



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

July 31, 2018 Government Records Council Meeting

Terry Nase
Complainant

Complaint No. 2016-273

v.

Township of Middle (Cape May)
Custodian of Record

At the July 31, 2018 public meeting, the Government Records Council (“Council”) considered the July 24, 2018 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. The building plans for the home located in Cape May Court House responsive to the Complainant’s OPRA request are exempt from disclosure as they contain security information or procedures for a building facility which, if disclosed, would jeopardize security of the building or facility or persons therein. N.J.S.A. 47:1A-1.1; Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Final Decision dated February 26, 2013). The Custodian thus lawfully denied access to them. N.J.S.A. 47:1A-6.
2. The adjudication of the common law issue is outside of the GRC’s authority. See Rowan, Jr., GRC 2011-347. Specifically, the GRC does not have the authority to adjudicate the Complainant’s common law claim to the responsive building plans. N.J.S.A. 47:1A-7(b); Rosenblum, 2006 N.J. Super. Unpub. LEXIS 1444.

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 31st Day of July, 2018

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: August 3, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
July 31, 2018 Council Meeting**

**Terry Nase¹
Complainant**

GRC Complaint No. 2016-273

v.

**Township of Middle (Cape May)²
Custodial Agency**

Records Relevant to Complaint: Hardcopies via U.S. mail of architectural and building plans for a home in Cape May Court House, New Jersey.

Custodian of Record: Kimberly D. Krauss
Request Received by Custodian: July 13, 2016
Response Made by Custodian: July 13, 2016
GRC Complaint Received: October 11, 2016

Background³

Request and Response:

On July 12, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 13, 2016, the Custodian responded in writing denying access to the Complainant’s OPRA request based on the security exemption discussed in “NJ DCA Bulletin No. 03-03 (Revised April 2013) (“Bulletin”). On August 7, 2016, the Complainant e-mailed the Custodian disputing the denial of access based on his understanding of the Bulletin. The Complainant contended that he did not believe disclosing the records to him would represent a security risk. The Complainant requested that the Custodian and Custodian’s Counsel reconsider the Township of Middle’s (“Township”) denial of access. Between August 7 and August 8, 2016, the Complainant submitted to the Custodian his resume, business card, and criminal background checks verifying that he had no criminal history.

On August 8, 2016, Custodian’s Counsel e-mailed the Custodian stating that he agreed that building plans were exempt from disclosure under OPRA, but may be accessible under common law. Counsel stated that in the instance that plans exist, they would not be subject to disclosure.

¹ No legal representation listed on record.

² Represented by Frank L. Corrado, Esq., of Barry, Corrado, Grassi & Gillin-Schwartz, P.C. (Wildwood, NJ).

³ 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.

Counsel further surmised that because the homeowner built the house, there was likely no architect hired for the project.

On August 10, 2016, the Complainant e-mailed the Custodian seeking a status update. The Complainant noted that he could provide credential verification and references to ensure confidential handling of records. The Complainant also noted that the only individuals that would see the plans were his long-time contractor and architect. The Complainant also offered to conduct a face-to-face interview and stated that he was willing to sign a release. On the same day, the Custodian responded advising that Custodian's Counsel confirmed the Township's denial of access based on the Bulletin.

Denial of Access Complaint:

On October 11, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant referred the GRC to his e-mail communications with the Custodian as a basis for challenging the Custodian's denial. The Complainant provided no additional arguments regarding the disclosability of the requested records.⁴

Statement of Information:

On June 12, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on July 13, 2016. The Custodian certified that her search included speaking with the Construction and Zoning Office, reviewing the request with Counsel, and reading the Bulletin. The Custodian certified that she responded in writing on the same day denying access to the responsive record, building plans, in accordance with the Bulletin.

The Custodian provided no additional arguments regarding her denial of access beyond those espoused in her responses to the Complainant.

Analysis

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.

OPRA further provides that the a "government record" shall not include "emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein." N.J.S.A. 47:1A-1.1.

⁴ Following submission of the Denial of Access Complaint, the Complainant submitted several new OPRA requests for building plans. The Custodian denied those requests each time based on the Bulletin.

The GRC has previously addressed requests for building plans. In Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Final Decision dated February 26, 2013), the complainant sought access to building plans for the municipal complex. The complainant subsequently filed a Denial of Access Complaint after not receiving a response. As part of the SOI, the custodian asserted that the requested plans were exempt under the safety and security exemption. The Council, looking to its prior decision in Cardillo v. City of Hudson (Zoning Office), GRC Complaint No. 2005-158 (December 2006) (holding that residential building plans were exempt from disclosure under OPRA), held that the custodian lawfully denied access to the requested building plans. Id. at 8. See also Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2007-319 (July 2008).

The Bulletin, created by the New Jersey Department of Community Affairs (“DCA”), Division of Codes and Standards (“DCS”) (and amended in April 2013), states that “[building plans are protected from disclosure pursuant to OPRA.” Id. at 1. DCS also noted in the Bulletin that DCA regulations include an exemption for building plans submitted as part of the permit process. N.J.A.C. 5:3-2.2. The Bulletin also states that individuals may be able to access building plans “through the common law right of access with a clearly stated reason for viewing” them. Id. at 2.

In the matter currently before the Council, the Complainant sought access to building plans for a particular home in Cape May Court House. The Custodian denied access to the responsive plans, citing the Bulletin’s explanation that they were exempt from disclosure under N.J.S.A. 47:1A-1.1. The Complainant disputed the denial on multiple occasions, noting that the Bulletin did provide for access if they were able to provide “a valid reason for doing so.” Id. The Complainant continuously pointed to the common law qualification in an attempt to obtain access to the records. The crux of this complaint thus reduces to two (2) issues.

The first issue is whether the Custodian lawfully denied access to the responsive building plans under OPRA. While the Bulletin provides guidance on this issue, the GRC relies on its prior decisions in Cardillo, GRC 2005-158 and Kohn, GRC 2011-330. Specifically, the Complainant sought access to building plans, which the Council has determined to be exempt under the safety and security exemption in OPRA. N.J.S.A. 47:1A-1.1. Additionally, the safety and security exemption does not contain any exceptions providing the Complainant an avenue by which he could access said plans under OPRA.

Accordingly, the building plans for the home located in Cape May Court House responsive to the Complainant’s OPRA request are exempt from disclosure as they contain security information or procedures for a building facility which, if disclosed, would jeopardize security of the building or facility or persons therein. N.J.S.A. 47:1A-1.1; Kohn, GRC 2011-330. The Custodian thus lawfully denied access to them. N.J.S.A. 47:1A-6.

The second issue is whether the Complainant should have been given access to the plans under the common law. In Rosenblum v. Borough of Closter, 2006 N.J. Super. Unpub. LEXIS 1444 (App. Div. 2006),⁵ the complainant appealed from a final decision of the GRC that denied him access under OPRA. In appealing the GRC’s decision, the complainant argued that he was

⁵ On appeal from Rosenblum v. Borough of Closter, GRC Complaint No. 2005-16 (October 2005).

entitled access to the requested records under common law. In denying the complainant's argument, the Court held that "the GRC is not empowered to adjudicate disputes concerning the scope of common law rights." Id. at 4. In addition, the Court stated that "[t]he Government Records Council is an agency 'within the Department of Community Affairs charged with adjudicating OPRA disputes' in the event the person seeking the record chooses not to file an action in Superior Court." Id. (citing Bent v. Twp. of Stafford Police Dep't., 381 N.J. Super. 30, 38 (App. Div. 2005) and N.J.S.A. 47:1A-6). See also Rowan Jr. v. Warren Hills Reg'l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013) (holding that the GRC had no jurisdiction over a common law complaint). Based on the forgoing, it is clear that the common law issue is not within the GRC's authority to adjudicate. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-7(b).

Thus, the adjudication of the common law issue is outside of the GRC's authority. See Rowan, Jr., GRC 2011-347. Specifically, the GRC does not have the authority to adjudicate the Complainant's common law claim to the responsive building plans. N.J.S.A. 47:1A-7(b); Rosenblum, 2006 N.J. Super. Unpub. LEXIS 1444.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The building plans for the home located in Cape May Court House responsive to the Complainant's OPRA request are exempt from disclosure as they contain security information or procedures for a building facility which, if disclosed, would jeopardize security of the building or facility or persons therein. N.J.S.A. 47:1A-1.1; Kohn v. Twp. of Livingston (Essex), GRC Complaint No. 2011-330 (Final Decision dated February 26, 2013). The Custodian thus lawfully denied access to them. N.J.S.A. 47:1A-6.
2. The adjudication of the common law issue is outside of the GRC's authority. See Rowan, Jr., GRC 2011-347. Specifically, the GRC does not have the authority to adjudicate the Complainant's common law claim to the responsive building plans. N.J.S.A. 47:1A-7(b); Rosenblum, 2006 N.J. Super. Unpub. LEXIS 1444.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

July 24, 2018