



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

January 30, 2015 Government Records Council Meeting

Christopher Lotito
Complainant

Complaint No. 2014-84

v.

NJ Department of Environmental Protection
Custodian of Record

At the January 30, 2015 public meeting, the Government Records Council (“Council”) considered the January 20, 2015 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 the Custodian has borne his burden of proving that he lawfully denied access to the responsive records because same are exempt from disclosure under the New Jersey Department of Environmental Protection’s promulgated regulations. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); N.J.A.C. 7:1D-3.2(c). Specifically, the Division of Green Acres and Ecological Restoration was under active negotiations with the New Jersey Audubon Society regarding the Weis Ecology Center site project and no binding contract has been executed at the time of the Complainant’s OPRA request.

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 30th Day of January, 2015

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 4, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 30, 2015 Council Meeting**

**Christopher Lotito¹
Complainant**

GRC Complaint No. 2014-84

v.

**New Jersey Department of Environmental Protection²
Custodial Agency**

Records Relevant to Complaint: Electronic copies of:

1. Inspection of Weis Ecology Center site (“Site”) by New Jersey Department of Environmental Protection (“DEP”) officials in 2013 prior to consideration for purchase.
2. Draft contract for acquisition of the Site by DEP and the New Jersey Audubon Society (“Society”).
3. Groundwater test results of test performed by DEP at the Site prior to consideration of for purchase.
4. Initial proposal letter submitted by the Society to DEP in 2013 regarding the potential transfer of the Site to DEP.

Custodian of Record: Matthew J. Coefer

Request Received by Custodian: February 11, 2014

Response Made by Custodian: February 20, 2014

GRC Complaint Received: February 21, 2014

Background³

Request and Response:

On February 11, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 20, 2014, the Custodian responded in writing, first noting that part of the Complainant’s OPRA request was invalid because it failed to identify specific records. Gannett N.J. Partners, LP v. Cnty. of Middlesex, 379 N.J. Super. 205 (App. Div. 2005). The Custodian stated that DEP searched only for those remedial, permitting and environmental records readily identified in various DEP programs. The Custodian stated that, based on his search, no records were located.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Ryan Benson.

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

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Denial of Access Complaint:

On February 21, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputed that his OPRA request was overly broad or that no records existed. The Complainant asserted that his request identified specific records with reasonable clarity and did not constitute an open-ended search. *See* Burke v. Brandes, 429 N. J. Super. 169, 176-77 (App. Div. 2012).

Supplemental Response

On February 24, 2014, the Custodian advised the Complainant that DEP was revising its response. The Custodian stated that DEP revisited the Complainant’s OPRA request and was able to locate records. However, said records are exempt from disclosure because to the project is still active and no binding contract was executed. N.J.S.A. 47:1A-9(a); N.J.A.C. 7:1D-3.2(c).

Statement of Information:

On March 4, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on February 11, 2014. The Custodian certified that the OPRA request was assigned to Patricia Scott, who mistakenly referred same to DEP’s Site Remediation Program (“SRP”) based on the terms “site inspection” and “groundwater results.” The SRP searched its records and advised Ms. Scott that no records existed. Thus, the Custodian affirmed that Ms. Scott prepared and sent a response to the Complainant on February 20, 2014 denying the Complainant’s OPRA request because no responsive records existed. The Custodian also certified that Ms. Scott included the “invalid request” language based on the term “groundwater results,” which is prevalent in the SRP’s records. However, the Custodian certified that DEP primarily based its initial denial on the non-existence of records.

The Custodian affirmed that DEP subsequently revisited the OPRA request, identified Ms. Scott’s mistake, and correctly referred the request to the Natural and Historic Resources Program, Office of Leases and Division of Green Acres and Ecological Restoration (“Green Acres”). The Custodian certified that Office of Leases did not locate any records; however, Green Acres located records and advised the Custodian that same were exempt under DEP’s promulgated regulations because the project was active. Thus, the Custodian affirmed that he sent a revised response to the Complainant on February 24, 2014 denying the Complainant access per N.J.A.C. 7:1D-3.2(c).

The Custodian certified that the following records comprising of 650 pages are responsive to the request.

- | | |
|------------------------------------|-------------------|
| 1. Title Report | 4. Hazard review |
| 2. Prior deeds | 5. Correspondence |
| 3. Prior survey and other mappings | 6. Draft contract |

The Custodian certified that the land on which the Site is currently situated is subject to a pending Green Acres acquisition. Further, the Custodian affirmed that the records sought were related to or created for acquisition and no binding contract has been signed. The Custodian contended that for these reasons, all records are exempt from access under N.J.S.A. 47:1A-9(a) and DEP's promulgated regulations at N.J.A.C. 7:1D-3.2(c), which exempts access to land acquisitions information related to land transactions, program offerings or a project actively under negotiation, without a binding contract or if disclosure would jeopardize the transaction.

The Custodian further noted that he agreed with the Complainant's Denial of Access Complaint assertion that the initial OPRA request was not overly broad. However, the Custodian asserted that its revised response rendered the erroneous response moot. The Custodian also noted that both responses were timely based on a State of emergency closing on February 13, 2014.

Amended Denial of Access Complaint

On March 4, 2014, the Complainant objected to the Custodian's SOI submission. The Complainant expressed concern about disclosability of a vast majority of the records, arguing that most apply strictly to the Site and not any pending acquisition discussions. The Complainant noted that the correspondence and draft contract should not be exempt and further asserted that DEP could utilize the exemption to block disclosure until its plan for the Site is completed.⁴

On March 5, 2014, the Complainant submitted an Amended Denial of Access Complaint ("Amended Complaint"). The Complainant stated that he wished to amend his complaint to address the new arguments raised in the SOI. The Complainant first reiterated from his March 4, 2014 e-mail that a vast majority of the records do not apply to the current conversation between DEP and the Society about acquiring the Site. The Complainant contended that DEP inappropriately included non-controversial records under the exemption. Also, the Complainant noted that DEP's regulations allow for disclosure of records that are public prior to "mediation." N.J.A.C. 7:1D-3.2(a)1.

Regarding the draft contract, the Complainant argued that same is non-binding and DEP does not appear prepared to execute same in the near future. The Complainant asserted that "Title 25" enumerates the requirements to make binding a contract for real estate transfers of which the draft contract at issue here fails to meet. The Complainant also asserted that because N.J.A.C. 7:1D-3 should not apply to the draft contract. Further, the Complainant asserted that "Title 25" should control because the DEP regulation does not define a "binding contract."

Regarding the correspondence, the Complainant contended that these records fail to meet the definition for exempt correspondence under OPRA and related statutes.

Finally, the Complainant contended that DEP's failure to disclose a large majority of the records is not in the public's interest of preserving historic buildings on the Site. The Complainant asserted that by upholding DEP's denial of access, there is a risk that DEP and the

⁴ On March 5, 2014, the GRC provided guidance to the Complainant on the appropriate process for filing an Amended Denial of Access Complaint. N.J.A.C. 5:105-2.3.

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Society will demolish the buildings while stifling the public's input into preserving same. Further, the Complainant argued that disclosure of these records would not adversely affect DEP's ability to negotiate contracts because the Site is not subject to a public bid process.

Additional Submissions

On March 11, 2014, the Custodian's Counsel sought an extension of time until March 20, 2014 to submit a response to the Amended Complaint, which the GRC granted.

On March 17, 2014, the Custodian submitted a response to the Amended Complaint attaching a certification from Lisa Stern, Supervising Program Specialist. Preliminarily, the Custodian noted that N.J.A.C. 7:1D-3.2(a)1 does not apply to the records at issue here because mediation did not occur.

The Custodian objected to the Complainant's argument that a vast majority of records do not refer to the possible acquisition of the site and thus should be disclosed. The Custodian asserted that N.J.A.C. 7:1D-3.2(c) does not differentiate between records solely concerning a site and records concerning acquisition discussions. The Custodian asserted that all records involving "planning and internal deliberation" leading up to negotiations are included in the exemption. 43 N.J.R. 3017(a), 3020. The Custodian asserted that the DEP's interpretation of the regulation originates from the list of examples included in the regulation ("appraisals, valuations and title investigations"). The Custodian contended that a competitor or the land conveyor could use disclosed information about the Site to undermine DEP's negotiating position.

The Custodian also objected to the Complainant assertion that correspondence and the draft contract should be disclosed because there is no evidence of an active negotiation. To the contrary, the Custodian certified that Green Acres is actively attempting to acquire the Site. *See* Stern certification at ¶ 6. The Custodian also stated that "correspondence" need not be defined because neither OPRA nor the DEP regulation carries any such a requirement or actual definition. The Custodian certified that DEP recently sent a draft contract to the Society, which owns the Site; thus, both correspondence and draft contract are exempt under N.J.A.C. 7:1D-3.2(c).

Further, the Custodian asserted that the Complainant's interpretation of a binding contract is erroneous. Specifically, N.J.A.C. 7:1D-3.2(c) does not require that a binding contract exist; rather, the regulation only requires that the parties to negotiation have not executed a contract. Further, the Custodian asserted that a plain reading of the regulation indicates that so long as one of the three factors for non-disclosure is met (active negotiations, no executed binding contract or that disclosure would jeopardize the land transaction) the exemption would apply. The Custodian certified that here, DEP had not executed a contract for the Site and thus the exemption is valid.

Additionally, the Custodian refuted that his denial violated OPRA because of the public interest in preserving historic buildings. The Custodian noted that the requestor's intended use of records obtained under OPRA does not factor into a response. Carfax v. Div. of Motor Vehicles, GRC Complaint No. 2003-87 (February 2004)(holding that the custodian lawfully denied access

to data based on a regulation even though the complainant assured the custodian that they did not intend to use the data for solicitation or political purposes). The Custodian asserted that, because OPRA recognizes exemptions in promulgated regulations, his denial was valid.

Finally, the Custodian disputed the Complainant's assertion that OPRA's "advantage to competitors and bidders" exemption only applies to public bid contracts. The Custodian noted that the Complainant cited no authority for such a supposition. Further, the Custodian asserted that N.J.A.C. 7:1D-3.2(c) is based on the "advantage" exemption and addresses Green Acres acquisitions to include those where the property owner offers to sell land to the State. 43 N.J.R. 3017(a), 3020. The Custodian noted that the regulation "balances the public's interest in the information with [DEP's] obligation to ensure that the taxpayers' and State's interests in these transactions are protected." 42 N.J.R. 2880(a), 2880-2881. *See also Murray v. Twp. of Warren*, GRC Complaint No. 2006-169 (February 2008).⁵

Analysis

Unlawful Denial of Access

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

OPRA provides that:

The provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; *regulation promulgated under the authority of any statute or Executive Order of the Governor*; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

N.J.S.A. 47:1A-9(a)(emphasis added).

Further, DEP's promulgated regulations provide that:

[L]and acquisitions, program offerings and active projects, including appraisals, valuations and title investigations, shall be made available for public inspection, examination and copying no later than 48 hours before formal action is to be taken on any land transaction, program offering or active project *unless the land transaction, program offering or active project is actively under negotiation, a binding contract has not been executed, or disclosure of the records would*

⁵ Although the Complainant subsequently expressed interest in submitting a response to the Custodian's March 17, 2014 submission, he did not submit same.

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jeopardize the land transaction, program offering or active project. An active project is one that has been initiated within two years of the date of appraisal.

N.J.A.C. 7:1D-3.2(c)(emphasis added).

Here, the Complainant contended that a majority of the 650 pages of records should have been provided because they dealt specifically with the Site and not with any negotiations that DEP was having with the Society. However, the Custodian contended that N.J.A.C. 7:1D-3.2(c) allowed DEP to exempt access to all of the records relating to Green Acres' possible acquisition of land so long as 1) the agency is actively negotiating such an acquisition; and 2) there is no binding contract. The Custodian argued that both are true and that his denial of access to the records was valid.

The GRC has reviewed DEP's regulation and is satisfied that the Custodian's denial of access was lawful. Specifically, the Custodian and Ms. Stern both certified to the fact that the acquisition project is active. Additionally, the Custodian confirmed that a draft contract was recently provided to the Society, which only further supports DEP's certifications. Also, the Complainant did not include any evidence to refute these certifications. Further, the GRC agrees that a plain reading of DEP's regulatory exemption does not differentiate between basic site records and those actually corresponding to the negotiation process.⁶

Therefore, the Custodian has borne his burden of proving that he lawfully denied access to the responsive records because same are exempt from disclosure under DEP's promulgated regulations. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); N.J.A.C. 7:1D-3.2(c). Specifically, Green Acres was under active negotiations with the Society regarding the Site project and no binding contract has been executed at the time of the Complainant's OPRA request.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has borne his burden of proving that he lawfully denied access to the responsive records because same are exempt from disclosure under the New Jersey Department of Environmental Protection's promulgated regulations. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); N.J.A.C. 7:1D-3.2(c). Specifically, the Division of Green Acres and Ecological Restoration was under active negotiations with the New Jersey Audubon Society regarding the Weis Ecology Center site project and no binding contract has been executed at the time of the Complainant's OPRA request.

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

Approved By: Dawn R. SanFilippo, Esq.
Deputy Executive Director

January 20, 2015

⁶ The GRC notes that, by its very nature, a draft contract would not be disclosable under OPRA. See Wolosky v. Sparta Bd. of Educ. (Sussex), GRC Complaint No. 2010-193 (November 2011).
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