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Alice A. Previte, Esq.
Attention: DEP Docket Number 11-10-11
Office of Legal Affairs
P.O. Box 402
Trenton, NJ 08625-0402 609-984-3488 (fax)

Re: DEP Docket Number 11-10-11, N.J.A.C. 7:1D-3

Dear Ms. Previte:

I am an attorney concentrating in Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -11, litigation. Thank you for this opportunity to comment on the proposed Department of Environmental Protection proposed Rule N.J.A.C. 7:1D-3 that exempts certain records from access under OPRA.

Sabotage and Terrorism

OPRA already exempts "security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software" and "emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein." N.J.S.A. 47:1A-1.1.

More importantly, Executive Order #21 (McGreevey) prohibits the disclosure of "any government record where the inspection, examination or copying of that record would substantially interfere with the State's ability to protect and defend the State and its citizens against acts of sabotage or terrorism, or which, if disclosed, would materially increase the risk or consequences of potential acts of sabotage or terrorism." The modified Department regulations announced August 13, 2002 in conjunction with Executive Order #26 (McGreevey) listed several specific categories of records that would be exempt "if the Department determines that" the disclosure of a record in that category satisfied the aforementioned "substantial interfere" standard of Executive Order #21. http://www.nj.gov/opra/eo26_rule_final.html

The Department states on page 3 of its current proposal that "[t]he categories of documents are the same as were protected under Executive Order #21 (McGreevey 2002), as modified by

Executive Order #26 (McGreevey 2002) (collectively, the EOs), except as specifically identified below." Yet, without being specifically identified by the Department, the new proposed exemption 7:1D-3.2(b) differs in language from the similar 2002 modified sabotage/terrorism exemption. Irrespective of the new proposal's intent, it is now ambiguous and can reasonably be interpreted as a determination that all records in the listed categories have satisfied the "substantially interfere" standard of Executive Order #26. While all records in some of those eight categories presumably satisfy the required standard, certain records in other categories may not. The Department should return to the precise language of the August 13, 2002 sabotage/terrorism exemption in order not to prejudge the confidentiality of all records in all eight categories.

Green Acres

Since the original issuance of the Green Acres proposed exemption on August 13, 2002, the Appellate Division has published its recent opinion *Paul Tractenberg v. Township of West Orange*, 416 N.J.Super. 354 (App. Div. 2010) regarding public access to real estate appraisals prepared for Green Acres purposes. *Id.* at 361. In the course of that decision, the Appellate Division considered the applicability of the OPRA exemption for "information which, if disclosed, would give an advantage to competitors or bidders" N.J.S.A. 47:1A-1.1, *Id.* at 377-79, a consideration that appears to be motivating the proposed exemption 7:1D-3.2 (c).

The Tractenberg decision held that the appraisals were not exempt from disclosure because the Township had not initiated negotiations with the property owner and had not demonstrated that such negotiations were probable in the near future. *Id.* at 379. The Court added that "[t]o contend that the mere potential for future negotiations, without a strong showing that negotiations are probable, satisfies the OPRA competitive advantage exemption 'subverts the broad reading of OPRA as intended by the Legislature.' *Times of Trenton, supra*, 183 N.J. at 535."

The proposed Green Acres exemption requires confidentiality whenever "a binding contract has not been executed," even if the project is not "actively under negotiations" and "disclosure of the information would [not] jeopardize" the project. The phrase "a binding contract has not been executed" should be deleted.

The last sentence of the proposed Green Acres exemption creates the impression that this exemption does not apply to records concerning land acquisitions that have not been initiated within two years after the date of the appraisal. But the exemption's two-year limitation applies only to "active projects," not "land acquisitions" or "program offerings."

Very truly yours,

Richard Gutman