Records Council

Decision Distribution Date: February 29, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 27, 2008 Council Meeting**

**Joseph E. Murray, Esq.¹
Complainant**

GRC Complaint No. 2006-169

v.

**Township of Warren²
Custodian of Records**

Records Relevant to Complaint: A copy of the appraisal report or reports, photographs and notes of the appraiser regarding the Facey property, Block 205, Lots 12 and 53-57 on the tax map of the Township of Warren.³

Request Made: August 14, 2006

Response Made: August 21, 2006

Custodian: Patricia DiRocco⁴

GRC Complaint Filed: September 13, 2006

Background

August 14, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

August 21, 2006

Custodian Counsel's response to the OPRA request. The Custodian's Counsel responds in writing to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request. The Custodian's Counsel states that the requested records are denied because both parties are still in negotiation and cites to N.J.S.A. 10:4-12(b)(5) of the Open Public Meetings Act ("OPMA").⁵

¹ Represented by Jay B. Bohn, Esq. of Schiller & Pittenger, PC (Scotch Plains, NJ).

² Represented by John P. Belardo, Esq. (Warren, NJ).

³ Complainant's original request also asked for any correspondence between the Township of Warren and any appraiser. However, those records are not relevant to this complaint.

⁴ Although Ms. Rocco is the Custodian of Records for this complaint, Custodian's Counsel made all responses to the request and Denial of Access Complaint.

⁵ N.J.S.A. 10:4-12(b)(5) states: "[a] public body may exclude the public only from that portion of a meeting at which the public body discusses ... [a]ny matter involving the purchase, lease or acquisition of real property with public funds, the settling of banking rates or investment of public funds, where it could adversely affect the public interest if discussions of such matters were disclosed."

September 7, 2006

Letter from the Complainant to the Custodian's Counsel. The Complainant acknowledges receipt of the Counsel's August 21, 2006 denial and cites N.J.S.A. 20:3-6 which provides that a Township can begin no proceedings to condemn a property which they were unable to acquire through "bona-fide negotiations," pursuant to which negotiations are required to include an offer in writing of the property and interest to be acquired through reasonable compensation via disclosure of appraisal. The Complainant claims that the statute further states that an agency cannot offer less than the appraisal of the fair market value of a property.

The Complainant asserts that if the Township of Warren is not seeking to purchase this property through negotiations pursuant to the Eminent Domain Act (N.J.S.A. 20:3-1 et seq.), then N.J.S.A. 10:4-12(b)(5) is an inappropriate defense. The Complainant further asserts that even though N.J.S.A. 47:1A-9.a. states that OPRA does not abrogate any exemptions pertaining to public records from any other statute, this request involves a private property owner attempting to obtain information on her property and not an OPRA request from the general public.

September 11, 2006

Letter from the Custodian's Counsel to the Complainant. The Custodian asserts that N.J.S.A. 20:3-6 does not require the disclosure of appraisals during the negotiation phase.

September 13, 2006

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Letter from the Complainant to Appraiser dated December 21, 2005.
- Letter from the Complainant to Custodian dated January 30, 2006.
- Complainant's OPRA records request dated August 14, 2006.
- Letter from the Complainant to Custodian's Counsel dated August 14, 2006.
- Letter from the Custodian's Counsel to Complainant denying request dated August 21, 2006.
- Letter from the Complainant to the Custodian's Counsel dated September 7, 2006 (with Custodian's handwritten denial of access on September 11, 2006).

The Complainant asserts that he represents Joan Facey in connection with the development of certain real property (the "Facey property"). The Complainant further asserts that on December 20, 2005, he was invited to attend an appraisal of the Facey property along with Custodian's Counsel. The Complainant states that on January 27, 2006, the Township of Warren made an offer to purchase the Facey property. The Complainant responded by letter on January 30, 2006 at which time he requested "a written proposal from the Township together with a copy of any appraisal or appraisals that have been provided." The Complainant asserts that he received no response. The Complainant states that on August 14, 2006, he forwarded an OPRA request to both the Custodian and Custodian's Counsel.

The Complainant states that the Custodian's Counsel answered the OPRA request five (5) business days later stating that the appraisal will not be disclosed because the Township of Warren was still in negotiations with the Complainant's client. The

Complainant states that the Custodian's Counsel cited N.J.S.A. 10:4-12(b)(5) of OPMA as the reason for denial. The Complainant re-asserts that this statute does not allow for a denial of access to government records, citing the same arguments from his September 7, 2006 letter. The Complainant further asserts that he asked the Custodian's Counsel to reconsider the Complainant's request based on the bona fide negotiation requirement pursuant to N.J.S.A. 20:3-6. The Complainant states that the Custodian's Counsel faxed a response on September 11, 2006 stating that case law does not require the release of an appraisal during the negotiation phase.

The Complainant asserts that under N.J.S.A. 20:3-6, a condemnor must give proof of fair-market value during negotiations and that contrary to the Custodian Counsel's September 11, 2006 letter, there is case law to support this claim (citing State v. Hancock, 208 N.J. Super. 737, 742 (Law. Div.), aff'd, 210 N.J. Super. 568 (App. Div. 1985), State v. D'Onofrio, 235 N.J. Super. 348 (Law. Div. 1989) and State v. Testa, 247 N.J. Super. 335 (App. Div. 1991)). The Complainant asserts that while he knows the Township is not positioning itself to condemn the Facey property, these cases render the Custodian Counsel's September 11, 2006 argument erroneous.

The Complainant asserts that neither reason for denial is adequate. Finally, the Complainant asserts that all records should be released to him and that prevailing party attorney fees should be awarded pursuant to N.J.S.A. 47:1A-6.

September 19, 2006

Offer of Mediation sent to both parties. The Complainant declines mediation and requests that the GRC begin a full investigation of this complaint.

September 19, 2006

Request for the Statement of Information sent to the Custodian.

September 26, 2006

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA records request dated August 14, 2006.
- Letter from the Custodian's Counsel to the Complainant dated August 21, 2006.
- Letter from the Custodian's Counsel to the Complainant dated September 11, 2006.

The Custodian's Counsel states that the records relevant to this request were denied pursuant to N.J.S.A. 47:1A-1.1 et seq. which exempts disclosure of records that will give an advantage to competitors. The Custodian's Counsel also asserts that N.J.S.A. 10:4-12(b)(5) allows any matters involving the purchase of land with public money that are expressly discussed in closed session to be confidential, and that N.J.S.A. 47:1A-9.b. protects against disclosing records that will adversely affect the public interest. The Custodian's Counsel further asserts that disclosure of an appraisal during the negotiation phase will adversely affect and defeat Legislative intent and judicial case law directed towards confidentiality during entry of a contract of purchase, termination of negotiations or filing of a complaint to condemn a property.

The Custodian's Counsel asserts that the records relevant to the request are protected as advisory, consultative or deliberative ("ACD") material pursuant to N.J.S.A.

47:1A-1 and refers to Toth v. Ewing Township, GRC Complaint No. 2004-21 (November 2004). The Custodian's Counsel states that the Township of Warren has no intention of invoking the statutory authority of eminent domain to acquire the Facey property, which makes the Complainant's arguments irrelevant.

The Custodian's Counsel asserts that releasing the records relevant to this request would put the Township at an unfair advantage in negotiations with Complainant's client. The Custodian's Counsel further asserts that allowing disclosure of the appraisal would undermine OPMA, which protects a governing body during ongoing negotiations. The Custodian's Counsel finally asserts that the denial of access was lawful and should be upheld.

October 6, 2006

The Complainant's Response to the Custodian's SOI. The Complainant asserts that the Custodian Counsel's denial of access is unlawful because the Custodian's Counsel is producing new reasons for denying access. The Complainant asserts that this is a violation of N.J.S.A. 47:1A-5.g., which requires a specific reason for denial of access when responding to a request.

The Complainant asserts that the statutory exemption for ACD material does not apply because an appraisal will contain mostly fact. The Complainant also states that if every outside consultant's report were considered "inter-agency or intra-agency" documents then there would be no need for an attorney-client privilege exception.

The Complainant states that the Complainant's client is under no obligation to keep confidential any offers made and could easily just use the offers to spur a bidding war to her own advantage without the appraisal. The Complainant cites Boggia v. Borough of Oakland, GRC Complaint No. 2005-36 (April 2006) in support of the contention that N.J.S.A. 47:1A-1.1 does not necessarily allow for complete nondisclosure of a document.

The Complainant contends that the Custodian's Counsel misinterprets the significance of N.J.S.A. 47:1A-9.b. and that statute does not provide an overriding "public interest" exception but rather relies on the balancing test under common-law right of access.

October 11, 2006

Response of Custodian's Counsel to the Complainant. The Custodian's Counsel asserts that the Complainant was lawfully denied access to the requested record and that the Custodian conformed to N.J.S.A. 47:1A-5.g. by stating that the requested record is privileged as a specific basis for denial of access. The Custodian's Counsel further states that according to N.J.S.A. 47:1A-5.g and Boggia, the Custodian is not required to provide a lengthy response when denying access to requested records. The Custodian's Counsel contends that if the Complainant's client wishes to terminate negotiations for her property, then the Custodian's Counsel would be more than happy to release the records responsive to this request.

The Custodian's Counsel contends that the GRC has previously followed federal court cases finding draft documents exempt from disclosure as ACD material. The Custodian's Counsel also asserts that release of the report would give the Complainant's

client an advantage in negotiations, and states that a similar decision in Boggia regarding correspondence between a municipality and its consultant in connection with a property negotiation affirms the requested records' exemption under OPRA. The Custodian's Counsel further asserts that if the requested records were deemed to be disclosable by the GRC, then any developer could save time and money by requesting appraisals from municipalities.

The Custodian's Counsel further states that once an agreement to purchase the Facey property is completed, the appraisal report can be released; thus, the public's right to know the evaluation of a property purchased with public funds will be preserved. The Custodian's Counsel asserts that until such time, non-disclosure of the appraisal report will preserve the competitive position of the Township and prevent competitors from exerting an unfair advantage in the process.

The Custodian's Counsel finally asserts that pursuant to N.J.S.A. 47:1A-9.b., the Township has a common law right to withhold the appraisal report because the public interest of confidentiality in the negotiation process outweighs the private rights of access to the Complainant's client at this stage. The Custodian's Counsel urges the GRC to draw a bright line distinction by ruling that an appraisal report is not a government record subject to disclosure under OPRA until either negotiations with a property owner are terminated or a contract to purchase the property is executed.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ... [t]he terms shall not include ... *information which, if disclosed, would give an advantage to competitors or bidders ...* " (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

"[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ..." N.J.S.A. 47:1A-5.g.

OPRA further provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA also provides that:

“[t]he provisions of this act ... *shall not abrogate or erode* any executive or legislative privilege or *grant of confidentiality* heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality *may duly be claimed to restrict public access* to a public record or government record.” (Emphasis added.) N.J.S.A.47:1A-9.b.

OPMA states that:

“[a] public body *may exclude* the public only from that portion of a meeting at which the public body discusses ... [a]ny matter involving the purchase, *lease or acquisition of real property with public funds*, the setting of banking rates or investment of public funds, where it could *adversely affect the public interest* if discussion of such matters were disclosed.” (Emphasis added.) N.J.S.A. 10:4-12(b)(5).

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. 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. A custodian must also release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

In this complaint, the Custodian’s Counsel responded in writing to the Complainant’s August 14, 2006 OPRA request five (5) business days following receipt of the request denying access to the requested records pursuant to N.J.S.A. 10:4-12(b)(5). OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. In the matter before the Council, the Custodian’s Counsel responded in writing to the Complainant’s August 14, 2006 OPRA request in a timely manner pursuant to N.J.S.A. 47:1A-5.g. However, the Custodian Counsel’s reliance on N.J.S.A. 10:4-12(b)(5) is

misplaced because OPMA exempts only closed session minutes from disclosure (and not in their entirety).

The Custodian Counsel's reliance on the statutory exemption from disclosure for materials which are ACD is also misplaced; the exemption for ACD material is inapplicable to the requested records.

OPRA excludes from the definition of a government record "inter-agency or intra-agency advisory, consultative or deliberative material." N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the "deliberative process privilege."

The deliberative process privilege was discussed at length in In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000). There, the court addressed the question of whether the Commissioner of Insurance, acting in the capacity of liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. *Id.* at 81. The court adopted a qualified deliberative process privilege based upon the holding of McClain v. College Hospital, 99 N.J. 346 (1985), Liquidation of Integrity, *supra*, 165 N.J. at 88. In doing so, the court noted that:

"[a] document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. ... Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. ... Purely factual material that does not reflect deliberative processes is not protected. ... Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the "preponderating policy" and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure." (Citations omitted.) *Id.* at 84-85.

Because the appraisal report, photographs and notes of the appraiser requested by the Complainant in his August 14, 2006 OPRA request likely contain primarily factual information about the Facey property, the Custodian is erroneous in asserting ACD as a lawful exemption.

The Complainant makes several arguments for disclosure of the requested records based on case law regarding bona fide negotiations which occur when an agency attempts to condemn a property under eminent domain after prior negotiations have failed pursuant to N.J.S.A. 20:3-6. The records in question pertain to preliminary negotiation of property purchase; eminent domain has not been invoked. Therefore, the Complainant's arguments are inapposite to the complaint before the Council.

However, the requested records are lawfully exempt from disclosure as information which, if disclosed, would give an advantage to competitors or bidders. N.J.S.A. 47:1A-1.1. At the time of the request, the Township was negotiating the purchase of property belonging to a client of the Complainant. The records responsive to

this request represent a part of the negotiation phase that gives a party interested in buying or selling a property a level of bargaining power. The Complainant asserts that disclosure of the records responsive to his August 14, 2006 request would help the negotiation process. The Township of Warren is using the records to substantiate its offer of purchase to the Complainant's client. Disclosure of the records requested could greatly hinder the Township's position in the negotiation process by making public the price range at which the Township is willing to obtain the property and could be used to start a bidding war by private companies. Therefore, the requested records are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 regarding information which, if disclosed, would give an advantage to competitors or bidders.

Further, the Custodian Counsel's assertion that a custodian does not need to supply a detailed reason for a denial of access is incorrect. N.J.S.A. 47:1A-5.g. provides that "[i]f the custodian is unable to comply with a request for access, the Custodian ... shall indicate the *specific* basis...(Emphasis added)." Additionally, N.J.S.A. 47:1A-6 places the "burden of proving that the denial of access is authorized by law" on the Custodian or in this case the Custodian's Counsel. In order to comply with OPRA, the statute is clear that a denial must be specific and must be sufficient to prove that a custodian's denial is authorized by OPRA. Therefore, the Custodian Counsel's assertion that a custodian does not need to supply a requestor with a detailed denial is inaccurate pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-6.

Whether the Complainant is a "prevailing party" entitled to attorney's fees pursuant to N.J.S.A. 47:1A-6?

OPRA provides that:

"... [i]f it is determined that access has been improperly denied, the court or agency [GRC] head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee."
N.J.S.A. 47:1A-6.

Attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). A complainant is a "prevailing party" if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. *Id.*

In the matter before the Council, the Complainant failed to achieve the desired result of disclosure of a requested record since the records are exempt from disclosure because they contain information which, if disclosed, would give an advantage to competitors or bidders pursuant to N.J.S.A. 47:1A-1.1. The Complainant, therefore, is not entitled to prevailing party attorney's fees. See Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and NJ Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166, 175 (App. Div. 2007).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. While the Custodian's Counsel responded in writing to the Complainant's August 14, 2006 OPRA request in a timely manner pursuant to N.J.S.A. 47:1A-5.g., the Custodian inaccurately cited to N.J.S.A. 10:4-12(b)(5) as the reason for denial because OPMA only works to exempt closed session minutes (and not in their entirety). However, the Custodian Counsel's denial of access was lawful pursuant N.J.S.A. 47:1A-5.i. because the requested records are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 as information which, if disclosed, would give an advantage to competitors or bidders.
2. The Custodian Counsel's assertion that a custodian does not need to supply a requestor with a detailed denial is inaccurate pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-6. In order to comply with OPRA, the statute is clear that a denial must be specific and must be sufficient to prove that a custodian's denial is authorized by OPRA.
3. The Complainant failed to achieve the desired result of disclosure of a requested record since the records are exempt from disclosure because they contain information which, if disclosed, would give an advantage to competitors or bidders pursuant to N.J.S.A. 47:1A-1.1. The Complainant, therefore, is not entitled to prevailing party attorney's fees. See Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and NJ Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166, 175 (App. Div. 2007).

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

February 20, 2008