



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

July 25, 2007 Government Records Council Meeting

Beth Burns
Complainant

Complaint No. 2004-169

v.

Borough of Collingswood
Custodian of Record

At the July 25, 2007 public meeting, the Government Records Council ("Council") considered the July 19, 2007 Supplemental 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 Custodian fully complied with the provisions of the Council's September 8, 2005 Interim Order by delivering to the Council a redaction index and the unredacted records for *in camera* examination in a timely manner.
2. The Denial of Access Complainant should be dismissed because the Custodian certifies on July 19, 2007 that the requested records were made available to the Complainant because the Borough has recently completed the first phase of their redevelopment project; therefore, the records are no longer privileged as advisory, consultative or deliberative material and information which, if disclosed, would give an advantage to competitors or bidders.

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., P.O. 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, P.O. Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the
Government Records Council
On The 25th Day of July, 2007

Robin Berg Tabakin, Vice 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: August 2, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 25, 2007 Council Meeting**

**Beth Burns¹
Complainant**

GRC Complaint No. 2004-169

v.

**Borough of Collingswood²
Custodian of Records**

Records Relevant to Complaint:

1. Any and all marketing studies that have been conducted regarding Peter Lumber and the cost to the Borough for these studies.
2. All material submitted by Lumber Yard Redevelopment, LLC to the Planning Board, including the application, for its May 23 [2004] meeting.
3. Detailed break-down of all expenditures to date since its purchase by the Borough, including its purchase price for Peter Lumber (the Complainant asked that the Custodian break out the expenditures by calendar year).

Request Made: September 14, 2004

Response Made: September 16, 2004

Custodian: Alice Marks³

GRC Complaint Filed: October 20, 2004

Background

September 8, 2005

Government Records Council's ("Council") Interim Order. At its September 8, 2005 public meeting, the Council considered the September 2, 2005 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, will conduct an *in camera* review of the unredacted copies of all requested marketing studies at the October 28, 2005 Council meeting to determine whether the documents are exempt from disclosure, in whole or in part, on the basis of "advisory, consultative, or deliberative material" and "information which, if disclosed, would give an advantage to competitors or bidders" pursuant to N.J.S.A. 47:1A-1.1.

September 19, 2005

Council's Interim Order distributed to the parties.

¹ No legal representation listed on record.

² Joseph D. Nardi, III, Esq. of Brown and Connery, LLP (Collingswood, NJ).

³ Complainant's request was denied by the Borough Administrator, Bradford Stokes.

October 17, 2005

Letter from the GRC to the Custodian. The GRC directed the Custodian to forward to the GRC the certified redaction index for the *in camera* inspection by October 24, 2005 and to hand-deliver to the GRC on October 28, 2005 a copy of the unredacted marketing studies for the Peter Lumber redevelopment project pursuant to the GRC's September 8, 2005 Interim Order.

October 24, 2005

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel provided a redaction index certified by the Custodian.

October 26, 2005

Letter from the Custodian to the GRC. The Custodian provided a copy of the unredacted Peter Lumber Marketing Study and a certification indicating that it is the record ordered for the *in camera* inspection.

October 27, 2005

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel forwarded the unredacted Peter Lumber Marketing Study to the GRC.

June 29, 2007

Telephone call from the GRC to the Complainant. The GRC requested the Complainant's position regarding the present status of the case and the Complainant renewed her request for the requested records.

June 29, 2007

Letter from the GRC to the Custodian. The GRC requested the Custodian's position regarding the present status of the case.

July 3, 2007

Telephone call from the GRC to the Custodian. The GRC followed up on its June 29, 2007 letter.

July 5, 2007

Telephone call from the Custodian to the GRC. The Custodian states she spoke with the business administrator to determine if the records are still privileged as advisory, consultative or deliberative material and information which, if disclosed, would give an advantage to bidders. She said a decision was made to release the unredacted records to the Complainant because the Borough has recently completed the first phase of the lumber yard redevelopment project and the record is no longer considered privileged. The Custodian states she will contact the Complainant and offer to release the unredacted records upon the Complainant's payment of the reproduction costs.

July 5, 2007

Letter from the Custodian to the Complainant. The Custodian informed the Complainant that an unredacted copy of the records was available upon payment of copying fees of \$28.50.

July 16, 2007

E-mail from the Complainant to the Custodian. The Complainant queried whether the Borough had or could obtain an electronic copy of the records so same could be e-mailed to her.

July 16, 2007

Reply e-mail from the Custodian to the Complainant. The Custodian informed the Complainant that the Borough only had a hard copy of the record available.

July 16, 2007

E-mail from the Complainant to the Custodian. The Complainant expressed her intention to pick up the records on July 20, 2007.

July 17, 2007

Telephone call from the Borough of Collingswood Business Administrator to the GRC. The Business Administrator advised the GRC that the Custodian is on vacation, but will return on July 18, 2007. He said the offer had been made to provide the Complainant with a copy of the record, but the Complainant now wanted the material to be provided to her in an electronic format. The Business Administrator said the Complainant was told the record was available in a paper copy format. The Business Administrator informed the GRC he would have the Custodian contact the Complainant on July 18, 2007 and subsequently provide the GRC with a status report.

July 18, 2007

Telephone call from the Custodian to the GRC. The Custodian states the Complainant intends to pick up the records at the Borough Hall on July 20, 2007.

July 19, 2007

Custodian's Certification. The Custodian certifies the requested records were made available to the Complainant on July 5, 2007. The Custodian also forwarded to the GRC a copy of the Custodian's July 5, 2007 letter to the Complainant and a copy of the e-mail correspondence between the Complainant and the Custodian on July 16, 2007.

Analysis

Pursuant to Council's September 8, 2005 Interim Order, the Council directed an *in camera* review of the unredacted copies of all requested marketing studies at the October 28, 2005 Council meeting. A copy of the Interim Order was forwarded to the parties on September 19, 2005.

By letter dated October 17, 2005, the GRC directed the Custodian to forward to the GRC the certified redaction index for the *in camera* inspection by October 24, 2005 and to hand-deliver to the GRC on October 28, 2005 a copy of the unredacted marketing studies.

On October 24, 2005 the Custodian's Counsel provided to the GRC a redaction index certified by the Custodian. On October 27, 2005 the Custodian's Counsel provided to the GRC a copy of the unredacted Peter Lumber Marketing Study and a certification indicating that it is the record ordered for the *in camera* inspection. All of the materials the GRC directed the Custodian to produce were produced in a timely manner, and in full compliance with Council's September 8, 2005 Interim Order.

On July 5, 2007 the Custodian informed the GRC that she intended to release an unredacted copy of the requested records to the Complainant because the Borough had recently completed the first phase of the lumber yard redevelopment project; therefore, the records are no longer exempt from disclosure as advisory, consultative or deliberative material and information which, if disclosed, would give an advantage to bidders. The Custodian later that same date sent a letter to the Complainant informing her that the requested records were available. On July 16, 2007 the Complainant requested the records in an electronic format. A request that the records be provided in this medium was not included in the Complainant's September 14, 2004 records request. The availability of the records in an electronic format and any special service charge for record conversion need not be included in this analysis because the Complainant subsequently expressed her intent to accept the record in paper copy format.

The Custodian certified on July 19, 2007 that the requested records were made available to the Complainant therefore no further analysis is necessary.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council find:

1. The Custodian fully complied with the provisions of the Council's September 8, 2005 Interim Order by delivering to the Council a redaction index and the unredacted records for *in camera* examination in a timely manner.
2. The Denial of Access Complainant should be dismissed because the Custodian certifies on July 19, 2007 that the requested records were made available to the Complainant because the Borough has recently completed the first phase of their redevelopment project; therefore, the records are no longer privileged as advisory, consultative or deliberative material and information which, if disclosed, would give an advantage to competitors or bidders.

Prepared By:

John E. Stewart
Case Manager/*In Camera* Attorney

Approved By:

Catherine Starghill, Esq.
Executive Director

July 19, 2007



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GOVERNMENT RECORDS COUNCIL
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Interim Decision on Access
September 8, 2005 Government Records Council Meeting

Beth Burns
Complainant

Complaint No. 2004-169

v.

Borough of Collingswood
Custodian of Record

At the September 8, 2005 public meeting, the Government Records Council (“Council”) considered the September 2, 2005 Executive Director’s Findings and Recommendations and all related documents submitted by the parties. The Council voted by a majority to adopt the entirety of said findings and recommendations. Therefore, the Council hereby finds that the Council will conduct an *in camera* review of the unredacted copies of all requested marketing studies at the October 28, 2005 Council meeting to determine whether the documents are exempt from disclosure, in whole or in part, on the basis of “advisory, consultative, or deliberative material” and “information which, if disclosed, would give an advantage to competitors or bidders” pursuant to N.J.S.A. 47:1A-1.1.

Interim Decision Rendered by the
Government Records Council
On The 8th Day of September, 2005

Vincent P. Maltese, Chairman
Government Records Council

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

DeAnna Minus-Vincent, Secretary
Government Records Council



Decision Distribution Date: September 19, 2005

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of Executive Director
September 8, 2005 Council Meeting**

**Beth Burns
Complainant**

GRC Complaint No. 2004-169

v.

**Borough of Collingswood
Custodian of Records**

Records Requested: (As stated in the Complainants OPRA request)

1. Any and all marketing studies that have been conducted regarding Peter Lumber, and the cost to the Borough for these studies.
2. All material submitted by Lumber Yard Redevelopment, LLC to the Planning Board, including the application, for its May 23 [2004] meeting.
3. Detailed break-down of all expenditures to date since its purchase by the Borough, including its purchase price for Peter Lumber. (The Complainant asked that the Custodian break out the expenditures by calendar year)

Request Made: September 14, 2004

Response Made: September 16, 2004

Custodian: Alice Marks¹

GRC Complaint filed: October 20, 2004

Background

September 14, 2004

Complainant's Open Public Records Act ("OPRA") Request. The Complainant seeks the records stated above.

September 16, 2004

The Borough Administrator's response to the Complainant's OPRA request. He states that the request for copies of market studies on the Peter Lumber property are exempt from disclosure. He also states that there was no cost to the Borough of Collingswood associated with the study. The Custodian states that there will be a charge of \$8.50 for the requests numbered 2 and 3 above.

October 20, 2004

The Complainant's Denial of Access Complaint states that the information contained within the marketing studies is not proprietary to the preparer of the document. The Complainant asserts that the study presumably contains an analysis that the preparer was paid to perform for the purpose of making decisions relating to the expenditure of taxpayer funds. She further states that if the document contains no proprietary information about the preparer, it can afford no advantage to competitors and bidders.

¹ Complainant's request was denied by the Borough Administrator, Bradford Stokes.
Burns v. Borough of Collingswood, 2004-169 Findings and Recommendations of the Executive Director

October 20, 2004

Mediation offered to both parties

November 5, 2004

The Complainant declines mediation.

November 12, 2004

The Custodian's Statement of Information to the Government Records Council (GRC). The Custodian states that no portion of the Peter Lumber site marketing studies were made available to the requestor because:

- The documents sought constitute "trade secrets and proprietary information," and therefore are not government records pursuant to N.J.S.A. 47:1A-1.
- Disclosure of the documents sought would "give an advantage to competitors or bidders," and therefore are not government records pursuant to N.J.S.A. 47:1A-1.
- The documents sought contain deliberative materials.

The Custodian states that the Borough of Collingswood is engaged in the early phases of a novel redevelopment concept and project which would be detrimentally affected if the marketing studies were disclosed to the public. He also states that neighboring municipalities may be able to utilize the marketing studies to replicate the Borough's efforts and siphon off promising businesses and ideas that would otherwise lead to the success of the Borough's redevelopment project.

November 20, 2004

The Complainant's response to the Custodian's Statement of Information. The Complainant states that she cannot imagine that the firm preparing the marketing study has inserted any trade secrets or proprietary information in the study. She also states that the report, as presented at a town meeting many months ago, seemed to be a review and analysis of selected census data. She goes on to state that surrounding jurisdictions neither compete with nor bid against the firm that created the Borough's marketing study, nor does Collingswood compete or bid against neighboring townships in procurement situations. Finally, the Complainant requests that the Council directly review the study as it did in GRC case no. 2004-21.

February 14, 2005

Custodian's counsel response to the Complainant's November 20, 2004 letter. Custodian's counsel responds with the following points:

- The marketing analysis was not presented at a town meeting. Borough representatives indicated that a marketing study had been obtained for the purpose of attempting to determine how the residential needs of the Borough

residents could be best served by a redevelopment project centered around the site of a former lumberyard.

As part of the redevelopment process, the Borough commissioned a consulting firm to complete a study to identify the market potential of the lumberyard redevelopment project. The consultant specifically noted in its study that the extent and characteristics of the potential market were identified using “proprietary target market methodology,” and these comments alone “provide a sufficient basis for the Borough’s determination that the consultant’s study is proprietary, and, as a result, is exempted from release pursuant to N.J.S.A. 47:1A-1.1.”

- Adjoining communities are in various phases of similar residential redevelopment projects and could find useful information in the Borough’s marketing study without undertaking the financial obligation or the risk in commissioning their own study.

April 22, 2005

The GRC staff’s letter to the Custodian asking for more information to support their position of non-disclosure.

May 3, 2005

Custodian’s counsel response to the April 22, 2005 letter. Custodian’s counsel includes in the letter certifications of the Borough Administrator, Bradford Stokes, and the Managing Member of the designated redeveloper for the Peter Lumber project, John A. Costanza. Custodian’s counsel states “you will note from reviewing these Certifications that it is the Borough’s position that disclosure of the marketing analysis places the Borough and the redeveloper in a competitive disadvantage with other neighboring municipalities presently in the process of planning similar projects.”

Custodian’s counsel also states that as noted from the certification of Mr. Stokes, the firm that prepared the market analysis asserted the right of non-disclosure via the restrictive legal disclaimer included in the study which prohibits any person or entity other than the Borough from copying or distributing the study.

Further, Custodian’s counsel cites Renna v. County of Union, GRC Case No. 2003-100, wherein the GRC found that a Custodian properly denied release of the requested records because XEROX had made a representation that the information was proprietary. In the same case, the GRC found that if disclosed the information would have given an unfair advantage to competition based on that representation from XEROX.

May 11, 2005

Complainant’s e-mail to the GRC replying to the Custodian’s counsel response. The Complainant references the statement in the marketing analysis that provides, “Zimmerman/Volk Associates, Inc. retains all rights, title and interest to all aspects of this report. This report cannot be copied or distributed by any person or entity other than the client without the express written permission of Zimmerman/Volk Associates, Inc.”

The Complainant asserted that “[t]his statement does not assert that the information is to be considered proprietary nor does it forbid disclosure.” She also states “[i]t gives express permission to the borough, its client, to release the report at will.”

Analysis

Whether the Custodian’s denial access to the marketing study because of the statutory exemptions for “advisory, consultative, or deliberative material” and “advantage to competitors or bidders” pursuant to N.J.S.A. 47:1A-1.1 was unlawful 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.

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

Further, OPRA provides that the “... public agency shall have the burden of proving that the denial of access is authorized by law ...” N.J.S.A. 47:1A-6.

Advisory, Consultative, or Deliberative Material

In an effort to prove that the denial of access to the marketing study and/or analysis was lawful, the Custodian asserts that the requested document is not a “government record” under the law. Specifically, the Custodian asserts that the requested marketing study and/or analysis is exempt from disclosure because it is “advisory, consultative, or deliberative material.”

OPRA provides that “...[t]he terms [government record or record] shall not include inter-agency or intra-agency *advisory, consultative, or deliberative material...*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

In support of this assertion, the Custodian’s counsel certified that “... the Borough and the redeveloper remain in the *deliberative* stages of the redevelopment project. Final decisions remain for architectural design, establishment of prices for the units and marketing and sales procedures. *Until those matters are finalized, I believe that the market analysis should not be disclosed since it could ultimately have a negative effect on the Borough’s success with this project ...*” (Emphasis added.)

In Toth v. Ewing Township, GRC Case No. 2004-21, the Council found that the Custodian’s counsel met the burden of proving that requested information was deliberative, consultative or advisory material exempt from disclosure under N.J.S.A. 47:1A-1.1. In that case, the Custodian’s Counsel explained that the requested documents

were pre-decisional to the Township Council's adoption of an early retirement program. It was further explained that the requested documents were deliberative materials created for the Township Council to assist in their decision-making process and contained opinions of the Chief Financial Officer and the Administration on the fiscal impact of early retirements, replacements and estimated salaries for replacements. Also, the Chief Financial Officer certified that any factual information contained in the requested documents was based on estimations, assumptions and analysis of the Administration and was inextricably intertwined and could not be separated from the opinions and conclusions.

Like in the Toth case, the Custodian's counsel certified that the Borough is in the *deliberative* stages of the redevelopment project and that several critical final decisions remain before the project's planning is complete. The facts in the present case are also similar to those in Toth because the marketing study is deliberative material *created for the Borough to assist in its decision-making process*.

While the Custodian's arguments and legal conclusions are persuasive, it can not be determined whether the Custodian has met the burden of proving that the requested document(s) are exempt from disclosure without actually reviewing the document to confirm the Custodian's legal conclusions. Therefore, it is recommended that the Council conduct an *in camera* inspection of all the marketing studies and analyses to determine whether the document is exempt from disclosure, in whole or in part, because it is "advisory, consultative, or deliberative material" pursuant to N.J.S.A. 47:1A-1.1.

Advantage to Competitors or Bidders

The Custodian in this case further asserts an additional statutory exemption from disclosure in support of the denial of access to the marketing studies and/or analysis. Specifically, the Custodian asserts that the requested document is exempt from disclosure because it is information that, if disclosed, would give an advantage to competitors.

OPRA provides that "... [a] government record shall not include the following information which is *deemed to be confidential* ...: ... *information which, if disclosed, would give an advantage to competitors or bidders; ...*" (Emphasis added.) N.J.S.A. 47:1A-1.1.

In his certification, the Custodian's counsel asserts that "...it is the Borough's position that release of this report *at this time* could jeopardize the success of the redevelopment project *since the Borough is currently in the process of competing with other adjoining municipalities in their redevelopment efforts*. For example, ... Haddon Township ... the former Garden State Racetrack in Cherry Hill Township ... other Camden County communities including the City of Camden and Pennsauken Township ... As a result, the Borough finds itself in competition with its neighboring municipalities while attempting to finalize its plan for development of the Peter Lumber site..." (Emphasis added.)

The Custodian's counsel further asserts that "...[w]e consider the marketing and sale techniques in developing and marketing the [residential and commercial] properties

for sale to be *proprietary in nature* and *the Borough is sensitive to the potential competitive disadvantage* the redeveloper would be placed against other redevelopers involved in other local redevelopment projects. At a minimum, until the units have been constructed and fully occupied, the Borough would not want to place the redeveloper in a disadvantageous position against its competitors...." (Emphasis added.)

It is also asserted in the certification of the managing member of the redeveloper's firm (John A. Costanza) that he "... believe[s] that *the release of the market analysis would undermine the Borough's ability to compete with other redevelopment projects*. In addition, part of our responsibilities under our agreement with the Borough is to sell the units. Release of the market analysis would not only undermine our ability to compete with other redevelopment projects but also undermine our ability to market and sell residential units to our target prospects. *To the best of my knowledge, and in my opinion, no developer would ever release its market study to the public or make it available to competitors...*" (Emphasis added.)

In Belth v. Department of Banking & Insurance, GRC Case No. 2003-29, the Council determined that the information requested was proprietary information that would provide an advantage to competitors. The Council relied upon the Custodian's certification that the information was "extremely sensitive and proprietary." The Council determined that the information was "deliberative" in nature and that disclosure of the information to competitors who had not disclosed similar information would give those competitors an advantage.

Like in the Belth case, the Custodian and the redeveloper in the present case have certified that disclosure of the marketing study at this time would provide an advantage to other local municipalities engaged in similar redevelopment projects. Specifically, the Custodian and redeveloper assert that the Borough is in competition with these other municipalities to sell commercial and residential property that will make up the redevelopment project.

Again, while the Custodian's arguments and legal conclusions are persuasive, it can not be determined whether the Custodian has met the burden of proving that the requested document(s) are exempt from disclosure without actually reviewing the document(s) to confirm the Custodian's legal conclusions. Therefore, it is recommended that the Council conduct an *in camera* inspection of all the marketing studies to determine whether the document is exempt from disclosure, in whole or in part, because it is "information which, if disclosed, would give an advantage to competitors or bidders" pursuant to N.J.S.A. 47:1A-1.1.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council request that un-redacted copies of all the marketing studies as requested be presented at the October 13, 2005 Council meeting for an *in camera* inspection to determine whether the documents are exempt from disclosure, in whole or in part, because the document is “advisory, consultative, or deliberative material” and “information which, if disclosed, would give an advantage to competitors or bidders” pursuant to N.J.S.A. 47:1A-1.1.

Prepared By: Chris Malloy, Case Manager

Approved By:

Paul F. Dice
Executive Director
Government Records Council

September 2, 2005