



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511
Fax: 609-633-6337
E-mail: grc@dca.state.nj.us
Web Address:
www.nj.gov/grc

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

FINAL DECISION

May 28, 2008 Government Records Council Meeting

Tina Renna
Complainant

Complaint No. 2008-39

v.

Somerset County Board of Chosen Freeholders
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, finds that:

1. Because the mylar tax maps were originally government records received in the course of the Somerset County GIS Office and because the maps were scanned in order to create a GIS parcel data set, the Custodian Counsel’s assertion does not apply.
2. Because the watermark does not affect access to the scanned images, the Council does not have jurisdiction over the watermark included in the requested scanned images of all county tax maps pursuant to N.J.S.A. 47:1A-7.b., Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005), Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005); Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004); Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003).
3. The Complainant failed to achieve the desired result because the GRC has no jurisdiction over content of records pursuant to Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005). The Complainant, therefore, is not entitled to prevailing party attorney’s fees. See Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and NJ Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166, 175 (App. Div. 2007).



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 4, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Tina Renna¹
Complainant**

GRC Complaint No. 2008-39

v.

**Somerset County Board of Chosen Freeholders²
Custodian of Records**

Records Relevant to Complaint: The most current scanned images of all county tax maps.

Request Made: December 3, 2007 and December 5, 2007

Response Made: December 3 and December 6, 2007

Custodian: Kathye Quick³

GRC Complaint Filed: March 1, 2008

Background

December 3, 2007

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

December 3, 2007

The Custodian's Response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the same business day following receipt of the request, stating that the Somerset Tax Board advised the Custodian that the Tax Board does not have electronic tax maps but receives a book from First American Estate Solutions once a year. The Custodian further states that the County Clerk advised the Custodian that the Complainant may want to contact each municipality individually for copies.

December 4, 2007

E-mail from the Custodian to Somerset County Geographical Information System ("GIS") Coordinator Jim Girvan of the Somerset County GIS Office attaching the Complainant's December 3, 2007 OPRA request. The Custodian asks if Mr. Girvan can fulfill the Complainant's request.

December 4, 2007

¹ Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

² Represented by Thomas C. Miller, Esq. (Somerville, NJ).

³ Ms. Quick is the Deputy Clerk of the Somerset County Board of Chosen Freeholders.

E-mail from Mr. Girvan to the Custodian. Mr. Girvan states that he spoke with the Complainant, who will be downloading the data directly through Somerset County GIS's website. Mr. Girvan states that the request is complete.

December 5, 2007

The Complainant resubmits her OPRA request, stating that she is requesting the maps that were scanned in 2000 to create a parcel layer in the electronic format which the maps are maintained, as she was informed by Mr. Girvan.

December 5, 2007

E-mail from the Deputy Clerk to Mr. Girvan attaching the Complainant's December 5, 2007 OPRA request. The Custodian requests that Mr. Girvan reply and copy the Deputy Clerk.

December 6, 2007

E-mail from Mr. Girvan to the Complainant. Mr. Girvan states that a disk containing the requested records has been prepared for delivery via U.S. Postal Service.

January 28, 2008

E-mail from the Complainant to the Deputy Clerk. The Complainant states that she made a records request on December 3, 2007 for the records responsive to this request. The Complainant states that she received a disk via first class mail from Mr. Girvan shortly after placing her request; however, the maps contained in the file on the disk had a watermark on them stating "NOT AN OFFICIAL RECORD." The Complainant states that she spoke with Mr. Girvan and that he advised that he felt he could not release the requested records without the watermark because the maps are not current.

The Complainant states that OPRA affords citizens the right to access government records as they were created. The Complainant asserts that placing the watermark on the files on the disk is altering public records and that the Complainant wishes to receive these records in their un-altered state.

January 29, 2008

E-mail from the Deputy Clerk to the Complainant. The Deputy Clerk states that the Complainant's January 28, 2008 e-mail has been forwarded to the Board's Counsel for his opinion.

January 31, 2008

Letter from the Custodian to the Complainant. The Custodian states that she is writing in response to the Complainant's January 28, 2008 e-mail. The Custodian states that the issue raised in the Complainant's e-mail was her objection to the map images provided which contained the watermark "NOT AN OFFICIAL DOCUMENT," which was placed on the scanned maps by Somerset County.

The Custodian states that in 2000, mylar tax maps were requested from the seventeen (17) municipalities within Somerset County. The Custodian states that these maps were scanned and degraded in order to minimize the maps into digital files. The

Custodian states that certain content within the maps, such as date stamp and signature of the approving engineer, was lost due to the scanning and conversion process.⁴ The Custodian also states that eight (8) years have passed and the maps have been updated by each individual municipality, rendering the copies retained by the Somerset County Board of Chosen Freeholders (“Freeholders”) out of date.

The Custodian states that the Freeholders are not the Custodian of these maps and only obtained them for the purpose of scanning and that the scans were watermarked for reason of information integrity. The Custodian further states that the watermarks do not block out any information on the scanned maps when viewed or printed. The Custodian finally states that Mr. Girvan already informed the Complainant that if she wanted to obtain current copies of the official maps then the Complainant would have to contact each individual municipality.

March 1, 2008

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

- Complainant’s OPRA request dated December 3, 2007.
- Complainant’s OPRA request dated December 5, 2007.
- E-mail from the Custodian to Mr. Girvan dated December 5, 2007.
- E-mail from Mr. Girvan to the Complainant dated December 6, 2007.
- E-mail from the Complainant to the Custodian dated January 28, 2008.
- E-mail from the Custodian to the Complainant dated January 29, 2008.
- Letter from the Custodian to the Complainant dated January 31, 2008.

The Complainant’s Counsel asserts that the Complainant submitted an OPRA request to the Custodian on December 3, 2007 requesting the most current scanned images of all county maps. The Complainant’s Counsel avers that the Complainant spoke with Mr. Girvan, who informed the Complainant that Somerset County no longer scans its tax maps and that the last time tax maps were scanned was in 2000. The Complainant’s Counsel asserts that the Complainant was further advised that Somerset County only had tax maps from seventeen (17) of twenty-one (21) municipalities.

The Complainant’s Counsel asserts that the Complainant modified and submitted her OPRA request on December 5, 2007 requesting all scanned maps from 2000 based on information received from Mr. Girvan. The Complainant’s Counsel further asserts that the Complainant received the requested tax maps from Mr. Girvan but each map contained a watermark stating that the maps were “NOT AN OFFICIAL DOCUMENT.” The Complainant’s Counsel asserts that the Complainant e-mailed the Custodian on January 28, 2008 and requested copies of the maps without the watermark. The Complainant’s Counsel asserts that the Complainant noted in her January 28, 2008 e-mail that the Complainant had spoken with Mr. Girvan, who stated that he felt that he could not release the requested tax maps without the watermark because the information was not current. The Complainant’s Counsel avers that the Complainant received an e-mail

⁴ The information excised from the tax maps during the scanning process was not important to the overall integrity of the tax maps.

from the Custodian on January 29, 2008 advising that the Complainant's issue had been referred to the Freeholders' legal counsel.

The Complainant's Counsel asserts that the Complainant received a letter dated January 31, 2008 from the Custodian informing the Complainant that the tax maps were watermarked because the maps were scanned in 2000, the images were degraded from their original quality and several of the tax maps have since become out of date.

The Complainant's Counsel contends that the Custodian's reasoning for adding the watermark on the tax maps does not comply with OPRA. The Complainant's Counsel asserts that any time a copy of a record is made, the copy is degraded especially if the record was faxed or scanned. The Complainant's Counsel further asserts that the quality of a scanned record depends on the resolution of the program used in scanning the record. The Complainant's Counsel contends that many types of government records become out of date over time, including budgets and titles, which should have watermarks according to the Custodian's reasoning.

The Complainant's Counsel asserts that just as public agencies are not required to create records in response to OPRA requests when no such records exist pursuant to Back v. Township of River Vale, GRC Complaint No. 2005-209 (February 2006), public agencies should not adulterate the content of records in response to an OPRA request.⁵ The Complainant's Counsel contends that the Complainant takes issue with the fact that the records being produced are adulterated and different than those maintained by the Freeholders. The Complainant's Counsel further asserts that the tax maps should have been modified in the ordinary course of business instead of specifically in response to an OPRA request for the maps.

The Complainant's Counsel further asserts that if the Freeholders' adulteration of the requested records is considered to be an "agency policy," such policy cannot supersede OPRA pursuant to Grauer v. N.J. Department of Treasury, GRC Complaint No. 2007-3 (November 2007). The Complainant's Counsel asserts that the Custodian should provide the requested unadulterated tax maps to the Complainant immediately.

The Complainant's Counsel requests an order:

1. Finding that the Custodian violated [OPRA] and denied access to records by altering the original documents requested by the Complainant.
2. Finding that the Custodian violated [OPRA] and denied access to records by refusing to disclose the records requested without any justification.
3. Ordering the Custodian to produce the documents responsive to the Complainant's OPRA request in the medium requested.
4. Awarding the Complainant attorneys fees as provided by N.J.S.A. 47:1A-6.

The Complainant did not agree to mediate this complaint.

⁵ The Complainant's Counsel notes that a public agency may lawfully redact a public record where some of the information is exempt from OPRA. The Complainant's Counsel asserts that no redactions were made to the tax maps, only adulterations to the original maps.

March 27, 2008

Request for the Statement of Information sent to the Custodian.

April 2, 2008

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

- Complainant's OPRA request dated December 3, 2007.
- E-mail from the Custodian to the Complainant dated December 3, 2007.
- E-mail from the Custodian to Mr. Girvan dated December 4, 2007.
- E-mail from Mr. Girvan to the Custodian dated December 4, 2007.
- Complainant's second OPRA request dated December 5, 2007.
- E-mail from the Custodian to Mr. Girvan dated December 5, 2007.
- E-mail from Mr. Girvan to the Complainant dated December 6, 2007.
- E-mail from the Complainant to the Custodian dated January 28, 2008.
- E-mail from the Custodian to the Complainant dated January 29, 2008.
- Letter from the Custodian to the Complainant dated January 31, 2008.⁶

The Custodian's Counsel states that the Somerset County GIS Office is responsible for managing geographical spatial data within the County of Somerset. The Custodian's Counsel further states that Somerset County GIS Office has created primary framework data sets and derivative data sets with countywide information, including tax parcel data sets, land use, land coverage, etc.

The Custodian's Counsel states that in 2000, the Somerset County GIS Office requested mylar tax maps from seventeen (17) of the twenty-one (21) municipalities within Somerset County that have not maintained their tax maps in GIS format. The Custodian's Counsel states that these tax maps were scanned and returned to the municipalities. The Custodian's Counsel further states that during the scanning process, the original tax map images had to be degraded in order to minimize the digital file size; thus, content was lost, making the maps no longer true, original copies. The Custodian's Counsel further states that since 2000, the initial GIS tax map parcel data set has been updated, refined and corrected on a continuing basis by the individual municipalities. The Custodian's Counsel states that the original maps were not retained by the County and the scanned electronic images were never intended to be used as official records. The Custodian's Counsel also states that the tax map parcel set is available online for inspection and copying by the public.

The Custodian's Counsel states that the Complainant submitted an OPRA request dated December 3, 2007 to the Custodian. The Custodian's Counsel states that the Complainant was advised by the Custodian that the Somerset County Tax Board did not have the electronic tax maps. The Custodian's Counsel further avers that Mr. Girvan spoke with the Complainant on December 4, 2007 advising that the requested records could be downloaded and viewed on the internet. The Custodian's Counsel states that the Complainant resubmitted the OPRA request on December 5, 2007 requesting the tax

⁶ The Custodian provided two additional e-mails that are not relevant to this complaint.

maps that were scanned in 2000 in electronic format. The Custodian's Counsel states that Mr. Girvan prepared and mailed a disk containing the requested records on December 6, 2007. The Custodian's Counsel further states that the Custodian received an e-mail from the Complainant on January 28, 2008 objecting to the watermark on the maps and requested the records without the watermark. The Custodian's Counsel finally states that the Custodian e-mailed the Complainant on January 31, 2008 advising that the watermark was added to the tax maps to denote that the maps were not official tax maps based on the scanning process from 2000.

The Custodian's Counsel asserts that the requested records were readily available for inspection, copying or examination pursuant to N.J.S.A. 47:1A-1 and Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super 312, 329 (Law Div. 2004). The Custodian's Counsel further asserts that the watermark does not block, alter, obstruct or otherwise interfere with any of the information contained on the requested tax maps, therefore, not violating the clear purpose and intent of OPRA. The Custodian's Counsel avers that the watermark protects public interest by alerting the public that the information contained in the tax maps are not necessarily accurate or current.

The Custodian's Counsel further asserts that the requested tax maps are not government records under OPRA because the scanned maps are not required to be made or maintained in the course of official business of the Somerset County GIS Office. The Custodian's Counsel further avers that the tax maps were simply utilized as a baseline tool to assist in the creation of the initial parcel data set. The Custodian's Counsel contends that the scanned tax maps are similar to handwritten notes utilized by a secretary as an aid in preparation of formal minutes. The Custodian's Counsel states that in O'Shea v. West Milford Board of Education, 391 N.J. Super 534 (App. Div. 2007), the Court concluded that handwritten notes could be considered "intra-agency consultation material" because the notes were informal and taken prior to preparing draft minutes for the Board's approval. The Custodian's Counsel states that the Court further held that informal notes were not government records because they were not part of a Secretary's "official business," which was the preparation of formal minutes. The Custodian's Counsel contends that in this case, the degraded digital images of the tax maps were similar to handwritten notes in that they were used to create a county tax parcel data set which was the official business of Mr. Girvan, the GIS Coordinator.

The Custodian's Counsel finally contends that no denial of access to the requested tax maps existed. The Custodian's Counsel avers that if the GRC determines that the watermark must be removed, the actions of the Custodian were not a knowing and willful violation of OPRA.

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.

OPRA further states that:

“[t]he Government Records Council shall ... receive, hear, review and adjudicate a complaint filed by any person concerning *a denial of access to a government record* by a records custodian...” (Emphasis added.) N.J.S.A. 47:1A-7.b.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In this case, the Complainant asserts that the Custodian’s reasoning for the watermark does not comply with OPRA. Conversely, the Custodian asserts that the watermark must be included in order to inform the public that the tax maps may not necessarily be accurate or current. The Custodian’s Counsel also avers that the requested maps can be compared to handwritten notes taken by a Secretary in order to prepare draft minutes for a Board’s approval because the maps were used to create a GIS data parcel set.

OPRA specifically identifies “maps that [have] been made, maintained or kept on file... or that [have] been received in the course of ... business” as government records. N.J.S.A. 47:1A-1.1.

The mylar tax maps provided to the Somerset County GIS Office by Somerset County municipalities were government records prior to being scanned and rendered for the purposes of creating a GIS parcel data set. The tax maps do not lose their status as government records when used to create GIS parcel data sets. Therefore, because the mylar tax maps were originally government records received in the course of the

Somerset County GIS Office's official business and because the maps were scanned in order to create a GIS parcel data set, the Custodian Counsel's assertion does not apply.

The watermark used by the Somerset County GIS office does not render the maps non-responsive to the Complainant's OPRA request, which sought "the most current scanned images of all county tax maps." As stated in the Custodian's SOI, the records provided by Mr. Girvan to the Complainant represent the most recent scanned images of all county tax maps. Moreover, the watermark does not obscure or obstruct any data contained in the scanned images nor does it otherwise render any part of the scanned images illegible. The watermark is therefore not analogous to a redaction of information contained within a government record. As stated by the Custodian's Counsel, the purpose of the watermark is to notify the public that the information contained in the scanned images of the tax maps is not necessarily accurate or current. Whether the information contained in the scanned images is accurate or current, however, does not affect the public's access to the scanned images.

In Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005), the Council held that it "does not oversee the content of documentation" but "does oversee the disclosure and non-disclosure of documents." *See also* Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005)(GRC does not have authority over the condition of records provided by a Custodian); Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004)(GRC does not have the authority to adjudicate the validity of a record); Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003)(the integrity of a requested record is not within the GRC's authority to adjudicate).

Therefore, because the watermark does not affect access to the scanned images, the Council does not have jurisdiction over the watermark included in the requested scanned images of all county tax maps pursuant to N.J.S.A. 47:1A-7.b., Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005), Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005); Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004); Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003).

Whether the Complainant is a "prevailing party" entitled to attorney's fees pursuant to N.J.S.A. 47:1A-6?

OPRA provides that:

"... [i]f it is determined that access has been improperly denied, the court or agency [GRC] head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee."
N.J.S.A. 47:1A-6.

Attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are

disclosed. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). A complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. *Id.*

In the matter before the Council, the Complainant failed to achieve the desired result because the GRC has no jurisdiction over content of records pursuant to Kwanzaa. The Complainant, therefore, is not entitled to prevailing party attorney’s fees. See Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and NJ Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166, 175 (App. Div. 2007).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the mylar tax maps were originally government records received in the course of the Somerset County GIS Office and because the maps were scanned in order to create a GIS parcel data set, the Custodian Counsel’s assertion does not apply.
2. Because the watermark does not affect access to the scanned images, the Council does not have jurisdiction over the watermark included in the requested scanned images of all county tax maps pursuant to N.J.S.A. 47:1A-7.b., Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005), Toscano v. NJ Dept of Labor, GRC Complaint No. 2005-59 (September 2005); Gillespie v. Newark Public Schools, GRC Complaint No. 2004-105 (November 2004); Katinsky v. River Vale Township, GRC Complaint No. 2003-68 (November 2003).
3. The Complainant failed to achieve the desired result because the GRC has no jurisdiction over content of records pursuant to Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005). The Complainant, therefore, is not entitled to prevailing party attorney’s fees. See Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and NJ Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166, 175 (App. Div. 2007).

Prepared By:

Frank F. Caruso
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

May 21, 2008