



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

May 28, 2008 Government Records Council Meeting

Michael DeLuca
Complainant

Complaint No. 2006-102

v.

Town of Guttenberg
Custodian of Record

At the May 28, 2008 public meeting, the Government Records Council (“Council”) considered the May 21, 2008 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted to unanimously adopt the entirety of said findings and recommendations. The Council, therefore, accepts the Administrative Law Judge’s Initial Decision dated April 8, 2008. No further adjudication is required.

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 May, 2008

Robin Berg Tabakin, 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: June 5, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 28, 2008 Council Meeting**

**Michael DeLuca¹
Complainant**

GRC Complaint No. 2006-102

v.

**Town of Guttenberg²
Custodian of Records**

Records Relevant to Complaint:

1. Certificate of approval for the fire safety system at 7000 Blvd. East, Tower I,
2. If no certificate of approval exists, then all documents relating to why no certificate exists as well as fines and copies of checks for fines and
3. All documents relating to the inspection of the pool pump room at 7000-7002-7004 Blvd. East, including all fines, letters, reports, copies of checks to pay fines and violations.

Request Made: November 16, 2005

Response Made: November 17, 2005

Custodian: Linda Martin

GRC Complaint Filed: December 23, 2005

Background

May 30, 2007

Government Records Council's ("Council") Interim Order. At its May 30, 2007 public meeting, the Council considered the May 23, 2007 *Reconsideration* 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, found that:

“...due to the significant question of whether or not the Custodian falsely certified that no records responsive to the Complainant’s November 16, 2005 OPRA request exist, this complaint should be referred to the Office of Administrative Law (OAL) for a hearing to resolve the contested facts. Specifically, whether the following records are responsive to the Complainant’s request for why no certificate of approval exists: a letter from the Electrical Subcode Official to Waseem Hakeem P.E., and Walter T. Gorman, P.E., P.C., dated September 7, 2005 as well as a letter from the Electrical Subcode Official to Waseem Hakeem P.E., and Walter T. Gorman, P.E., P.C., dated October 3, 2005.

¹ No legal representation listed on file.

² Represented by Charles P. Daglian, Esq., of Miller & Galdieri (Jersey City, NJ).

If it is determined via a fact finding hearing that the requested records do not exist and the records submitted by the Complainant are not responsive to his November 16, 2005 OPRA request, as the Custodian certified, then such determination will render this complaint moot.”

May 31, 2007

Council’s Interim Order distributed to the parties.

July 26, 2007

Complaint transmitted to the Office of Administrative Law (“OAL”).

April 8, 2008

OAL’s Initial Decision. The Administrative Law Judge found the following:

1. “[The] letters from the Guttenberg Electrical Sub-Code Official to the Galaxy fire alarm system project engineers dated September 7, 2005 and October 3, 2005, are responsive to complainant’s November 16, 2005 OPRA request.
2. Records Custodian Linda Martin violated OPRA by failing to disclose [the letters from the Guttenberg Electrical Sub-Code Official to the Galaxy fire alarm system project engineers dated September 7, 2005 and October 3, 2005] to complainant in response to his OPRA request.
3. The Records Custodian knew or should have known of the existence of the subject documents and that they were responsive to complainant’s OPRA request.
4. Records Custodian Linda Martin did not willfully violate OPRA inasmuch as she acted under the mistaken belief that no responsive documents existed. Therefore, her response to the request was not made with a deliberate intent to withhold responsive documents from the complainant. Her action did not reflect conscious wrongdoing.

Analysis

No analysis is required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council accept the Administrative Law Judge’s Initial Decision dated April 8, 2008. No further adjudication if required.

Prepared By:

Dara Lownie
Senior Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

May 21, 2008



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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VINCENT P. MALTESE, Chairman
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INTERIM ORDER

May 30, 2007 Government Records Council Meeting

Michael DeLuca
Complainant

Complaint No. 2006-102

v.

Town of Guttenberg
Custodian of Record

At the May 30, 2007 public meeting, the Government Records Council (“Council”) considered the May 23, 2007 *Reconsideration* 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 due to the significant question of whether or not the Custodian falsely certified that no records responsive to the Complainant’s November 16, 2005 OPRA request exist, this complaint should be referred to the Office of Administrative Law (OAL) for a hearing to resolve the contested facts. Specifically, whether the following records are responsive to the Complainant’s request for why no certificate of approval exists: a letter from the Electrical Subcode Official to Waseem Hakeem P.E., and Walter T. Gorman, P.E., P.C., dated September 7, 2005 as well as a letter from the Electrical Subcode Official to Waseem Hakeem P.E., and Walter T. Gorman, P.E., P.C., dated October 3, 2005.

If it is determined via a fact finding hearing that the requested records do not exist and the records submitted by the Complainant are not responsive to his November 16, 2005 OPRA request, as the Custodian certified, then such determination will render this complaint moot.

Interim Order Rendered by the
Government Records Council
On The 30th Day of May, 2007



Vincent P. 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: May 31, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
**Findings and Recommendations of the Executive Director
May 30, 2007 Council Meeting**

**Michael DeLuca¹
Complainant**

GRC Complaint No. 2006-102²

v.

**Town of Guttenberg³
Custodian of Records**

Records Relevant to Complaint:

1. Certificate of approval for the fire safety system at 7000 Blvd. East, Tower I,
2. If no certificate of approval exists, then all documents relating to why no certificate exists as well as fines and copies of checks for fines and
3. All documents relating to the inspection of the pool pump room at 7000-7002-7004 Blvd. East, including all fines, letters, reports, copies of checks to pay fines and violations.

Request Made: November 16, 2005

Response Made: November 17, 2005

Custodian: Linda Martin

GRC Complaint Filed: December 23, 2005

Background

May 11, 2006

At its May 11, 2006 public meeting, the Government Records Council (“Council”) considered the May 4, 2006 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties regarding Michael DeLuca v. Town of Guttenberg, GRC Complaint No. 2006-25. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. As the Custodian certifies that no records responsive to the Complainant’s request exist, there would not have been an unlawful denial of access. However, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a written response to his November 28, 2005

¹ No legal representation listed on record.

² This complaint is a reconsideration of Michael DeLuca v. Town of Guttenberg, GRC Complaint No. 2006-25 (May 2006).

³ Represented by Charles Daglian, Esq. (Jersey City, NJ).

- request within the statutorily mandated seven (7) business days, therefore creating a “deemed” denial.
2. The Custodian’s response that the Complainant had already been advised that the requested documents do not exist is not a lawful reason for a denial of access pursuant to the Custodian’s burden of proof obligation established and mandated under N.J.S.A. 47:1A-6.

May 30, 2006

Complainant’s request for reconsideration with the following attachments⁴:

- Letter from Walter T. Gorman, P.E., P.C. to Mark Barone, Electrical Subcode Official dated July 8, 2004,
- Building Technologies Group-NJ, LLC Temporary Fire Alarm System Test and Inspection Summary Report dated March 3, 2005,
- Town of Guttenberg’s Application for a Variation regarding the Galaxy Towers dated May 11, 2005,
- Uniform Construction Code (“UCC”) Inspection Log dated June 20, 2005,
- Letter from Mark Barone, Electrical Subcode Official to Waseem Hakeem, P.E. and Walter T. Gorman, P.E., P.C., dated September 7, 2005,
- Letter from Mark Barone, Electrical Subcode Official to Waseem Hakeem, P.E. and Walter T. Gorman, P.E., P.C., dated October 3, 2005,
- Building Technologies Group, Inc. Field Device Detail Report for Galaxy Tower I – Cab 17 and
- UCC NJ Fire Protection Subcode Technical Section for the fire system of Galaxy Tower I.

The Complainant states that in response to his OPRA request dated November 16, 2005⁵, the Custodian certified that no records responsive to the Complainant’s request exist. The Complainant states that his November 16, 2005 OPRA request was for all records relating to the non-approval of the fire safety system and the Certificate of Approval at the Galaxy Towers. The Complainant claims that the records submitted with this request for reconsideration, most notably the inspection logs dated June 2005 which the Complainant claims he acquired through a separate OPRA request made in April 2006, are responsive to his November 16, 2005 OPRA request and should have been provided by the Custodian. Additionally, the Complainant asserts that because all the records are dated prior to his November 16, 2005 OPRA request, it appears as though the Custodian provided false information in her certification that no records responsive exist. (The Council’s May 11, 2006 Final Decision regarding GRC Complaint No. 2006-25 held that “[a]s the Custodian certifies that no records responsive to the Complainant’s request exist, there would not have been an unlawful denial of access...”).

June 13, 2006

Letter from GRC to Complainant. The GRC requests that the Complainant provide documentation evidencing that the records submitted with the Complainant’s

⁴ The Complainant submitted said request on a Denial of Access Complaint form.

⁵ This OPRA request was the subject of Michael DeLuca v. Town of Guttenberg, GRC Complaint No. 2006-25 (May 2006).

request for reconsideration were obtained from the Town of Guttenberg through an OPRA request.

June 14, 2006

The Complainant submits the following records in response to GRC's request:

- Complainant's OPRA request dated November 16, 2005,
- Complainant's OPRA request dated April 19, 2006,
- Custodian's response to the OPRA request dated May 1, 2006,
- Custodian's subsequent response to the OPRA request dated May 10, 2006,
- Letter from Complainant to Custodian dated May 18, 2006,
- Letter from Complainant to Fire Subcode Official dated May 25, 2006,
- Letter from Fire Subcode Official to Complainant dated May 27, 2006,
- Letter from Complainant to Fire Subcode Official dated June 5, 2006 and
- Letter from Fire Subcode Official to Complainant dated June 8, 2006.

June 29, 2006

Custodian's certification with the following attachments⁶:

- Complainant's two (2) OPRA requests dated November 16, 2005 and
- Letter from Construction Official to Complainant dated November 17, 2005.

The Custodian certifies that the Complainant's first OPRA request dated November 16, 2005 was specifically for the Certificate of Approval for the fire safety system. The Custodian certifies that the Complainant also requested that if no Certificate of Approval exists, he should be provided with all records relating to why no certificate exists. The Custodian certifies that in response to said request, she provided the Complainant with a letter from the Building Inspector which was created solely in response to the Complainant's request, stating that no Certificate of Approval exists because the final inspection had not yet been completed. Additionally, the Custodian certifies that all of the documents the Complainant submitted to the GRC with his request for reconsideration are records from the Inspector's file and not the requested Certificate of Approval, nor are they records that relate to why a Certificate of Approval did not exist as of November 16, 2005.

The Custodian further certifies that the Complainant's second OPRA request dated November 16, 2005 was for all records relating to the inspection of the pool pump room. The Custodian certifies that she advised the Complainant that no records exist and provided him with a letter from the Building Department, which was created in response to the Complainant's request, stating that no inspection report exists because the inspection did not show any unsafe conditions. Additionally, the Custodian certifies that all of the records the Complainant submitted to the GRC with his request for reconsideration are records from the Inspector's file and are not responsive to the Complainant's request for records relating to the inspection of the pool pump room.

⁶ Custodian's certification submitted in response to GRC's request for information pursuant to Complainant's request for reconsideration of GRC Complaint No. 2006-25.

Furthermore, the Custodian certifies that the Town devotes an extraordinary amount of time in responding to the Complainant's open-ended requests. The Custodian also certifies that the Town has offered the Complainant the opportunity to come into the office and review the files so that the Custodian can copy the records the Complainant wants. However, the Custodian certifies that the Complainant has not yet accepted said offer. Additionally, the Custodian contends that this complaint should be dismissed because the Custodian certifies that none of the records submitted by the Complainant with his request for reconsideration are records the Complainant requested on November 16, 2005.

March 5, 2007

Letter from GRC to Custodian. The GRC requests a legal certification from the Custodian addressing the following questions for clarification:

1. Regarding the inspection log the Complainant provided with his request for reconsideration, whether any of the construction locations listed on said log relate to the pool pump room at the Galaxy Towers.
2. Whether the Field Device Detail Report, which the Complainant provided with his request for reconsideration, is responsive to the Complainant's OPRA request dated November 16, 2005 for all records relating to the inspection of the pool pump room, as said report has several entries relating to the pump room area.

March 15, 2007

Custodian's certification in response to GRC's request. The Custodian certifies that she had the Construction Code Official review the inspection report of a former Town employee dated June 20, 2005 to determine if any entries listed on said report relate to the Galaxy Towers' pool pump room. The Custodian certifies that the Construction Code Official advised her that none of the entries relate to the pool pump room. Additionally, the Custodian certifies that an employee of Building Technologies Group, Inc. reviewed the Field Device Detail Report which was prepared by said company. The Custodian certifies that the Building Technologies Group, Inc. employee advised her that the Field Device Detail Report is either from October 2005 or January 2007 and that said report does not indicate an inspection and/or refer to the Galaxy Towers' pool pump room. The Custodian further certifies that the Building Technologies Group, Inc. employee advised her that the pump area indicated on the report is in a different part of the towers and is not related to the pool.

March 18, 2007

Complainant's response to the Custodian's certification. The Complainant asserts that the records he provided to the GRC with his request to reconsider Michael DeLuca v. Town of Guttenberg, GRC Complaint No. 2006-25 (May 2006) are responsive to his request for all documents relating to why no certificate of approval exists, which the Custodian certified at the time of the request and initial complaint that no responsive records existed.

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

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.

The Complainant states that in response to his November 16, 2005 OPRA request which was the subject of GRC Complaint No. 2006-25 (May 2006), the Custodian certified that no records responsive to the Complainant’s request exist. The Complainant claims that the records submitted with his request for reconsideration, which the Custodian claims he acquired through a separate OPRA request made in April 2006, are responsive to his OPRA request dated November 16, 2005 and should have been provided by the Custodian.

The Custodian certifies that all of the records the Complainant submitted to the GRC with his request for reconsideration are records from the Inspector’s file, and not the requested Certificate of Approval, nor are they records that relate to why a Certificate of Approval did not exist as of November 16, 2005. Additionally, the Custodian certifies that the records the Complainant submitted to the GRC with his request for reconsideration are not responsive to the Complainant’s request for records relating to the inspection of the pool pump room, which was the subject of GRC Complaint No. 2006-25 (May 2006).

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.

Conflicting evidence exists with regard to the question of whether the records the Complainant submitted to the GRC with his request for reconsideration are responsive to the Complainant's November 16, 2005 OPRA request. Additionally, a review of the records submitted by the Complainant discloses that it may be possible that some of the records may be responsive to the Complainant's OPRA request for records relating to why no certificate of approval exists; specifically, a letter from the Electrical Subcode Official to Waseem Hakeem P.E., and Walter T. Gorman, P.E., P.C., dated September 7, 2005 as well as a letter from the Electrical Subcode Official to Waseem Hakeem P.E., and Walter T. Gorman, P.E., P.C., dated October 3, 2005.

Due to the significant question of whether or not the Custodian falsely certified that no records responsive to the Complainant's November 16, 2005 OPRA request exist, this complaint should be referred to the Office of Administrative Law (OAL) for a hearing to resolve the contested facts. Specifically, whether the following records are responsive to the Complainant's request for why no certificate of approval exists: a letter from the Electrical Subcode Official to Waseem Hakeem P.E., and Walter T. Gorman, P.E., P.C., dated September 7, 2005 as well as a letter from the Electrical Subcode Official to Waseem Hakeem P.E., and Walter T. Gorman, P.E., P.C., dated October 3, 2005. If it is determined via a fact finding hearing that the requested records do not exist and the records submitted by the Complainant are not responsive to his November 16, 2005 OPRA request, as the Custodian certified, then such determination will render this complaint moot.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that due to the significant question of whether or not the Custodian falsely certified that no records responsive to the Complainant's November 16, 2005 OPRA request exist, this complaint should be referred to the Office of Administrative Law (OAL) for a hearing to resolve the contested facts. Specifically, whether the following records are responsive to the Complainant's request for why no certificate of approval exists: a letter from the Electrical Subcode Official to Waseem Hakeem P.E., and Walter T. Gorman, P.E., P.C., dated September 7, 2005 as well as a letter from the Electrical Subcode Official to Waseem Hakeem P.E., and Walter T. Gorman, P.E., P.C., dated October 3, 2005.

If it is determined via a fact finding hearing that the requested records do not exist and the records submitted by the Complainant are not responsive to his November 16, 2005 OPRA request, as the Custodian certified, then such determination will render this complaint moot.

Prepared By:

Dara Lownie
Senior Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

May 23, 2007