



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**  
101 SOUTH BROAD STREET  
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TRENTON, NJ 08625-0819

VINCENT P. MALTESE, Chairman  
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**FINAL DECISION**

**June 27, 2007 Government Records Council Meeting**

Joseph Ferraro  
Complainant

Complaint No. 2007-65

v.

Township of Lakewood (Ocean)  
Custodian of Record

At the June 27, 2007 public meeting, the Government Records Council ("Council") considered the June 20, 2007 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 Executive Director respectfully recommends the Council find that:

1. Pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-3.a., the records responsive to this request are exempt because they are investigatory records the release of which would be inimical to public interest.
2. The records are also exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. because they contain proprietary commercial or financial information that could be detrimental to the parties applying for licenses if released.
3. Pursuant to N.J.S.A. 47:1A-6, the Custodian has borne her burden of proving a lawful denial of access to the licensing applications.

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 27<sup>th</sup> Day of June 2007



Vincent Maltese, Chairman  
Government Records Council

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

David Fleisher, Secretary  
Government Records Council

**Decision Distribution Date: July 5, 2007**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
June 27, 2007 Council Meeting**

**Joseph W. Ferraro, Esq.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-65**

v.

**Township of Lakewood (Ocean)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Copy of pending application and all supporting documents submitted by All Hours Towing in order to obtain a Lakewood Township towing license and
2. Copy of pending application and all supporting documents submitted by Price Rite Towing in order to obtain a Lakewood Township towing license.

**Request Made:** January 29, 2007

**Response Made:** January 31, 2007

**Custodian:** Bernadette Standowski

**GRC Complaint Filed:** February 6, 2007

**Background**

**January 29, 2007**

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.

**January 31, 2007**

Custodian's response to the OPRA request. The Custodian responded to the Complainant's OPRA request on the second (2<sup>nd</sup>) business day following receipt of such request. The Custodian denies access to the Complainant because the records relevant to the request are subjects of a pending investigation by the Township required by Township ordinance.

**February 6, 2007**

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

- Complainant's OPRA records request dated January 29, 2007 and
- Letter from the Custodian to the Complainant dated January 31, 2007 (with attachment).

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<sup>1</sup> No representation listed on record.

<sup>2</sup> Custodian represented by Guy P. Ryan, Esq. (Toms River, NJ).

The Complainant states that he submitted an OPRA request to the Custodian on January 29, 2007. The Complainant further states that he was denied access to the records relevant to the request in a letter from the Custodian dated January 31, 2007. The Complainant asserts that OPRA does not protect records that are subject of an investigation after they have already been received as government records. The Complainant also asserts that the Custodian failed to provide proof that releasing the records would harm public safety or jeopardize an investigation and that if the records were open for access prior to the investigation then they cannot be withheld during it. The Complainant finally asserts that the Custodian's denial of access clearly contradicts N.J.S.A. 47:1A-3.

**February 21, 2007**

Offer of Mediation sent to both parties. Neither party agreed to mediation of this complaint.

**February 28, 2007**

Request for the Statement of Information sent to the Custodian.

**March 5, 2007**

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

- Complainant's OPRA records request dated January 29, 2007 and
- Letter from the Custodian to the Complainant dated January 31, 2007 (with attachment).

The Custodian states that she received an OPRA request from the Complainant on January 29, 2007. The Custodian states that she denied the Complainant access to the requested records pursuant to N.J.S.A. 47:1A-3 on January 31, 2007. The Custodian asserts that all automotive businesses listed on the Complainant's Denial of Access Complaint have no standing in this complaint because they were not listed as requestors in Complainant's OPRA request of January 29, 2007.<sup>3</sup>

The Custodian states that all towing contractors must submit an application prior to the award of a license pursuant to Resolution of the Township Committee. The Custodian further asserts that because these applications undergo an investigation, they are protected from disclosure pursuant to N.J.S.A. 47:1A-3. The Custodian further asserts that the records relevant to the request were and still are under investigation, therefore exempting them from disclosure.

The Custodian asserts that since the requestor represents several competitors to the applicant towing companies, the release of the requested records could be used adversely against both applicants. The Custodian further asserts that the records are protected pursuant to N.J.S.A. 47:1A-3. The Custodian alleges that, because the Complainant represents a number of the applicants' competitors, release of the requested

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<sup>3</sup> The Denial of Access Complaint lists Allstar Auto, Allstar Autobody LLC., Barina Autobody, Barina, Dix Auto, Frankman & Son, Larson Ford, RW Towing, R & W Sunoco, Vince's Auto, Tilton's Total Car Care, and VCM Collectibles, care of Joseph W. Ferraro Jr., Esq.  
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records would be inimical to the public interest. The Custodian states that the definition of “inimical” is “being adverse, often by reason of hostility or malevolence” or “having the disposition of an enemy; hostile.”<sup>4</sup> The Custodian asserts that disclosure of the requested applications could release sensitive, business-related information to the public which might be used to undermine the application process. The Custodian asserts that in order to protect the integrity of the application process there needs to be confidentiality.

The Custodian asserts that public agencies should be entitled to conduct investigations in regard to licensing without interference from outside competitors. The Custodian finally asserts that no unlawful denial occurred and that there should be no finding of a knowing and willful violation because the Custodian relied on advice of legal counsel to support a denial.

### **March 14, 2007**

The Complainant’s response to the Custodian’s SOI. The Complainant asserts that the Custodian’s denial of access is unlawful because the Custodian failed to meet the burden of proof needed to deny a request. The Complainant also asserts that OPRA does not preclude requestors based on their intentions for requesting records. The Complainant further asserts that OPRA does not use the word “motivation” anywhere in its law, therefore rendering a denial on the basis of “motivation” unlawful.

The Complainant asserts that pursuant to N.J.S.A. 47:1A-3, a record cannot be withheld if the record was open to public inspection prior to investigation and that the records relevant to this request clearly fall into that category. The Complainant also asserts that the applications were received by the Township prior to being referred to the Police Department for investigation and were therefore government records at that time. The Complainant further asserts that OPRA requires that when records are being transferred from one public agency to another, the receiving public agency shall make those records accessible to the sending agency upon request, thus rendering the requested records accessible to the public.

The Complainant finally asserts that the Custodian’s analogy of releasing the records relevant to the request to releasing information in regard to a potential bid opening and award is false reasoning and that OPRA mandates the release of the record.

### **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:

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<sup>4</sup> Custodian’s Statement of Information, Item 10, pg. 2.

“... 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 ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA provides that:

“... trade secrets and proprietary commercial or financial information *obtained from any source ... [which] shall include data processing software obtained by a public body under licensing agreement ... prohibits its disclosure;*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

“... the record or records which are sought ... pertain to an investigation in progress by any public agency, the right of access provided for ... may be denied if the inspection, copying or examination of such record or records shall be inimical to the public interest; provided, however, that this provision shall not be construed to allow any public agency to prohibit access ... to a record ... that was open for public inspection, examination or copying before the investigation commenced.” N.J.S.A. 47:1A-3.a.

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 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.

N.J.S.A. 47:1A-3.a provides that access to investigatory records which pertain to an investigation in progress by any public agency may be denied if access to such records would be inimical to the public interest. See: Courier News v. Hunterdon County Prosecutor’s Office, 358 N.J. Super. 373, 379-380 (App. Div. 2003). OPRA is intended to be construed in favor of public access; therefore, allowing access to the records responsive to this request would have to be inimical to the *public interest* for N.J.S.A. 47:1A-3.a to apply. In this case, the Custodian’s assertion that allowing access to the records responsive to this request would be inimical to the public is within the spirit of OPRA because disclosure could be detrimental to the Township’s licensing process. The public has a compelling interest in the integrity of the licensing process because the public reliance on municipalities to conduct fair investigations could be jeopardized with

the release of applicant records. It is thus concluded that the records requested are exempt from disclosure pursuant to N.J.S.A. 47:1A-3.a.

The Complainant's assertion that the records were open to the public before the licensing investigation commenced is not founded. The license applications were filed with the Township of Lakewood for the sole purpose of approval by the township, which necessarily includes the investigation as part of the approval process. The records, therefore, were never open to the public prior to the licensing process.

In Renna v. County of Union, GRC Complaint No. 2003-100 (February 2004), the GRC held that the Custodian had lawfully denied access to a proposal submitted by Xerox to run a print shop, stating that release of the information would give an unfair advantage to competitors. In this case, the applications necessarily contain sensitive business information in order for the Township Committee to make the most accurate ruling on granting a towing license to the applicants. Therefore, it is concluded that the records are also exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. because they contain proprietary commercial or financial information that could be detrimental to the parties applying for licenses if released.

For the foregoing reasons, the Custodian has borne his burden of proof that the denial of access to the requested records was lawful pursuant to N.J.S.A. 47:1A-6.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Pursuant to N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-3.a., the records responsive to this request are exempt because they are investigatory records the release of which would be inimical to public interest.
2. The records are also exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. because they contain proprietary commercial or financial information that could be detrimental to the parties applying for licenses if released.
3. Pursuant to N.J.S.A. 47:1A-6, the Custodian has borne her burden of proving a lawful denial of access to the licensing applications.

Prepared By:

Frank F. Caruso  
Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

June 20, 2007