

U.S. Department of Homeland Security  
Washington, DC 20528



**Homeland  
Security**

**Reply to: PCII Program Office  
Department of Homeland Security  
245 Murray Lane, SW, Building 410  
Washington, DC 20528-0001**

6/3/2005

Mr. Kevin Donald  
Executive Director  
Brick Township Municipal Utilities Authority  
1551 Route 88 West  
Brick, NJ 08724

**PCII Tracking Number: PCII-050525-000502**

**Status: Information Validated as PCII**

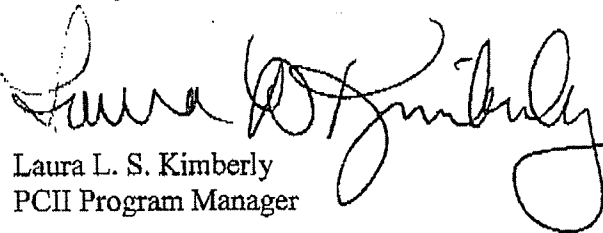
Dear Mr. Donald:

Thank you for submitting information to the Protected Critical Infrastructure Information (PCII) Program Office for consideration for protection under the Critical Infrastructure Information Act of 2002 (CII Act) and 6 Code of Federal Regulations (CFR) Part 29.

This letter is to inform you that the PCII Program Office has received your submission with the Express Statement requesting protection of the information under the CII Act and your submission has been validated as PCII. Your submission has been assigned the tracking number noted above. It will be handled and safeguarded as required by the CII Act and 6 CFR 29.

Please address any correspondence regarding this submission to the address above and include the tracking number.

Sincerely,

  
Laura L. S. Kimberly  
PCII Program Manager

CARLUCCIO, LEONE, DIMON, DOYLE & SACKS, L.L.C.  
 9 Robbins Street  
 Toms River, New Jersey 08753  
 (732) 797-1600  
 Attorney for Defendant

ROBERT TOMBS

OFFICE OF ADMINISTRATIVE LAW

Agency Reference No: 2003-123

Plaintiff,

vs.

DOCKET NO. GRC 06786-2004S

BRICK TOWNSHIP MUNICIPAL  
 UTILITIES AUTHORITY,

Defendants.

AFFIDAVIT

COUNTY OF OCEAN :  
 : ss.  
 STATE OF NEW JERSEY :

I, KEVIN DONALD, Executive Director of the Brick Township Municipal Utilities Authority, hereby certify and state the following:

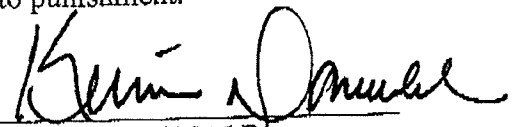
1. The Brick Township Municipal Utilities Authority GIS Information, hereinafter referred to as "BTMUA GIS," has been voluntarily submitted to the U.S. Department of Homeland Security for purposes of the Critical Infrastructure Information Act of 2002 on November 24, 2004.

2. The BTMUA GIS database contains all of the information pertaining to the potable water treatment and distribution system, and the sanitary sewer collection system for the customers who receive services from the BTMUA. This critical infrastructure information is the primary focus of the submission and request for protection. The BTMUA GIS database is the only single database that contains all of the following information in one place: water booster stations, fittings, storage tanks, hydrants, intakes, interconnects, valves, pipe wells; sanitary sewer fittings, valves, force mains, pipe casings, pump stations, manholes, pipes; storm sewer basins, catch basins, flared end sections, outfalls, manholes, storm pipes; property information such as block corners, condominiums, easements, parcels, property corners, bridges, buildings, bulkheads, cemeteries, athletic courts, dams, contours, docks, driveways, public facilities, fire districts, lakes, map sheet index, obscured, parking areas, pools, rivers, road

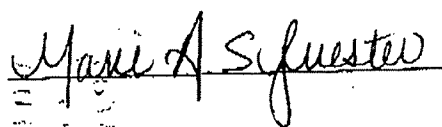
centerlines, edge of road, emergency shelters, shoreline, shrubs, streams, storage tanks, trailers, wooded areas; watershed monitoring sites and sample sites. It also contains color orthophotography, and topographic base maps.

3. The totality of the BTMUA GIS database, in a digital format, is information that is not customarily in the public domain. Digital information is not available to the general public.

4. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing is willfully false, I am subject to punishment.

  
\_\_\_\_\_  
KEVIN DONALD

Sworn to and Subscribed  
before me this 14th  
day of December 2004.



MARIE A. SYLVESTER  
Notary Public, State of New Jersey  
No: 2048446 - Monmouth County  
My Commission Expires June 17, 2008

N



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW  
9 Quakerbridge Plaza  
PO Box 049  
Trenton, New Jersey 08625-0049  
(609) 588-6582

JEFF S. MASIN  
DEPUTY DIRECTOR  
ADMINISTRATIVE LAW JUDGE

Fax. No. (609) 588-6536

November 30, 2004

**BY FACSIMILE TRANSMISSION AND REGULAR MAIL**

Diana Anderson, Esq.  
Carluccio, Leone, Diamon, Doyle & Sacks  
9 Robbins Street  
Toms River, NJ 08753

Re: Robert Tombs v. Brick Twsp. Mun. Utilities Auth.  
OAL DKT. NO. GRC 06786-04S  
AGENCY DKT. NO. 2003-123

Dear Ms. Anderson:

I received your letter dated November 22, 2004, as well as a response from Mr. Tombs, dated November 24, 2004. In responding to Mr. Tombs discovery request of September 24, 2004, you have chosen to assert that the submission of materials to the United States Department of Homeland Security ("DHS"), made pursuant to the Protected Critical Infrastructure Information Program ("PCIIP"), serves as a complete foreclosure of any responsibility on the part of your client to respond to Mr. Tombs' requests either specifically regarding the discovery requested or more generally in connection with his application for disclosure of materials under *N.J.S.A. 47:1A-1 et seq.* In his response, Mr. Tombs has expressed concern that your position as to the presumptively protected status of the material submitted to DHS does not address the question of whether this material, or at least some of it, may be material that is "customarily in the public domain" such that, pursuant to 6 *C.F.R.* §29.5(a)(iv), the material does not qualify for protection. He notes that your client had previously offered to provide the maps sought "in paper form" and it also told the Government Records Council that ". . . (a)ny and all paper (hard) copies of information are available at any time." He also appears to assert that agencies arguably similar to your own client had previously provided the kind of information that he seeks. While I am certainly cognizant of the need to assure the security of information that the United States Congress deems protected under provisions of law governing the DHS and the PCI Program, nevertheless simply because you have provided information to the DHS does not necessarily mean that the current matter may not proceed. If you are asserting that all of the information sought by Mr. Tombs in discovery, or more generally sought by Mr. Tombs in his request under *N.J.S.A. 47:1A-1*, is material which (1) has been submitted to DHS with the "express statement" required by 6 *CFR* §29.5(a)(3) "in expectation of protection from disclosure as provided by the provisions of the Critical Infrastructure Information Act of 2002" and (2) is in fact "of a type not customarily in the public domain," then I require that you state so directly in writing with a

certification or affidavit to that effect from someone at the Brick Township Municipal Utilities Authority who has the knowledge to make such an assertion under oath. In other words, while your client may have decided to voluntarily make a submission to the DHS, without some further evidence that the scope of the information provided did not sweep together both information that is not customarily in the public domain and therefore may qualify for protection and information which is customarily in the public domain and therefore would not qualify for protection under the CIIAP, the position expressed in your November 22, 2004, letter cannot be accepted at face value. If, to the contrary, some of the information sought is material not submitted with the "express statement" and/or which is "information . . . customarily in the public domain," then you are directed to answer the specific discovery requests immediately and provide the specific information requested, unless you have some other legal basis for asserting that it is not discoverable or not obtainable under *N.J.S.A. 47:1A-1 et seq.* other than because of its submission under the PCIAP. In such case, you will advise Mr. Tombs of the basis for your refusal to answer his request as to such material with specific information as to the alternate basis for such refusal.

Both parties in this case as well as this judge must recognize that the establishment of the DHS and legislation such as the CIIAP, as well as exemptions existing in State law for matters dealing with domestic security, have added a new layer, or perhaps better, layers, of concern to traditional issues regarding what matters may be available under laws seeking to guarantee public access to government records. Because of the nature of the concerns in this matter I do not intend to rush forward to a decision without careful consideration of the claims of both parties. To the extent that there seems to be a colorable argument that the DHS must first pass upon the protectability of material submitted to it, I might well be inclined to lean in favor of delay. However, despite a natural caution in favor of such, it is essential that the respondent, and its attorneys, weigh carefully any assertion that every piece of information sought by Mr. Tombs actually falls within the category of materials which *may* be protected, as that class of materials is defined in the *C.F.R.* Thus I expect extreme care to be exercised before presentation of any blanket assertion that all of the material sought was (1) included within the submission made to DHS and (2) information . . . of a type not customarily in the public domain."

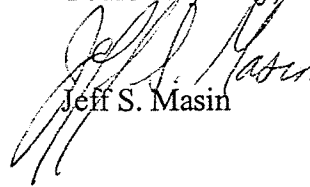
To the extent that the respondent may, in good faith, determine to present such a blanket certification, I will have to consider what further action, if any, may be taken on this case prior to a determination by DHS as to the protectability of the information. On its face, such an assertion might be testable by an evidentiary hearing, but given the nature of the CIIAP process, it remains to be determined whether any hearing can be held in the face of a blanket certification that all of the material sought is "not customarily in the public domain." This is in part because discussions of the exact nature of the material or systems involved, as well as how it has been treated in the past may impinge on DHS' role in determining whether protection will adhere to the materials. Mr. Tombs is free to comment on that concern at such time as we see the extent to which Ms. Anderson deems it appropriate to present a blanket certification.

Once again, in weighing the interests involved here, I caution the respondent to be extremely careful in weighing how far they can assert protection pending DHS review in light of the statement in 6 *C.F.R.* §29.5 (a)(iv).

Thank you for your continued cooperation. In light of the status of the matter at this time, the December 9 hearing will be adjourned. Since it may take at least some time for Ms.

Anderson to file her response and Mr. Tombs to comment on that to the extent he chooses, and since after receiving the submission I will have to weigh exactly where that puts the matter at that point, I deem it best to adjourn the hearing, to be rescheduled as quickly as possible if further proceedings appear warranted in the near future rather than at some later date dependant upon DHS determinations. That said, please understand that to the extent that there appears to be a matter still ripe for determination in the near term at the OAL and ultimately at the Government Records Council, I will proceed quickly and will maintain the commitment for an accelerated decision.

Yours very truly,



Jeff S. Masin

mjm

~~c Mr. Robert Bradley Tombs~~

Joanne Restivo, Deputy Clerk

# CARLUCCIO, LEONE, DIMON, DOYLE & SACKS, L.L.C.

A Professional Limited Liability Company

COUNSELLORS AT LAW

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Daniel J. Carluccio☐  
Stephan R. Leone☉±  
Edward J. Dimon†☉  
John Paul Doyle  
Robert L. Gutman±  
Diana L. Anderson§▽⊕Δ  
Neil Brodsky☉  
Richard S. Kohn  
Louis A. Felicetta  
Annemarie Schreiber§  
Paul V. Orecchia§

June 16, 2005

☉Also admitted in NY  
†Also admitted in MA  
±Also admitted in DC  
§Also admitted in PA  
☐Rule 1:40 qualified Mediator  
▽Registered Guardian  
⊕Member of NAELA, National  
Academy of Elder Law Attorneys  
ΔCertified Elder Law Attorney

Richard K. Sacks 1999-2002

Honorable Jeff S. Masin, ALJ  
Office of Administrative Law  
9 Quakerbridge Plaza  
PO Box 049  
Trenton, NJ 08625-0049

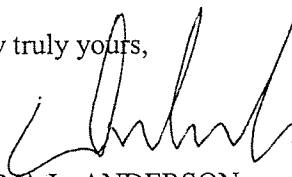
**RE: ROBERT TOMBS V. BRICK TWSP. MUN. UTILITIES AUTH.  
OAL DKT. NO. GRC 06786-04S  
AGENCY DKT. NO. 2003-123  
OUR FILE NO. 1485-002**

Dear Judge Masin:

In accordance with the Interlocutory Order entered by the Court on January 13, 2005 the above referenced matter was stayed and made inactive for a period of six months. The Court directed the undersigned to notify Your Honor and the petitioner immediately if any decision from the Department of Homeland Security was obtained. In accordance with the Order I am enclosing a copy of correspondence received from Laura L. S. Kimberly, PCII Program Manager indicating that the submission made by the Brick Township Municipal Utilities Authority has been validated as protecting critical infrastructure information. The information is now being handled and safeguarded in accordance with the Critical Infrastructure Information Act and 6 CFR 29, "Procedures for Handling Critical Infrastructure Information: Interim Rule". Said material was published in the Federal Register on February 20, 2004.

Thank you for the Court's attention to this matter.

Very truly yours,



DIANA L. ANDERSON

DLA:dol

cc: / Robert Bradley Tombs  
Kevin F. Donald  
Greg Hannah  
Richard E. Garnett, P.L.S., P.P.