



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

December 18, 2008 Government Records Council Meeting

Bartley Shrader
Complainant

Complaint No. 2007-265

v.

Florence Township Board of Education (Burlington)
Custodian of Record

At the December 18, 2008 public meeting, the Government Records Council ("Council") considered the December 10, 2008 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 because the Complainant's amended Denial of Access Complaint voluntarily withdraws all of the records relevant to the complaint except for Item #5, and because the Complainant materially altered Item #5 to assert a denial of access to records for which no underlying written OPRA request had been submitted, contrary to the provisions of N.J.S.A. 47:1A-5.g., the complaint should be dismissed as without any reasonable factual basis pursuant to N.J.S.A. 47:1A-7.e. Further, there is no denial of access to those records verbally requested at the time the Complainant inspected those records originally requested because the Custodian has certified that the records verbally requested either do not exist or were properly destroyed pursuant to the records retention schedule established by New Jersey Department of State, Division of Archives and Records Management for failed referendums.

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 18th Day of December, 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: December 22, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 18, 2008 Council Meeting**

**Bartley Shrader¹
Complainant**

GRC Complaint No. 2007-265

v.

**Florence Township Board of Education (Burlington)²
Custodian of Records**

Records Relevant to Complaint:³

1. The Florence Township tax map dated June 4, 1990 used as a reference in the ED-215 prepared by Dante Guzzi Engineering Associates for the new Florence High School.
2. Wetlands plan, Florence Township Board of Education (“BOE”), Florence Township, Block 160, Lots 17 and 27, Burlington County, NJ dated April 18, 2003 (revised January 2, 2004) prepared by Dante Guzzi Engineering Associates and submitted to the New Jersey Department of Environmental Protection (“NJDEP”) for the new Florence High School.
3. The topographic survey dated March 25, 2004, prepared by Dante Guzzi Engineering Associates, which is referenced in the notes of the “Existing Conditions Plan” for the new Florence High School, drawing C1, dated August 6, 2004 (revised March 7, 2005).
4. All the financial records pertaining to the construction of the new Florence High School including payments made and grants received.
5. Any and all plans, reports, percolation tests, soil borings, designs, data, and pictures relating to the two previous school referenda for the two previous attempts to build the new Florence High School on Cedar Lane (the first was around 1988 and the second was around 1990-1991).
6. All reports and information, documents, income and payments received and any other financial records that are not mentioned here pertaining to the farming of the BOE property located on Cedar Lane; the property known formally as 160.01 17 and 27.

¹ Represented by Thomas T. Booth, Esq. (Haddonfield, NJ).

² Represented by George Morris, Esq., of Parker McCay, P.A. (Marlton, NJ).

³ The records requested are different in the Denial of Access Complaint from those stated in the original request. In the Denial of Access Complaint, the Complainant abbreviated the description of the originally requested record so it would fit in the space provided on page four of the complaint.

Requests Made: August 16, 2007 and September 24, 2007⁴

Response Made: October 1, 2007

Custodian: Wendy Spera

GRC Complaint Filed: October 26, 2007⁵

Background

August 16, 2007

Complainant's Open Public Records Act ("OPRA") requests. The Complainant requests the records relevant to this complaint listed above on official OPRA request forms.

September 24, 2007

Complainant's Open Public Records Act ("OPRA") requests. The Complainant requests the records relevant to this complaint listed above on official OPRA request forms.

October 1, 2007

Custodian's response to the OPRA requests. The Custodian responds in writing to the Complainant's August 16, 2007 OPRA requests on the thirty-first (31st) business day following receipt of such requests. The Custodian fails to respond in writing to the Complainant's September 24, 2007 OPRA requests. The Custodian informs the Complainant that she is confirming an earlier telephone conversation this date wherein the Custodian states she informed the Complainant that he could visit her office and view financial records; however, the Custodian states that she has no records responsive to the Complainant's requests with respect to plans prepared by Guzzi Engineering. The Custodian informs the Complainant that he will have to make arrangements with Guzzi Engineering for disclosure of any reports that the engineering company prepared.

October 26, 2007

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

- Letter from the NJ Department of Environmental Protection to Dante Guzzi Engineering Associates, dated January 28, 2004.
- Dante Guzzi Engineering Associates existing conditions plan, referencing a topographic survey dated March 25, 2004.
- Dante Guzzi Engineering Associates existing conditions plan for the new Florence High School, dated March 7, 2005.
- Complainant's OPRA requests dated August 16, 2007.
- Complainant's OPRA requests dated September 24, 2007.

⁴ The Complainant filed three (3) separate OPRA request forms on each of the two (2) dates. The records relevant to the complaint, along with other records that are not relevant to this complaint, were requested on the six (6) separate request forms. Although the requests dated September 24, 2007 contain a date of September 23, 2007 written by the Complainant, both Custodian and Complainant acknowledge the correct date to be September 24, 2007.

⁵The GRC received the Denial of Access Complaint on said date.

- Letter from the Township of Florence Administrator Richard Brook to the Complainant, dated September 6, 2007.
- Custodian's response to the August 16, 2007 OPRA requests, dated October 1, 2007.

The Complainant states that he submitted numerous OPRA requests to the Custodian but that six (6) of the requests, three (3) dated August 16, 2008 and three (3) dated September 24, 2007, contain requests for records that the Custodian failed to disclose. The Complainant states that he spoke to the Custodian on October 23, 2007, and that the Custodian informed him that on October 12, 2007 she spoke with the engineer for the BOE, Dante Guzzi. The Complainant states that the Custodian informed him that she asked Mr. Guzzi to provide the records prepared by Dante Guzzi Engineering Associates to the Complainant. The Complainant states that the records have not been disclosed.

November 2, 2007

Offer of Mediation sent to both parties.

November 5, 2007

The Custodian agrees to mediation.

November 13, 2007

The Complainant declines mediation.

November 15, 2007

Request for the Statement of Information sent to the Custodian.

November 15, 2007

Telephone call from the Complainant to the GRC. The Complainant wants to know how the complaint process will proceed. The Complainant also states that he received some of the records responsive to his requests; therefore some records relevant to the complaint now need to be modified. The Complainant was unsure if he should withdraw a portion of the Complaint. The Complainant expresses his intention to withdraw his complaint and informs the GRC he will e-mail or fax a decision to the GRC promptly.

November 15, 2007

Letter from the GRC to the Complainant. The GRC confirms its telephone conversation with the Complainant earlier this date.

November 15, 2007

Facsimile transmission to the Custodian. The GRC informs the Custodian that the Complainant has expressed his intention to withdraw his complaint and that the deadline date for return of the Custodian's SOI will be suspended until further notice.

November 21, 2007

Letter from the GRC to the Complainant. The GRC informs the Complainant that the GRC will proceed with adjudication of this matter unless the Complainant informs the GRC otherwise within five (5) days.

November 26, 2007

Amended Denial of Access Complaint filed with the GRC with the following attachments:

- Copy of a purported page of minutes from a BOE meeting alleged by the Complainant to have occurred on July 10, 1989.
- Copy of a partial page of minutes from a BOE meeting dated October 7, 1991.

The Complainant amends his October 26, 2007 complaint by withdrawing his request for Items #1, #2, #3, #4 and #6. The Complainant states he is rewording Item #5 of his request to reflect new information. The reworded request states:

“Copy of the property surveys mentioned in the October 7, 1991 meeting minutes from the Florence Township Board of Education and copy of the engineering studies performed on the school board property as mentioned in the July 10, 1989 meeting minutes from the Florence Township Board of Education.”

On the copy of a purported page of minutes from a BOE meeting alleged by the Complainant to have occurred July 10, 1989 that the Complainant attached to his amended complaint, the Complainant circled a statement wherein Mr. D’Emidio references a letter from Richard A. Alaimo Associates that indicates the company tested the new school site and determined that a septic system could not be installed on the site.⁶ On the copy of a partial page of minutes from a BOE meeting dated October 7, 1991 that the Complainant attached to his amended complaint, the Complainant circled a statement indicating the agenda is approved with the addition of the appointment of Richard A. Alaimo Associates to “prepare updated property surveys.” The Complainant states that he spoke to the Custodian “regarding this request” on November 7, 2007.

The Complainant further states that he received a verbal response from the Custodian that the requested documents were destroyed pursuant to the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”). The Complainant states that the Custodian provided him with a copy of the pertinent Request and Authorization for Records Disposal. The Complainant states that he spoke with Ms. Karen Perry from DARM and that Ms. Perry informed him the requested records could not be destroyed consistent with the law.

⁶ The Complainant states that Richard A. Alaimo Associates served as BOE engineers prior to Guzzi Engineering Associates.
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November 26, 2007

Request for the Statement of Information for the Amended Denial of Access Complaint sent to the Custodian.

November 29, 2007

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel states that the Complainant submitted to the Custodian ten (10) OPRA requests: four (4) dated August 16, 2007, one (1) dated September 5, 2007 and five (5) dated September 24, 2007. Counsel states that the records requested in the August 16, 2007 OPRA requests were made available to the Complainant on September 5, 2007 and September 24, 2007. Counsel further states that the record requested in the Complainant's September 5, 2007 request was provided to the Complainant.⁷ Counsel contends that the records requested by the Complainant in his September 24, 2007 requests were made available to him on October 1, 2007. Counsel states that the Complainant visited the BOE on October 29, 2007 to inspect the records.

Counsel asserts that while the Complainant was viewing documents on October 29, 2007, he verbally requested property surveys and septic system testing information. Counsel states that the Complainant had never previously requested this information. The Custodian's Counsel states that the Custodian searched for the documents, but was unable to locate them.

Counsel states that the Custodian is not certain if the updated property survey, despite being authorized, was ever performed. Further, Counsel states it is not clear from the BOE meeting minutes what property was to be surveyed and if a government record was ever prepared. Counsel states it is also unclear from the BOE meeting minutes that any septic system testing documentation ever existed other than the letter referenced in the minutes. Counsel also contends that if the records did at one time exist, they may have since been destroyed in accordance with DARM regulations. Counsel states that DARM provides that applications pertaining to school facility construction and/or renovation that have been denied need only be retained for three (3) years, but that building plans and specifications are permanent records. Counsel states that the BOE does have the building plans and specifications for the building that was constructed; however, it is likely those records sought by the Complainant were destroyed in 2001. Counsel states that the Custodian concluded that the documents either never existed or were destroyed pursuant to DARM regulations; therefore, the Complainant was denied access to the records because they were determined to be non-existent records.

Counsel states that following the Complainant's verbal request and subsequent denial of access, the Complainant then amended his complaint on November 15, 2007, withdrawing his claims for denial of access to all of the documents set forth in the original complaint and asserting a denial of access only to the property surveys and septic system testing information which were verbally requested at the time the Complainant inspected the originally requested records. Counsel contends that there are no records that exist relevant to the amended complaint and because there was no official OPRA

⁷ The Custodian did not provide the date on which access to such records was granted.
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request filed, as required by GRC Advisory Opinion 2006-1, the Custodian was not obligated to provide a written denial of the request.

November 30, 2007

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

- Copy of a purported page of minutes from a BOE meeting alleged by the Complainant to have occurred on July 10, 1989.
- One (1) seven (7) page DARM School District Records Retention Schedule dated October 1989.
- DARM Request and Authorization for records Disposal: two (2) pages dated April 23, 2001 and five (5) pages dated May 7, 2001.
- One (1) three (3) page Certificate of Destruction issued from Shred-it Philadelphia to the BOE dated July 6, 2001.
- Copy of a partial page of minutes from a BOE meeting dated October 7, 1991.
- Four (4) of Complainant's OPRA requests dated August 16, 2007.
- Complainant's OPRA request dated September 5, 2007.
- Five (5) of Complainant's OPRA requests dated September 24, 2007.
- Records Denied List from the Complainant's Amended Denial of Access Complaint dated November 26, 2007.
- Letter from the Custodian's Counsel to the GRC dated November 29, 2007.

The Custodian certifies that she performed an exhaustive search for the requested records. The Custodian also certifies that the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by DARM was July 6, 2001.

The Custodian certifies that the Complainant submitted ten (10) OPRA requests: four (4) dated August 16, 2007, one (1) dated September 5, 2007 and five (5) dated September 24, 2007. The Custodian further certifies that all requests filed on OPRA forms have been fulfilled because all information was made available for review within seven (7) business days; however, the Custodian asserts that the Complainant withdrew all of his requests relevant to the complaint except for Item #5, which he amended on November 26, 2007 to include only copies of a property survey mentioned in the October 7, 1991 BOE meeting minutes and an engineering study mentioned in the July 10, 1989 BOE meeting minutes. The Custodian certifies that the amended complaint is based upon a verbal request she received from the Complainant on October 29, 2007, after the records were referenced in other government records the Complainant viewed on that date.

Notwithstanding the Complainant's verbal request, the Custodian certifies that she attempted to locate the requested records; however, she concluded the records do not exist, or if they did exist, they have been properly destroyed. The Custodian states that pursuant to DARM regulations, document retention for a failed referendum is not required to be maintained for a length of time greater than three (3) years from the failure date and building information is required to be maintained for seven (7) years past the destruction of the building. The Custodian certifies that a seven (7) year retention period

would apply with respect to the records responsive to the Complainant's request because the building project did not occur.

December 4, 2007

Letter from the GRC to the Complainant. Because it is unclear whether the Custodian copied the Complainant with the SOI, the GRC forwards a copy of the SOI to the Complainant.

January 3, 2008

Telephone call from the Complainant to the GRC. The Complainant states that he is in receipt of a copy of the SOI and wants to respond to the Custodian's averments. The Complainant states he is very busy and needs at least a week to fashion his response. The Complainant requests the GRC suspend preparation of the adjudication until he submits his response. The GRC acknowledges that it will suspend the adjudication pending receipt of the Complainant's response, but urges the Complainant to forward his response without undue delay.

February 14, 2008

Letter from the GRC to the Complainant. The GRC informs the Complainant that the GRC has not yet received the Complainant's response to the Custodian's SOI. The GRC asks the Complainant to contact the GRC with respect to the status of the Complainant's response.

February 21, 2008

Telephone call from the Complainant to the GRC. The Complainant states that he received the letter from the GRC dated February 14, 2008, and that he does want to submit a response to the Custodian's SOI; however, the Complainant states that he has been preoccupied with other matters and will submit the response as soon as possible. The GRC informs the Complainant to send the response promptly.

April 10, 2008

Letter from the GRC to the Complainant. The GRC informs the Complainant that the GRC has still not received the Complainant's response to the SOI and if the response is not received within five (5) business days the GRC will adjudicate this complaint based solely on the information presently on file.

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 also provides:

“[a] request for access to a government record *shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian.*” (Emphasis added.) N.J.S.A. 47:1A-5.g.

OPRA further provides:

"The council shall make a determination as to whether the complaint is within its jurisdiction or frivolous or *without any reasonable factual basis.* (Emphasis added)." N.J.S.A. 47:1A-7.e.

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.

The Denial of Access Complaint in the instant matter was filed on October 26, 2007. The Complainant lists several records that he alleges are relevant to the complaint. The records the Complainant alleges he was originally denied appeared in six (6) OPRA requests; three (3) requests were dated August 16, 2007 and three (3) requests were dated September 24, 2007. The only written response the Custodian sent to the Complainant was a letter dated October 1, 2007, which states that the Complainant can visit the Custodian to view the meeting minutes and financial records but informs the Complainant that there are no plans from Guzzi Engineering in her office. The letter never identifies for which OPRA requests the records can be viewed; however, the records prepared by Guzzi Engineering were requested in the Complainant’s requests dated August 16, 2007. There is nothing in the record to indicate any other written response was sent to the Complainant after he filed his OPRA requests.

The Complainant acknowledges that the Custodian disclosed some of the records; however, those records that the Complainant alleges the Custodian did not disclose were listed in the complaint as Items #1 through #6. Items #1 through #3 coincide with three

(3) of the Complainant's requests dated August 16, 2007. The balance of the items listed in the complaint coincides with the Complainant's requests dated September 24, 2007.

On November 26, 2008, the Complainant modified his complaint, wherein he withdrew all records relevant to the complaint except for those comprising Item #5. The Complainant amended Item #5 to request property surveys which the Complainant states were mentioned in BOE meeting minutes dated October 7, 1991 and to request engineering studies performed on the school board property which the Complainant states were mentioned in the BOE meeting minutes dated July 10, 1989. The record reveals that the effect of the Complainant's modification was not to amend existing records relevant to the complaint, but rather to completely revise Item #5 to reflect a "request" for records he did not previously know existed.

The Custodian certifies that the Complainant first requested the property surveys and engineering studies on October 29, 2007, while he was at her office viewing other records. The Custodian certifies the Complainant verbally requested the records after they were referenced in other government records the Complainant viewed on that date. The Custodian's statement is confirmed by the Complainant, because in his amended complaint the Complainant refers to the property surveys and engineering studies as "new information."

Because the Complainant's amended Denial of Access Complaint voluntarily withdraws all of the records relevant to the complaint except for Item #5, and because the Complainant materially altered Item #5 to assert a denial of access to records for which no underlying written OPRA request had been submitted, contrary to the provisions of N.J.S.A. 47:1A-5.g., the complaint should be dismissed as without any reasonable factual basis pursuant to N.J.S.A. 47:1A-7.e.

Further, there is no denial of access to those records verbally requested at the time the Complainant inspected those records originally requested because the Custodian has certified that the records verbally requested either do not exist or were properly destroyed pursuant to the records retention schedule established by DARM for failed referendums.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant's amended Denial of Access Complaint voluntarily withdraws all of the records relevant to the complaint except for Item #5, and because the Complainant materially altered Item #5 to assert a denial of access to records for which no underlying written OPRA request had been submitted, contrary to the provisions of N.J.S.A. 47:1A-5.g., the complaint should be dismissed as without any reasonable factual basis pursuant to N.J.S.A. 47:1A-7.e. Further, there is no denial of access to those records verbally requested at the time the Complainant inspected those records originally requested because the Custodian has certified that the records verbally requested either do not exist or were properly destroyed pursuant to the records retention schedule established by New Jersey Department of State, Division of Archives and Records Management for failed referendums.

Prepared By: John E. Stewart
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

December 10, 2008