



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

August 28, 2012 Government Records Council Meeting

Donald Winant
Complainant

Complaint No. 2011-31

v.

Borough of Dumont (Bergen)
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Custodian’s certification in the Statement of Information established that at the time of the Complainant’s OPRA request, the requested transcript of Mr. Cook’s testimony was related to an investigation in progress by the Borough regarding contamination at the Department of Public Works. Further, the Custodian’s certification in the Statement of Information established that the requested transcript did not exist prior to the institution of the investigation and that release of the transcript was inimical to the public interest because disclosure of the transcript would impede the Borough’s ability to determine the veracity of witnesses and would discourage witness cooperation. Therefore, the Custodian lawfully denied access to such records pursuant to N.J.S.A. 47:1A-3.a.; N.J.S.A. 47:1A-6.

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 August, 2012

Robin Berg Tabakin, Chair
Government Records Council



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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: August 30, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 28, 2012 Council Meeting**

**Donald Winant¹
Complainant**

GRC Complaint No. 2011-31

v.

**Borough of Dumont (Bergen)²
Custodian of Records**

Records Relevant to Complaint: Copy of the verbatim transcript of any and all testimony given by former Borough of Dumont's ("Borough") Department of Public Works ("DPW") Superintendent, John Cook ("Mr. Cook") at the Law Offices of Gregg F. Paster & Associates relative to any Department of Environmental Protection ("DEP") issues and any DEP files.

Request Made: January 26, 2011

Response Made: January 27, 2011

Custodian: Susan Connelly

GRC Complaint Filed: February 1, 2011³

Background

January 26, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in an e-mail with an official OPRA request form attachment.

January 27, 2011

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the first (1st) business day following receipt of such request. The Custodian states that access to the deposition transcript is denied because such record is related to an ongoing investigation pursuant to N.J.S.A. 47:1A-1.2.

February 1, 2011

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

- Complainant's OPRA request dated January 26, 2011
- E-mail from the Custodian to the Complainant dated January 27, 2011⁴

¹ No legal representation listed on record.

² Represented by Gregg F. Paster, Esq., of Gregg F. Paster & Associates (Rochelle Park, NJ).

³ The GRC received the Denial of Access Complaint on said date.

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The Complainant does not agree to mediate this complaint.

February 17, 2011

Request for the Statement of Information (“SOI”) sent to the Custodian.

February 24, 2011

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated January 26, 2011
- Letter from the Custodian to the Complainant dated January 27, 2011

The Custodian certifies that there is one deposition transcript from John Cook responsive to the Complainant’s OPRA request. The Custodian also certifies that the deposition transcript responsive to the OPRA request must be kept for twenty (20) years after the conclusion of the investigation in accordance with the Records Destruction Schedule established and approved by Records Management Services.⁵

The Custodian certifies that Mr. Cook provided a statement under oath on January 18, 2011 at the Law Offices of Gregg F. Paster & Associates. The Custodian also certifies that the topic of the examination includes issues pertaining to the alleged release of hazardous substances at the Borough’s DPW Garage and nearby properties during the 1980s through the 2000s including, but not limited to, company policy on such release of hazardous substances, identity of decision making authorities and chain of command and procedure to obtain permission for such deposit. The Custodian further certifies that the deposition transcript is exempt pursuant to N.J.S.A. 47:1A-3.a. because it relates to an ongoing investigation in progress.

Custodian’s Counsel states that the Complainant filed an OPRA request on January 26, 2011 for a “copy of the verbatim transcript of any and all testimony given by Mr. Cook at the Law Offices of Gregg F. Paster & Associates relative to any Department DEP issues and any DEP files.” Counsel also states that the Custodian denied the OPRA request because the deposition transcript responsive was part of an ongoing investigation pursuant to N.J.S.A. 47:1A-1.2. Counsel further states that the correct citation for the ongoing investigation exemption is N.J.S.A. 47:1A-3.

Counsel argues that in order to deny access to records pursuant to N.J.S.A. 47:1A-3.a., the government agency must show that the records pertain to an investigation by any public agency and that the release of such records would be inimical to the public interest. See Courier News v. Hunterdon County Prosecutor’s Office, 358 N.J. Super. 373 (App. Div. 2003) and Asbury Park Press v. Lakewood Township Police Department, 354 N.J. Super. 146 (Law Div. 2002). Counsel states that since November 9, 2010 the Borough has been investigating the circumstances concerning the environmental contamination at the DPW. Counsel also states that the Complainant was the Borough Mayor at the time of the failed environmental remediation efforts. Counsel further states

⁴ The Complainant made no legal arguments or factual assertions in support of his Denial of Access Complaint.

⁵ The Custodian did not certify to the search undertaken to locate the records responsive.

that the Borough must investigate the troubling history underlying the contamination in order to fully address its present and future responsibilities. Counsel additionally states that the Borough formally acknowledged its investigation regarding the DPW environmental contamination in Resolution 285.⁶ Counsel states that the deposition transcript responsive to the Complainant's request did not exist before the investigation commenced and therefore it was never "open for public inspection, examination or copying before the investigation commenced" pursuant to N.J.S.A. 47:1A-3.a.

Counsel states that release of this deposition transcript is inimical to the public interest because the privacy and confidentiality of information contained therein is crucial in ascertaining the truth. Counsel also states that there is a long history of remediation failures and lost records. Counsel further states that the records eventually uncovered suggest a deficient Borough administration and such information can become compromised if this investigation information is made public. Counsel asserts that the Appellate Division held in Asbury Park Press v. County of Monmouth, 406 N.J. Super. 1 (App. Div. 2009) "the Legislature struck a balance in OPRA between competing interests of privacy and open government." Counsel argues that the policy underlying open government does not demand access to the transcript of an examination under oath of a witness made pursuant to an investigation. Counsel also argues that releasing the transcript to the public at this time would not only have the chilling effect of discouraging cooperation with this fact-finding investigation, but it would also hinder the Borough's ability to determine the truth by corroborating one witness statement against another. Counsel states that the fact that the Complainant is directly connected to the cause of the investigation makes this situation all the more sensitive. Lastly, Counsel argues that giving the Complainant or any other individual access to this deposition transcript is wholly inimical to the public interest.

November 10, 2011

E-mail from the GRC to Custodian's Counsel. The GRC states that in reviewing the Custodian's SOI, Counsel submitted a letter brief asserting numerous facts. The GRC also states that the Custodian has not submitted a legal certification verifying these facts.

November 10, 2011

E-mail from Custodian's Counsel to the GRC. Counsel states that she will submit certification from the appropriate individuals.

November 29, 2011

E-mail from Custodian's Counsel to the GRC attaching a legal certification from Mayor McHale. Mayor McHale certifies that on September 29, 2010 he received a nine (9) page letter from DEP detailing outstanding cases of environmental hazards at the Borough's DPW dating back to 1986. Mayor McHale also certifies that he requested various Borough personnel to review records regarding the contamination at the DPW. Mayor McHale further certifies that no such records concerning contamination at the DPW existed. Mayor McHale further certifies that once the Borough became aware of the chronic contamination at DPW, it was apparent that a formal investigation was required to determine what remediation efforts remained outstanding and why previous remediation efforts failed. Mayor McHale additionally certifies that on November 9,

⁶ The Custodian includes a copy of this Resolution with her SOI.

2010, the Borough resolved to investigate the circumstances and actions surrounding the hazards set forth in the DEP letter dated September 29, 2010. Mayor McHale certifies that as part of the investigation, current and former Borough employees, officials and council members have been issued subpoenas to compel testimony regarding the DPW area contamination. Mayor McHale also certifies that this investigation remained ongoing at the time of the Complainant's OPRA request and remains ongoing at the signing of this certification.

November 30, 2011

E-mail from the Complainant to the GRC. The Complainant responds to Mayor McHale's certification dated November 29, 2011. The Complainant states that N.J.S.A. 40:48-25 states "when the governing body of a municipality shall have appointed a committee of its members upon any subject or matter within its jurisdiction, the committee may issue a subpoena ad testificandum or subpoena duces tecum, to any person within this state, to appear before it to give testimony or information required." The Complainant also states that this statute is clear as to the legal way in which a governing body may initiate and conduct investigation. The Complainant further states that any and all such meetings for the purposes of conducting investigations pursuant to this statute become bound by the Open Public Meetings Act ("OPMA"). The Complainant additionally states that potential violations of OPMA are not within the GRC's authority to adjudicate, however the Borough's refusal to provide the Complainant with a copy of the meeting minutes and the deposition transcript is within the GRC's authority.⁷

The Complainant states that this particular refusal is in sharp contrast to the subpoenaed testimony of Mr. Jack Eckel. The Complainant also states that Mr. Eckel was compelled by subpoena to appear at an advertised public meeting on October 17, 2011. The Complainant further states that the public was able to attend this meeting, the proceedings and testimony were a matter of public record and were reported in the *Bergen Record* on October 18, 2011.

December 21, 2011

E-mail from Custodian's Counsel to the GRC. Counsel states that the Borough completed its investigation on December 20, 2011. Counsel also states that the Borough's ad-hoc investigatory committee issued its report of findings. Counsel further states that the Custodian has already or will be taking the initiative to provide the responsive deposition transcript to the Complainant.

December 22, 2011

E-mail from the Custodian to the Complainant. The Custodian attaches a copy of the deposition transcript responsive to the Complainant's request. The Custodian states that since the investigation has concluded and the ad-hoc committee issued its report, the deposition transcript became a public record.

⁷ The Complainant did not request meeting minutes in his OPRA request dated January 26, 2011. Donald Winant v. Borough of Dumont (Bergen), 2011-31 – Findings and Recommendations of the Executive Director

May 10, 2012

E-mail from the GRC to the Custodian. The GRC states that in order to properly adjudicate the Complainant's Denial of Access Complaint, it is requesting a legal certification from the Custodian. The GRC states that Custodian's Counsel submitted an e-mail to the GRC on December 21, 2011 in which she stated that the ad-hoc investigatory committee completed its investigation and issued its report of findings. The GRC also states that Custodian's Counsel also stated that the Custodian would be taking the initiative of providing the responsive deposition transcript to the Complainant. The GRC requests the Custodian to legally certify if she provided a copy of the deposition transcript responsive to the OPRA request to the Complainant. The GRC also requests the Custodian to certify that if a copy of the deposition transcript was provided, when did the Custodian provide the deposition transcript.

May 15, 2012

E-mail from the Custodian to the GRC attaching the requested legal certification. The Custodian certifies that she provided a copy of the responsive deposition transcript to the Complainant on December 22, 2011 via e-mail.⁸

Analysis

Whether the deposition transcript responsive to the Complainant's OPRA request is exempt from disclosure under OPRA?

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

OPRA also provides that:

"...where it shall appear that the record or records which are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency, the right of access provided for in [OPRA] 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

⁸ The Custodian attaches a copy of this e-mail dated December 22, 2011.
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provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced. Whenever a public agency, during the course of an investigation, obtains from another public agency a government record that was open for public inspection, examination or copying before the investigation commenced, the investigating agency shall provide the other agency with sufficient access to the record to allow the other agency to comply with requests made pursuant to [OPRA].” 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. 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.

In the instant complaint, the Custodian denied the Complainant access to the deposition transcript responsive to his OPRA request because the transcript was related to an ongoing investigation. Custodian’s Counsel stated in the SOI that since November 9, 2010 the Borough has been investigating the circumstances surrounding environmental contamination at the DPW. The Custodian certified in the SOI that Mr. Cook provided a statement under oath on January 18, 2011. The Custodian also certified in the SOI that Mr. Cook’s deposition involved issues pertaining to the alleged release of hazardous substances at the Borough’s DPW garage and nearby properties during the 1980s through the 2000s. Counsel argued that release of the deposition transcript would be inimical to the public interest because it would have a chilling effect of discouraging cooperation with the Borough’s investigation and would hinder the Borough’s ability to determine the truth by corroborating one witness statement against another, especially since the Complainant was directly connected to the cause of the underlying investigation. Counsel also stated in the SOI that that the deposition transcript responsive to the Complainant’s request did not exist before the investigation commenced and thus it was never “open for public inspection, examination or copying before the investigation commenced” pursuant to N.J.S.A. 47:1A-3.a.

Mayor McHale submitted a separate legal certification on November 29, 2011. Mayor McHale certified that on November 9, 2010 the Borough passed a resolution to investigate the circumstances and actions surrounding the environmental contamination at the DPW. Mayor McHale also certified that as part of this investigation current and former Borough employees, officials and council members were issued subpoenas to compel testimony regarding the DPW area contamination. Mayor McHale further

certified that this investigation remained ongoing at the time of the complainant's OPRA request.

OPRA provides that access may be denied to government records that pertain to an investigation in progress by any public agency where disclosure is inimical to the public interest. N.J.S.A. 47:1A-3.a.

In the matter before the Council, the Custodian's certification in the SOI established that at the time of the Complainant's OPRA request, the requested transcript of Mr. Cook's testimony was related to an investigation in progress by the Borough regarding contamination at the DPW. Further, the Custodian's certification in the SOI established that the requested transcript did not exist prior to the institution of the investigation and that release of the transcript was inimical to the public interest because disclosure of the transcript would impede the Borough's ability to determine the veracity of witnesses and would discourage witness cooperation. Therefore, the Custodian lawfully denied access to such records pursuant to N.J.S.A. 47:1A-3.a.; N.J.S.A. 47:1A-6.

However, Custodian's Counsel informed the GRC on December 21, 2011 via e-mail that the Borough completed its investigation on December 20, 2011. Counsel also stated that the Custodian will be providing the deposition transcript responsive to the Complainant. The Custodian certified on May 15, 2012 that she provided a copy of the deposition transcript responsive to the Complainant's request on December 22, 2011 via e-mail.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian's certification in the Statement of Information established that at the time of the Complainant's OPRA request, the requested transcript of Mr. Cook's testimony was related to an investigation in progress by the Borough regarding contamination at the Department of Public Works. Further, the Custodian's certification in the Statement of Information established that the requested transcript did not exist prior to the institution of the investigation and that release of the transcript was inimical to the public interest because disclosure of the transcript would impede the Borough's ability to determine the veracity of witnesses and would discourage witness cooperation. Therefore, the Custodian lawfully denied access to such records pursuant to N.J.S.A. 47:1A-3.a.; N.J.S.A. 47:1A-6.

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

Approved By: Karyn Gordon, Esq.
Acting Executive Director

August 21, 2012