



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

November 15, 2016 Government Records Council Meeting

Randy L. Farkas
Complainant

Complaint No. 2015-226

v.

Borough of Milltown (Middlesex)
Custodian of Record

At the November 15, 2016 public meeting, the Government Records Council (“Council”) considered the November 9, 2016 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 responsive records were exempt from disclosure at the time the Complainant’s OPRA request was made, because the Complainant certified that they pertained to an ongoing investigation that commenced prior to the request. Accordingly, the Custodian lawfully denied access to such records pursuant to N.J.S.A. 47:1A-3.a.; N.J.S.A. 47:1A-6.; *See Henderson v. New Jersey Department of Law and Public Safety, Division of Alcoholic Beverage Control*, GRC Complaint No. 2010-139 (April 2011).

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 15th Day of November, 2016

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: November 17, 2016



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 15, 2016 Council Meeting**

**Randy L. Farkas¹
Complainant**

GRC Complaint No. 2015-226

v.

**Borough of Milltown (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Any and all documents, notes, studies, permits, hazard assessments, e-mails, texts, etc. related to the demolition of buildings at the Ford Ave. site that occurred during the week of June 28, 2015, and any future demolition plans by property owner, issued by the Borough of Milltown.

Custodian of Record: Michael Januszka
Request Received by Custodian: July 6, 2015
Response Made by Custodian: July 13, 2015
GRC Complaint Received: July 22, 2015

Background³

Request and Response:

On July 6, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 13, 2014, the Custodian responded in writing, denying the request. The Custodian stated that the requested information “is unavailable” because “the entire file relating to this property is currently part of the criminal prosecution and ongoing criminal investigation of the property owner.” The Custodian copied Borough Attorney Thomas J. Buck and Zoning/Code Official Michael Marcinczyk on this response. The Custodian asserted no other legal defenses.

Denial of Access Complaint:

On July 21, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted his belief that the demolition referred to in his OPRA request “did not have permits and the area residents were exposed to

¹ No legal representation listed on record.

² Represented by Thomas A. Buck, Esq. (Milltown, NJ).

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.

dangerous and toxic contaminants” that were not controlled during demolition. The Complainant delineated the steps he felt “should be taken” and asserted his belief that none of the precautions he described were taken in the referenced matter.

Statement of Information:

On August 14, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on July 6, 2015. The Custodian certified that he forwarded the request to the Borough’s Department of Code Enforcement to retrieve any responsive records. The Custodian included a July 10, 2015 memorandum that Zoning/Code Official Marcinczyk sent to him regarding the request, which advised that his office was unable to accommodate the Complainant’s OPRA Request. In that memorandum, Mr. Marcinczyk stated that the “entire file relating to this property is currently part of the criminal prosecution and ongoing criminal investigation of the property owner and therefore outside the realm of information subject to the Open Public Records Act in accordance with Court rules.” The Custodian certified that he responded in writing on July 13, 2015, denying the request.

In Item #9 of the SOI, the Custodian identified a list of nine (9) records responsive to the request. These included:

- 1) Borough Engineer’s Report issued by CME Associates, detailing structural defects (37 pages)
- 2) Notice of Violation and Imminent Hazard issued by Construction Official, Vincent Lupo, dated May 20, 2015 (1 page)
- 3) Notice of Violation issued by Zoning/Code Official, Michael Marcinczyk, dated June 10, 2015 (2 pages)
- 4) Inspection Report and Notice of Violation issued by Middlesex County Fire Marshal’s Office, dated June 15, 2015 (10 pages)
- 5) 72 color photographs of Ford Avenue Site (36 pages)
- 6) Application of Appeal to Middlesex County Construction Board of Appeals, filed by property owner and dated June 1, 2015 (2 pages)
- 7) Notice from Middlesex County Construction Board of Appeals to property owner, dated June 3, 2015 (1 page)
- 8) Copy of Affidavit/Certification in Support of Probable Cause for criminal complaints, filed by Zoning/Code Official Michael Marcinczyk (1 page)
- 9) Copy of Criminal Complaint #1212S2015000082 filed by Zoning/Code Official Michael Marcinczyk against Lawrence Berger, T/A Alsol Corporation dated June 15, 2015 (1 page)

The Custodian stated that the legal explanation for the denial was pursuant to N.J.S.A. 47:1A-3(a), which exempts disclosure when records that are sought pertain to an investigation in process. He stated that the documents were withheld based on instructions from the Borough Attorney and Borough Prosecutor.

In a separate attachment, Code Official Michael Marcinczyk disputed some of the statements made by the Complainant in his Denial of Access Complaint. He argued that the six steps outlined in the Complainant's summary "are not consistent with State Construction Code regulations for demolition." He further disputed the Complainant's assertion that they had spoken at the site or in his office, either during or immediately following the demolition. He further stated that "[d]emolition of structures CLEARLY falls under the jurisdiction of the Construction Official, Mr. Lupo" (emphasis in original).

Additional Party Submissions

On October 17, 2016, the GRC wrote to the Custodian, asking for the date on which the "ongoing criminal investigation" commenced. On October 25, 2016, the Custodian submitted a certification to the GRC and attached a copy of a municipal court summons dated June 15, 2015. The summons noted that the defendant had not addressed "the notice of imminent hazard which was issued to the defendant on 5/20/2015."

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.

With respect to records subject to an investigation in progress, OPRA provides: [W]here it shall appear that the record or records that are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency, the right of access provided for in [OPRA] . . . may be denied if the inspection, copying, or examination of such record or records shall be inimical to the public interest; provided, however, that this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced. N.J.S.A. 47:1A-3(a).

In the instant matter, the Complainant's OPRA request was dated July 6, 2015, and the Custodian certified that he was in receipt of the request that same date. The Custodian's response, dated July 13, 2015, denied the request because the responsive records were part of "the entire file" relating to the request that was part of an "ongoing criminal investigation of the property owner" at that time. In response to the GRC's request for additional information regarding that investigation, the Custodian certified that a summons was issued on June 15, 2015, prior to the Complainant's OPRA request. Based on the summons, which noted that the defendant had failed to address a Notice of Imminent Hazard issued to him on May 20, 2015, it appears that an investigation had been in progress on or before that day. Accordingly, it appears from the facts in record that at the time of the Complainant's OPRA request, July 6, 2015, the responsive records were part of a file related to an investigation in progress. Therefore, the

Custodian did not unlawfully deny the Complainant access to the requested record pursuant to N.J.S.A. 47:1A-3(a).

Therefore, the responsive records were exempt from disclosure at the time the Complainant's OPRA request was made, because the Complainant certified that they pertained to an ongoing investigation that commenced prior to the request. Accordingly, the Custodian lawfully denied access to such records pursuant to N.J.S.A. 47:1A-3.a.; N.J.S.A. 47:1A-6.; *See Henderson v. New Jersey Department of Law and Public Safety, Division of Alcoholic Beverage Control*, GRC Complaint No. 2010-139 (April 2011).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the responsive records were exempt from disclosure at the time the Complainant's OPRA request was made, because the Complainant certified that they pertained to an ongoing investigation that commenced prior to the request. Accordingly, the Custodian lawfully denied access to such records pursuant to N.J.S.A. 47:1A-3.a.; N.J.S.A. 47:1A-6.; *See Henderson v. New Jersey Department of Law and Public Safety, Division of Alcoholic Beverage Control*, GRC Complaint No. 2010-139 (April 2011).

Prepared By: Husna Kazmir
Staff Attorney

November 9, 2016