



Miami-Dade Commission on Ethics & Public Trust

Report of Inquiry

Investigator: Robert Steinback

Case No. PI 14-010	Case Name: Key Biscayne Walgreen's	Date Open:	
Complainant(s): Michael Winkleman	Subject(s): Stephen Helfman Jud Kurlancheek	February 12, 2014	

Allegation(s):

Complainant Michael Winkleman (Winkleman) alleges that subjects Stephen Helfman (Helfman) and Jud Kurlancheek (Kurlancheek), and possibly other administrative staff members for the Village of Key Biscayne, deliberately withheld information that should have been released in response to a Public Records Request (PRR) submitted by the complainant.

Relevant Ordinances:

Complainant alleges a violation of the Miami-Dade Citizens' Bill of Rights, provisions (2) *Truth in Government. No County or municipal official or employee shall knowingly furnish false information on any public matter, nor knowingly omit significant facts when giving requested information to members of the public;* and (3) *Public Records. All audits, reports, minutes, documents and other public records of the County and the municipalities and their boards, agencies, departments and authorities shall be open for inspection at reasonable times and places convenient to the public.*

Complainant also alleges a violation of Chapter 119 Florida Statutes, which states in part, in 119.01 (1): *It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.* Also relevant to this case is Chapter 119.0701 (2): *In addition to other contract requirements provided by law, each public agency contract for services must include a provision that requires the contractor to comply with public records laws, specifically to:*
(a) *Keep and maintain public records that ordinarily and necessarily would be required by*

the public agency in order to perform the service.

(b) Provide the public with access to public records on the same terms and conditions that the public agency would provide the records and at a cost that does not exceed the cost provided in this chapter or as otherwise provided by law.

Investigation:

Interviews

Michael Winkleman, attorney for 12, 22-24 Crandon Blvd. property owner Max Puyanik (Puyanik); February 12, 2014, 4:30 p.m., by telephone.

Summary of interview:

Winkleman explained that his clients are the property owners hoping to bring a Walgreen's pharmacy and a liquor store to the property.

Winkleman said he filed "valid public records requests for reports that were never produced [by the village]. [The reports] had opinions in them [that were] taken out by Jud (Kurlancheek) and the village attorney. My main fear, why I called you, I knew they were going to try to suppress this evidence. They struck it from the record; they approved the project, but taking away cross-access [between the development's parking lot and the adjacent one, and making it accessible] only for golf carts and pedestrians."

Winkleman said he wasn't sure if the Walgreen's project would go forward with the essential cross-access struck from the plans. Winkleman said, "If Walgreens walks away, [he would] hold [the Village] accountable."

Winkleman said he believed at least some Village Council members were aware of or involved in an effort to undermine the Walgreen's development, thereby devaluing the property and making it more attractive for condemnation.

Winkleman said the matter could amount to anything from "much ado about nothing" up to outright fraud. He said he believes fraud was a factor, in that the village administration did not want to release early versions of a traffic study which said the Walgreen's would not significantly increase traffic, a conclusion some board members did not want to hear or accept. Winkleman said he believed Kurlancheek intervened to make sure that parts of the draft reports that did not conform to the Council's wishes were expunged from the final report.

Winkleman said of Helfman that "I knew, based on e-mails, that he was going to try to suppress this evidence. When it comes to fraud, civil fraud, I could file a complaint. "

Regarding the public conflict between Helfman and Winkleman over Winkleman's agreement not to use anything learned in depositions taken for Winkleman's mandamus action in the zoning hearing (an agreement Helfman said Winkleman violated), Winkleman said that had his Dec. 6, 2013 public records request received the proper response, he never would have

agreed to limit the deposition, and may not have needed the deposition at all. Noting that the law regarding public records requests stipulates that a response should be received in a "reasonable amount of time," Winkleman asserted that he still did not have a response to his PRR after waiting a month and a half and that this should not be considered reasonable.

Winkleman noted that planning director Kurlancheek had a conversation with Atkins contractor Darlene Fernandez (Fernandez) at which he suggested changes.

Winkleman stated his belief that a document that is reviewed by a city official is a public record.

Niesen Kasdin, attorney for Morgan Property Group, developer of 12, 22-24 Crandon Boulevard; by telephone, date uncertain but approximately mid-February 2013.

Summary of interview:

Kasdin said his office did a public records request asking for drafts of the traffic analysis. "Nothing was produced. I heard from Jud's testimony that there was a draft and he had reviewed it," Kasdin said. "The traffic study was the essential issue in this whole thing. The draft of the traffic study supported our position."

Kasdin said that if Atkins was commissioned to do a traffic study on behalf of the agency [the Village], that would be a public record.

Kasdin suggested asking Kurlancheek why he didn't keep a copy. He suggested asking Fernandez what efforts were made by the city to get that record.

Kasdin spoke of the agreement between the city attorney [Helfman] and the attorney for the property owner (Winkleman). Kasdin said his client, the developer, was not a party to that agreement. Kasdin described the agreement as not allowing anything learned in deposition to be used in the zoning case. Kasdin described the "indignation over the fact that the breach of the agreement was more important than its substance."

Kasdin said the village's final report "just deleted the reference to the cross-access." Kurlancheek had seen that in the first, and requested that cross access reference be taken out.

Kasdin believes it was Kurlancheek who directed Fernandez to take out the reference. Kasdin said that the earlier report that included the cross-access reference was germane and part of the public record. The agreement made at the deposition was to keep that evidence away from zoning hearing.

Kasdin said, "We suspected that there were drafts and there almost always are drafts. Our suspicion was that the earlier draft had changed. Winkleman didn't know if drafts existed."

Jud Kurlancheek, Building, zoning and planning director, Village of Key Biscayne; by telephone; date uncertain but approximately mid-February.

Summary of interview:

When the investigator reached Kurlancheek, he said he was only at that moment reading the deposition that Fernandez gave. He said he was learning "for the first time" that there were "11 or 15 different drafts that I never knew of."

Kurlancheek said it was on a Friday morning prior to the Dec. 6 meeting that Fernandez wanted to review her draft report with him. He recalled the date as Nov. 21 (which was a Thursday). He and Fernandez discussed a draft of the report. Apparently Fernandez actually came in the next day, on Friday, with a draft, which they reviewed.

Kurlancheek said Fernandez left with the document she had brought with her, so there was no draft of her report in the village's possession. Kurlancheek said that while Fernandez determined in her report that the cross-access driveway between the two properties posed no problem, he had a problem with it, and asked her to make changes.

Kurlancheek said that an e-mailed records request came to him Dec. 6 from Blislainey Sainz, legal administrative assistant to Steven Wernick (Wernick) and two other attorneys at the Akerman LLP firm. He said that normally PRRs go to the village clerk, but since he was copied on this request, he immediately sent a copy to Fernandez at the Atkins firm. He directed Fernandez to send whatever she had directly to the village clerk.

Kurlancheek said he only learned later that Fernandez and Atkins hadn't sent anything.

Kurlancheek said that according to Chad Friedman (Friedman), a colleague of Helfman's, Atkins was holding back on responding to the PRR because of concerns about not being paid by the village. He said it turned out the firm was paid "on a timely basis. I think we paid within 30 days." Kurlancheek stated that "there was no follow up" to make sure the PRR had been responded to. He added that he didn't know that at the time that the firm was holding back for any particular reason. In addition, "We never received any subsequent request from Wernick saying, 'Where is my PRR?' They do it a lot. If you were so concerned, why [didn't anyone call and say], 'Jud, where is my record?'"

Stephen Helfman (Helfman), village attorney for Village of Key Biscayne and partner in the firm Weiss Serota Helfman, by telephone, date uncertain by approximately mid-February.

Summary of interview:

Helfman described the players in this matter and the history of the case from his vantage point.

He noted that the property owner and the developer, while allied, have operated somewhat autonomously.

Helfman said that on Dec. 6, 2013, a PRR was submitted by the developer Morgan Property Group, represented by Wernick (associate of Kasdin). Helfman said he believed none of the several PRRs submitted related to this matter had been left unanswered.

Helfman explained that a public hearing on the zoning application was scheduled for Dec. 3, but the village council deferred the hearing and the application was not heard. [The council did discuss the matter before deferring it.] This happened, Helfman said, because the village wanted additional study of the traffic effects of the development. The existing study had two recommendations in particular: that a more specific study be done that took into consideration Key Biscayne's unique traffic circumstance, and a recommendation by Atkins Group that there be consideration given to the safety of an abutting intersection.

Three days later, according to Helfman, Akerman, on behalf of Morgan property group, submitted a PRR for traffic-study related records from Aug 27 to Dec. 3. The request was submitted by Wernick who also copied Kurlancheek, Kasdin, and Friedman, an associate of Helfman. He sought written communication between Atkins and the Village, internal documents, etc. Helfman said he personally didn't know the outcome of how this PRR was answered. "It wasn't addressed to me," he said. Helfman said he didn't know whether Wernick was satisfied.

Helfman said Kasdin asked him on the record, what happened to their PRR.... "I said, 'I don't know.'"

Helfman said that what Winkleman found out through a deposition in a lawsuit he filed against village council trying to force a hearing [the mandamus action to force a zoning hearing after the council deferred action Dec. 3]. The court never heard the mandamus pleading, although the village responded to the judge's "show cause" order.

Helfman: "What I think happened was Wernick got a bunch of stuff, what was delivered in response to the PRR. From talking to Jud, I said, 'What did you do?' He said, 'I gave them whatever I had, and I wrote to Atkins and [told them to] give them all you have, and they did not respond.' He assumed they had nothing to give. They never responded. That's what he tells me."

Helfman: "Here's what I think happened; the Village responds to Wernick and says, 'Here's all the docs, and satisfies the PRR.' My guess is now, maybe to surprise of village, the village doesn't have the draft, but Atkins has the draft in their file. The city asked Atkins, they deliver

nothing, the city gives what IT has.”

Helfman: “What Winkleman learns in his deposition is that there ARE earlier drafts. He asks her [Fernandez] to bring all her drafts. In her files are the drafts. Now his theory is, Village of Key Biscayne knew about these drafts, knew they were in Atkins file, but they didn’t produce them. And even Steve Helfman was complicit in keeping file secret. {A} conspiracy to keep file at Atkins. Wild theory.”

Helfman offered this scenario of events: “The City first engages Atkins Engineering, Darlene Fernandez works for Atkins. She drafted a report and delivered it to the city. She discussed that with the city planner Jud. She is an independent consultant, hired by city. She had several conversations with Jud about her report. I think they were all by phone, could have been in person. She has work product in her office. For the moment, let’s say that is public record, although there is a question about a contractor’s work product is a public record. If Jud had the draft, no question it’s public. If he doesn’t physically have it, but it may be a public document; the question is what is his responsibility to go fetch it? How many drafts? It may be that Jud who has the relationship with Darlene, did the reasonable thing, send what you have to Darlene.”

Helfman offered more background on the evolution of Fernandez’ report. He said that on Dec. 3, her report was “blasted by the commission – they didn’t like the content of her report; ‘a total piece of garbage,’ ‘do not pay them.’ Fernandez had reported that the traffic from the proposed project would create minimal impact on surrounding roads. Jud questioned her and couldn’t understand her report. I couldn’t figure out how she arrived at her conclusion, either. Everyone was astounded by her finding. They [Atkins] base their studies on ITE [Institute of Traffic Engineers] standards. When you do a traditional traffic study, you use a national average of what a typical pharmacy generates throughout the US. She plugged that into her study. It doesn’t tell you what is going to happen on Key Biscayne in your unique circumstances. If you fit into the average situation, then those projections will work. But if you have a situation like Key Biscayne – you’re on an island, you have a circumstance where you are not served by the kinds of services you might otherwise have – you end up using a pharmacy differently from how you’d use it elsewhere.”

Helfman continued: “What she [Fernandez] didn’t understand, on Key Biscayne, the CVS and Walgreen’s are used as 24-hour convenience stores. The pharmacy is not open 24-hours. What she didn’t recognize is that Key Biscayne is a very unique community. When the second study came back by Moss [Miles Moss, the contractor who produced his own study of traffic effects of the proposed Walgreen’s for the village], he counted the actual usage of a comparable store, the numbers came back at double the national average. That’s why they said to Darlene Fernandez, ‘you’re crazy, we’re not like anybody else.’”

Helfman said, “I think they anticipated that she would do a study that evaluated the impact in Key Biscayne population in Key Biscayne.... They never anticipated that what she would use national averages and give them a textbook answer. They said, ‘What do we care what the national average is?’”

Helfman said, “The original study was requested by Village staff, [by] Jud Kurlancheek,

because he was concerned about the traffic implications of the proposal. He is the one who asked for the study to be done. When he submitted his recommendation to the commission, he put in his report that he was unable to make a complete recommendation to them because he felt that the traffic study was insufficient, and didn't provide him with enough data to give a full assessment to council. They then read the study, and concurred with him. 'This gives us national averages.' That's the reason they deferred. We want to know what will happen HERE. Also, Atkins identified a safety problem. They [the Council] deferred because the administration said they weren't satisfied with results."

Helfman continued: "When they did that, they were so put off by what the report did reflect; as was Jud that they basically said to her 'You don't know what you're doing.' I am not surprised that three days later, when she was asked to provide copies of all of her work by the village [in response to Wernick's PRR], that she didn't do it."

Helfman said, "The rumor is that she [meaning Atkins] had not been paid. The Village Council that night said the bill hadn't been paid. Maybe that's [the reason] why she didn't send them [the material:] the circumstances under which she was treated rudely by council. And the council suggested it wasn't worth the paper it was written on and shouldn't be paid for it."

Helfman said that Winkleman's theory is that the city was deliberately withholding the earlier drafts. Helfman said that his view is that "If a document is delivered to city with intent to give it to city, it is a public record. If a document is brought to the city, and shown to a city official, who is asked to read it or comment or mark it, with intent that it is to be taken back, it is not a public record."

Under Kasdin's theory, once a document crosses a city office's threshold, it's a public record, Helfman said. "It might be public for some other reason, as a contractor. But not just because someone read it."

Helfman said Winkleman is suggesting that village didn't want to release the earlier draft, but that he discovered their existence in his deposition of Fernandez. As they were in the possession of the consulting engineer, Winkleman believes they should have been released.

Asked about his reported agreement with Winkleman regarding the Fernandez deposition, Helfman surmised: "The property owner becomes frustrated with the process that Morgan Property group is going through to get to the public hearing on site plan. There is a history to why Puyanik is frustrated. He assembles the properties through foreclosure and puts them together, and ultimately finds a tenant. He went through many efforts to figure out what he could do with the properties. He has had difficulties getting what he needed to know from city, he wanted to get rid of tenants after he got property. Puyanik asked the village to cite tenants for code violations. Tenants fixed problems, that frustrated Puyanik; he became angry because the village [hadn't cited] the tenants right away. He filed complaints, etc.

"Then he was encouraged by Jud to explore possibility of building a hotel there. I believe him when he says that he spent money to [advance] the hotel idea. For whatever reason, when the hotel concept was developed, Jud decided that he would not be supportive of that, and gave

reasons why he didn't like the idea. And he became really upset with Jud, and came to a meeting, with previous manager Iglesias and asked for Jud to be fired. He was furious. Over time, a terrible feeling of ill will between him and the village and the planning department over what to do here [arose]. There is not a nice feeling between them.

Helfman said: "There is a long history here that has led up to this application. Max Puyanic, finally gets a viable tenant for the site, brings forward an application (by Morgan Property Group), and proposes it, but proposes that the site have this secondary means of access through a shopping center in the rear. This complicates the application because he is [suggesting] going through the [adjacent] property but without their consent. [In fact, the applicant stated that the adjacent property owner had given consent to keep the connecting driveway open.]

"[At a] summit on March 13 [2013] to file this application. Jud responds in two weeks, with 18-21 exceptions, including not including the neighboring property in the application. Max responds, [saying,] 'You're not allowed to ask me for that. That's between me and property owner.' We say, forget it if you're not going to include that. He ends up in four-month battle with the village about whether to include it. I call the attorney; there is an appeal of Jud's decision about including the other property. He learns: Max won't do it because he and the other landowner are worried that if they include it, they'd have to trigger the requirement that the old 7-11 property has to be brought up to code.

"I said to them: 'We're not trying to make the center redevelop. If you're proposing to do work on the center, you'll have to upgrade, but if all you're doing is driving through, you're not having a problem. They file an application. The old ladies who own it say it's OK to drive through the property. Finally in October, they file a proper application. Max still says the requirement is illegal; he did it because he had to, and he believes the village wants to buy the land.

"The Council voted not to take it, but he is not nuts; there are others who do want to buy it. I don't care either way. Jud told Max you have to follow the rules.

"We get to the hearing on Dec. 3; the Council decides they're not ready for a hearing. It decided [to hear the application] on Feb. 11. Max [Puyanic], not the applicant, decides that he is so pissed off that he will hire a lawyer, Winkleman, to sue the council itself, not the village. He filed the mandamus to compel council to act, [claiming] that it had a duty, no discretion, to act on Dec. 3 and refused to do so. He wanted to have a court order council to do it. Then they set down the deposition of Darlene Fernandez in mandamus case. We thought, 'What the hell are they doing? Why are they taking the deposition of a traffic engineer if they're trying to get council to act?'

"'What really bothers me is,' I said, 'I don't think that's what you're going. What do you want from Fernandez?' I said, 'OK, if you think you're taking her depo to use her testimony in the zoning hearing, you're wrong. You're not going to misuse the judicial process to file a B.S. mandamus action to set down a deposition you otherwise can't take. I think you're trying to get her into a deposition so you can use her deposition against the city.' He says, 'absolutely not.' I said, 'Fine. You agree with me that you will not use that deposition or anything you get

through it at the zoning hearing.' He wants to check with client. I said, 'I will go to court right now if that's the case.'"

Winkleman agrees to the terms, and Helfman decides not to get a court order, telling Winkleman to go ahead with the deposition.

Helfman said, "What does he do, the day before the zoning hearing, he discovers what he thinks is a cover up. 'Darlene has drafts. We found a cover-up.' He decides to take entire deposition and memorandum of law, 170-page document and sends it to the council members and says 'You need to be aware of this.' He has uncovered this cover-up, and so he's going to go ahead directly to City Commission.... Not only is he lobbying the Commission, and he's not a registered lobbyist. He did exactly what I thought he would do. He did precisely what he agreed not to do. Now he is offended.

"We had an understanding. I believe the agreement has force of law. It binds your client. He went to Max. 'They want us to agree not to use this in zoning hearing.' He now knows that he's done something bad. Max, then, who by the way is a lawyer, sends out all the stuff directly to council on his own. My lawyer attempted to send this, but Helfman has told you guys that you shouldn't look at this, I'm sending this. This was Morgan's application. Max has not registered as a lobbyist. Calling council people, etc. is violating the code of ethics.

"We have a clear registering policy, we have forms. They've been lobbying for months, calling on phone, meeting with them. They haven't stopped; it is incessant. Promoting their own interests, because they will financially benefit from the situation.

"He tried to do it again, on the theory that I committed a fraud, he thinks that he should be able to use the information, so he hands it over to Kasdin, who tried to get into the record [during the council meeting].

This is all new stuff. You can't allow one party to take a deposition, and show up at a hearing and use it against another party. You can't do that. His theory is 'You knew it all along and you held it back.' They never talked to Jud. They've concocted a whole story here to promote their agenda."

In a follow-up conversation, Helfman said that Kurlancheek said that he only knew of one draft but never saw any others. He told her to send everything [in response to the PRR] to village clerk.

Darlene Fernandez, Traffic engineer project manager, Atkins North America, interview Monday Feb. 17, 2014, at her office 2001 NW 107th Ave. Doral, 3 p.m. Attending by telephone was Atkins counsel Carl Pierce.

Summary of interview:

Fernandez said that a week before the Dec. 3 hearing, she met with Helfman to talk about the draft study. Kurlancheek had reviewed an earlier version and objected to her traffic conclusion. She suggested a traffic circulation analysis that could be added in to her report, though she later didn't advocate her company doing it. At meeting with Helfman, he said he didn't like her conclusion, but suggested she go ahead and present it as is to the council.

Fernandez said there were several drafts that she and Kurlancheek discussed, about four. The entire time for the survey was about four weeks. The first two were subcontracted to a firm to conduct data gathering, the last two weeks were her drawing up the report analysis.

Although there were several drafts, she only met with Kurlancheek once about a week before the meeting Dec. 3, 2013, Council hearing. She said that at first, Kurlancheek said he understood that the development would have no impact on traffic, "but about 6 that afternoon, he calls again [to say], 'Before you submit your final report, Helfman would like to meet with you.' She meets with Helfman on Monday or Tuesday (week of Thanksgiving)... to discuss the same draft she had submitted to Jud, but with additional comments from Jud."

Helfman said he didn't agree with her numbers. She explained to him about national standards for such studies. Helfman says she should treat the pharmacy as a convenience store (which would generate much more traffic according to ITE standards). Helfman said her analysis should reflect a pharmacy of 1,000 square feet and a convenience store of 9,000 square feet. Fernandez said, "I said [to Helfman], 'I can't assume it's a convenience store. Standards allow for the city to do its own trip generation study which could be incorporated into her study.'" He (and evidently Kurlancheek as well) asked, "Why can't this be considered a convenience store?" Fernandez said Helfman seemed to know a bit about ITE standards, and knew that under ITE analyses, a convenience store would generate the most traffic.

Fernandez said that meeting was the first time anyone from the city brought up to her the idea of regarding the Walgreen's as a convenience store.

Fernandez included in her report that numbers could be different, and that the city could arrange to have a local trip generation study done of the area if it desired.

On Mon. Dec. 2, Fernandez said Kurlancheek called to say that Helfman wanted Fernandez to be ready to do a presentation on the study. She arrived Dec. 3 for the council hearing, but she never testified. The Council moved to defer to order another study. So she didn't get a chance to defend her report. Her report said the existing traffic issues, and there are issues, would not be impacted by a Walgreen's at that location.

A second engineer, Joaquin Vargas of Traftech, submitted a study that essentially came to the same conclusion as Fernandez. [Traftech was hired by the developer, Morgan Properties,

represented by Kasdin].

After the meeting, Kurlancheek said he would contact Fernandez about doing the local trip generation study, but she didn't hear from him for another month. When he finally called, Fernandez said she didn't want Atkins to do the trip generation study. The next day, the city asked for a discount of Atkins fee.

Fernandez said, "We were trying to get paid." Council approved a \$27,000 contract, half went to subcontractor. "We opted not to do the traffic generation report," she said, due to the disagreements and unhappiness her original report had generated. Atkins finally agreed to a \$3,000 discount. Fernandez said the cost was actually higher to the company because she met twice with Jud in the field and met with Helfman, without charging for it.

Regarding the Public Records Request: She didn't know who had asked for the PRR. She assumed it had come from property owner (atty: Winkleman) and when they responded to the subpoena, thought that had settled the matter. [Actually, the PRR had come from the developer, Morgan Properties, represented by Kasdin and Steve Wernick). When Kurlancheek sent the PRR to her, she relayed it directly to company lawyer (not Pierce).

Pierce said the subpoena that arrived January 9, 2014. (the PRR was about three weeks before) – was styled like a lawsuit. Pierce said he was brought in in advance of the deposition. In response to the subpoena, "We sent copies of documents to Winkleman and over to Helfman's office."

Pierce said, "I don't know that [Atkins] ever responded [to the PRR] in view of the subpoena hit[ting] the door."

Fernandez said, "They never told us who the PRR was from."

Pierce said, "I will confirm whether any information was sent to city clerk. I would suspect it didn't hit the clerk's office because of the subpoena. ... I don't know that there ever was a PRR response."

Fernandez said, there were drafts of the report she discussed with Kurlancheek by telephone. She said Kurlancheek told her not to send him anything by email. There were different versions.

Holidays may also have interfered with PRR response. "We came back from holidays and we got subpoenas."

Humberto Alonso, of Atkins, said, regarding the PRR, "If we're going to respond, we still haven't gotten paid. All of these conversations happened [before] Jan 9 when we got the subpoena."

Deposition was Feb 5, 2014.

Conchita Alvarez, Key Biscayne Village Clerk, interview, February 24, 2014, 3 p.m., her office at Village Hall, Key Biscayne.

Summary of interview:

Met with Alvarez to review her public records file on this case. She admits to being somewhat overwhelmed by multiple requests, made worse by the fact that this was happening during the Christmas season, two weeks of which she spent on vacation.

Among other problems, Alvarez said that when she had accumulated the material in response to Wernick's Dec. 6, 2013, PRR (Wernick on behalf of the developer Morgan Property) by Dec. 31, she erroneously notified Claudia Ridge (representing the property owner Puyanic) that the request was completed. This happened even though on Dec. 11, Wernick had written to request an update of the Village's progress on fulfilling the PRR. The confusion only delayed Wernick's receipt of the documents by three days.

Also contributing to the delay overall was that Alvarez was on vacation from Dec. 13 to Dec. 27th.

Alvarez said that at no time did she receive any documents from Atkins. She said she would not customarily receive drafts of studies, only completed studies that are ready for submission to the Council. As far as she was concerned, the only Atkins draft she was aware of was the Dec. 3 one that the Council received.

Alvarez said she was not aware of the agreement between Helfman and Winkleman about using information gleaned from the deposition. Winkleman sent the large document including information about the earlier draft and asked Alvarez to distribute it to the Council, which she did. But she also sent it to Helfman, who told her not to send it after it was already gone. Alvarez sent an electronic "recall" order, which would only work if the recipient hadn't opened the document.

Document/Audio/Video Review:

Received from Winkleman

- Written comments from Winkleman outlining his perspective on the issue at hand. It includes excerpts from the Fernandez deposition at the heart of the conflict.

Summary of findings:

Winkleman argues in this document that Fernandez' deposition "has uncovered the Village's shocking, egregious and fraudulent misconduct." He states that "the Village intends to close the 'cross-access' between the proposed Walgreen's property and the adjacent Harbor Plaza Shopping in order to significantly de-value the property and possibly force Walgreen's to walk away from the deal. In order to accomplish this, the Village conducted a non-required traffic study, but when the results of the traffic study were not what the Village needed, the Village buried the true findings of the study, and instead, found a 'hired gun' accident reconstruction expert witness [Miles Moss (Moss)] who is more than happy to say whatever the Village needs to accomplish its unfair and illegal goals."

Winkleman accuses Moss, the accident reconstruction expert, of simply reporting what the Village wanted him to say, which is that the Walgreen's development would, in fact, create significant traffic problems. Winkleman states that Moss is not competent to render such an opinion. Winkleman argues that the Village is using the traffic study to duck its legal obligation to approve the Puyanic/Morgan Properties site plan application, and instead find a way to deny what it has no legal basis for denying. The property is already zoned for the proposed use, Winkleman states.

Winkleman states that "The Village Council's dilatory, bad faith conduct has already forced KB Gateway [the company of property owner Puyanic] to file a Complaint for Writ of Mandamus" to force the Council to act. Winkleman points out that by closing the cross-access driveway, the Village would not only increase pressure on Walgreen's to walk away from the project, but also, by its own figures, reduce the value of the property from \$15 million to \$11 million, which would be a 38 percent savings should the Village then decide to condemn the property and purchase it. Winkleman points out that the Village code does not require a traffic study for this type of development request.

Winkleman cites passages from Fernandez' earlier draft report, and quotes relevant passages from her deposition.

Winkleman states that Kurlancheek "intentionally hid and/or disregarded the true findings of the Atkins Traffic study" in his Site Plan Review submitted to the Council on Dec. 3, 2013, where Kurlancheek wrote, "A finding related to criteria (a) could not be made for reasons that are set forth in the attached Traffic Study." Winkleman writes, "This is simply untrue. Kurlancheek knew full that the Atkins Traffic Expert opined, 'The site plan submitted by the developer does allow free movement within the proposed development while discouraging excessive speeds. The access points to peripheral streets which are compatible and functional with circulation systems. ... Yet Kurlancheek expressly told Atkins to remove this opinion because he would place it elsewhere in the report. This was also untrue. Accordingly, the

Village Council has not been told the truth, and critical information has been withheld by Kurlancheek.”

Winkleman cites an e-mail from Helfman to Fernandez explaining the Council’s unhappiness with the report she provided Dec. 3, 2013, which describes the Walgreen’s as “a small box 24-hour convenience store of approximately 9,000 square feet with a pharmacy of approximately 1,000 feet open from 9 a.m. to 9 p.m.” Helfman further writes that Fernandez basing her study on a “10,000-square-foot pharmacy” was, in the eyes of the Council, incorrect.” Helfman finally requests a discount on the agreed-upon fee because “the Council doesn’t feel they have received what they contracted for.”

Winkleman takes excerpts from Atkins internal communications, including one from Fernandez stating that “Everything they [the Village] state in their e-mail is incorrect” and that a response is essential. Among other things, Fernandez argues in a draft letter to herself [but presumably intended for Helfman] that was produced in response to the subpoena, “I have told you repeatedly that Walgreen’s is not a convenience store and I cannot make that assumption as a professional. ...No Walgreen’s anywhere produces that much traffic.”

Winkleman describes the work of Moss, the engineer hired by the Village Council to do a separate traffic analysis, as that of a “hired gun” whose expertise is accident reconstruction, not traffic impact studies.

Included as an exhibit to this document is a copy of the complaint for writ of mandamus.

Received from Darlene Fernandez, Atkins North America:

- A copy of the Atkins proposal for the Key Biscayne study dated Oct. 25, 2013
- A copy of the Atkins final report dated Nov. 25, 2013

Received from Conchita Alvarez, Key Biscayne Village Clerk:

- A copy of the binder Winkleman delivered to the village for distribution to the Village Council members, including the original village request for proposals, draft and final versions of the Atkins study by Fernandez, copies of the traffic studies by Traftech and Miles Moss, a full copy of the Fernandez deposition, and other supporting documents.
- Copies of various internal e-mails and messages between the village and the parties in the case.

Summary of findings

The binder is the material Winkleman sought to place into the hands of the Village Council members, particularly the draft copy of Fernandez’ final report, which Helfman sought to block.

Received from Stephen Helfman, Key Biscayne Village Attorney, by mail, dated March 7, 2014

- A summary analysis of the PRR case from the Village's perspective, with selected e-mails.

Summary of findings:

Helfman concludes this letter saying "I trust that this letter and the attached documents make clear that at no time did the Village or any of its employees or officials in any manner attempt to impede production of, conceal, alter or withhold any public records. In fact, the Village officials took all reasonable efforts to timely comply with the PRR, including seeking out documents from its contractor, which the Village acknowledges are public records but which were not in the Village's possession or control."

Analysis:

There are three parties involved: The Village of Key Biscayne, whose village attorney is Helfman; property owner Puyanik dba Gateway KB Associates (and also principal of another firm, Commodore Realty, of which his son David is president), whose attorney is Winkleman; and developer Morgan Property Group, whose attorney is Kasdin (with colleague Steven Wernick). The developer is intending to build a Walgreen's Pharmacy on Puyanik's property right at the entrance to Key Biscayne proper, at 12, 22-24 Crandon Boulevard.

The property owner and the developer have been trying to get site plan approval for the Walgreen's project for more than a year. Both of them, though primarily the property owner, are suspicious that the village wants to condemn the land and buy it for a park, and as such has an interest in driving down the value of the property. (That possibility has been floated in the local newspaper, attributed to certain council members.) Inducing Walgreen's to walk away from the deal would serve that purpose. The property has been appraised at \$15 million if there is a Walgreen's deal in place, \$11 million if not.

The problem for the village (if the suspicions are accurate) is that the applicants already have the right to develop the property, as the site plan already conforms to all village zoning requirements. Given this, the village council is required to approve the site development plan.

The city hired an outside traffic consultant, Atkins North America (affiliated with Atkins Global), to do a traffic study of the project. A traffic study was not required for site plan approval, but traffic circulation around that development is already considered substandard. The applicants felt the city did this because it was fishing for an excuse to block approval of the site plan.

The Atkins traffic study is at the heart of the dispute. Atkins engineer Darlene Fernandez was its principal author.

Shortly before a scheduled Dec. 3, 2013, hearing, Village Planning Director Kurlancheek reviewed a draft of the Atkins study, and disagreed with a few elements of it, particularly the conclusion that a business such as a Walgreen's would not significantly worsen traffic circulation in that area. Fernandez's conclusion was contingent two factors: (1) keeping open a cross-access driveway connecting the development site and an adjacent shopping center (owned by an different owner) and, (2) considering Walgreen's a pharmacy [that might seem obvious, but the village would argue that it should be considered a convenience store that happens to include a pharmacy. Traffic engineering research has determined that convenience stores generate much more car traffic than pharmacies.].

The owners of the adjacent property had no problem with keeping the cross-access driveway open. Fernandez said that if the cross-access *were* closed, it *would* worsen the traffic conditions on the surrounding streets. Also, Fernandez said professional standards prohibited her from reclassifying the proposed Walgreen's as a convenience store, as professional guidelines already take into account that such businesses sell more than pharmaceuticals. Kurlancheek disagreed with Fernandez's conclusion that the Walgreen's would not worsen traffic, and directed her to remove it from the report.

Atkins submitted its report to the city, this version including Kurlancheek's objections, and omitting the cross-access analysis. She would not reclassify the Walgreen's as a convenience store.

The site plan approval hearing was held Dec. 3, 2013, but the city deferred a decision mostly due to fears about the traffic impact of the project resulting from Kurlancheek's objections. Whether these concerns are valid or not, it is abundantly clear the Village's position is that a Walgreen's in that location is not desirable. But since the site plan conforms to the Village zoning code, it appears the Village is looking to use traffic concerns to squelch the plan. And Fernandez's original conclusion that the Walgreen's would not significantly add to traffic congestion further complicated the village's case.

There seemed to be popular acceptance among Key Biscayne council members and staff about treating a Walgreen's as a convenience store. They argue that due to Key Biscayne's unique geography as an isolated island at the end of a causeway, residents in reality treated the enterprise as a convenience store. They base this view in part on an existing CVS pharmacy in the village, which in fact generates far more car traffic than the national average for such stores.

Meanwhile, the developer, Morgan Property Group, hired its own traffic engineer, who came to the same conclusion as Fernandez. But the village contracted yet another study, which finally stated what village officials apparently wanted to hear – that the Walgreen's development plan would increase the traffic hazard. But the new contractor, Miles Moss, is not a traffic engineer; he is an accident reconstruction specialist. The applicants accused village officials simply shopping for a "hired gun" to give them the outcome they desired.

Suspecting more stalling by the Village, Winkleman filed a mandamus action against the Village to compel it to hold a site plan review hearing after the Village deferred action on Dec. 3, 2013. Village attorney Helfman considered this frivolous because the city deferred to a date

certain, Feb. 11, 2014, meaning the objective of the mandamus was already scheduled to be met.

Rather, Helfman suspected the mandamus was a ruse. He believed Winkleman actually wanted to use the mandamus as an excuse to depose witnesses – specifically Fernandez – to mine for evidence to bolster the applicant’s case in the site plan hearing. Helfman considered asking a judge to order that nothing Winkleman learned in his depositions could be used in the zoning hearing. But Winkleman agreed by e-mail that he wouldn’t use anything from the deposition in the zoning hearing, and Helfman accepted that.

A time line of events is useful.

- Nov. 21 – Kurlancheek and Fernandez discuss a draft of the traffic study on the phone. She shares conclusion of no traffic impact; he objects to the conclusion and requests that she redraft the study to take out reference to cross-access. He does not actually receive a copy of this draft.
- Nov. 26 – Kurlancheek asks Fernandez to send copies of the (revised) traffic study to him and city staffers, including Helfman.
- Nov. 27 – Darlene Fernandez sends a traffic study to Kurlancheek and city staffers as directed in preparation for Dec. 3 meeting. This is the first version of the study Kurlancheek actually reads, though it is the fourth draft Fernandez has written. Fernandez stated to the investigator that Kurlancheek earlier had specifically requested that she NOT physically send drafts, until he finally requests this first ‘final’ version, for which he requests changes.
- A public record request is filed Dec. 6 by Wernick (a colleague of Kasdin at Akerman, representing the developer Morgan Property Group). This is for any and all documents related to the Atkins traffic study, including drafts and correspondence.
- Same day: Kurlancheek gets PRR at 11:25 a.m. He sends a message to Fernandez at 11:28 a.m. forwarding the PRR, and asking her to send the results to Village Clerk Alvarez. Fernandez forwards it to Atkins’ attorneys. The company never responds to this PRR. Village Clerk Alvarez says she didn’t know to expect anything from Atkins. “I was not aware that Darlene Fernandez had received information [relevant to this PRR].” Also, Kurlancheek did not follow up with Fernandez to make sure the material was gathered and sent to Alvarez.
- Public records request is filed Dec. 13 by Claudia Ridge (office manager for Commodore Realty, Puyanich’s company and Winkleman’s client) for all correspondence between council members, mayor, BZ director, clerk and attorney for Dec. 2 and Dec. 3.
- Village Clerk Alvarez erroneously sends the material gathered for Wernick’s Dec. 6 request to Commodore Realty. She corrects the mistake a few days later after Wernick contacts her to ask where his files are.
- On Jan. 2, Ridge reviews the CD she was given but doesn’t find the traffic study on it. She asks Village Clerk Alvarez to research this and send it.
- Winkleman’s subpoena reaches Atkins on Jan. 9, 2014.
- Another PRR filed Jan. 28 from Puyanich (for property owner; Winkleman’s clients). This is for information related to traffic at the site, and anything related to the hiring of the second traffic study purveyor, Moss.

Winkleman deposes Darlene Fernandez from Atkins on Feb. 5, 2014. This is when he learns that there were at least four drafts of the traffic study prior to the final one Fernandez gave to the village. The earlier drafts include Fernandez's conclusion that the Walgreen's would not worsen traffic around the site – the conclusion that Winkleman considers most favorable for his client, and which he believes should compel the village to finally approve the site plan as is. All but one of those drafts, however, never physically left Atkins' shop prior to receipt of the subpoena.

Winkleman decides – evidently, it appears, without doing any actual research or investigation of the matter – that this discovery is proof that the village was engaging in fraud to hide Fernandez's first conclusion – that the Walgreen's would not exacerbate traffic problems – from him, his client (the property owner) and the developer. Using this self-ratified notion of "fraud," Winkleman gives himself justification for voiding his informal agreement with Helfman, and, does, indeed endeavor to use what he has learned from the deposition to leverage the zoning hearing, precisely what he agreed with Helfman he wouldn't do.

That is what triggered the huge five-hour brouhaha at the Feb. 11 hearing, with all the attorneys hurling accusations at each other. Winkleman wanted the council members to see Fernandez's early draft, the one that Kurlancheek requested she change. Helfman didn't want that version in the official record. Winkleman sent his conclusions about the earlier draft directly to the council members on Feb. 10 via Alvarez (the village clerk), but about four minutes later, Helfman jumps in and asked Alvarez to "recall" the message. It is not known if any council members saw that version before it was deleted by the sender, although it is unlikely more than a handful, if any, did, since there was such a tiny window of opportunity to open it.

At the hearing Feb. 11, the Village Council finally decided to approve the development, but with the critical cross-access closed to cars (but open for pedestrians and golf carts). The first Fernandez conclusion, that keeping the cross-access open would result in no worsening of traffic, never officially reached the council. The question remaining: Will Walgreen's walk away from the deal without that cross-access available? And would that be what the city was hoping for all along?

Review and Analysis:

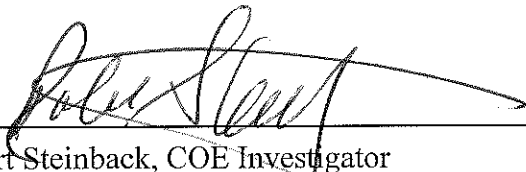
The conclusions reached by this investigator are as follows:

- The Village made a reasonable attempt to respond to the several PRRs submitted to it. The Village promptly turned over all of the relevant material in its possession (adjusting for delays caused by the holidays and vacations). The problem arises with respect to documents that were properly considered public records (Helfman acknowledges) but which were in the possession of the outside contractor, Atkins North America. Key Biscayne's PRR process did not adequately provide for follow-up to ascertain that all parties were responding to the requests. Specifically, Planning Director Kurlancheek promptly forwarded Wernick's PRR to Atkins, but apparently did not alert Village Clerk Alvarez to expect documents from Atkins. As a result, Alvarez was not aware that she should have received documents from Atkins. In turn, no one pressed Atkins to comply with the PRR after Atkins delayed responding.
- Atkins (via Fernandez and Pierce, the Atkins counsel) admits to not responding to the PRR. Two explanations are offered: First, there was initial hesitation caused by the Village Council's extreme displeasure with the conclusions in Fernandez' report. That displeasure sparked discussion of either not paying for the study or demanding a discount of the price. [The council's displeasure with the results appears unjustified in that, by all appearances, the contractor performed as required under the contract.] Atkins' initial response was reticence to answer the PRR while also facing the possibility of not being paid in full. The payment, however, was delivered within a few weeks, including a \$3,000 discount agreed to by Atkins. The second explanation is that Atkins officials believed (erroneously) that the PRR had come from the same party that had requested documents under the subpoena in the mandamus action, and believed that in responding to the subpoena, it had also satisfied the PRR.
- Winkleman's determination that the Village engaged in fraud was reached precipitously and without predicate. There is no evidence supporting such a conclusion. Winkleman's inference that Village officials conspired to suppress evidence of the Atkins draft – which is already a stretch given the lack of real evidence to support it – requires the complicity of private contractor Atkins, which had absolutely no incentive, rationale or proprietary interest to go along with such a scheme. Winkleman's assumption regarding the Village's secret desire to condemn the Puyanik property effectively excludes Atkins as a participant, as Atkins would have no stake whatsoever in this perceived intrigue.
- Nevertheless, it does appear the Village administration went to unusual lengths to avoid allowing into the official record the conclusions of both the Atkins and Traftech studies that the establishing of a Walgreen's in the subject location would not exacerbate traffic problems there. It appears further that a majority of the Village Council had a perceptible desire not to approve the zoning application as presented and reacted severely to a traffic report that did not support its preferred conclusion. This provides context for Winkleman's actions, if not a justification. However, the appropriateness of the Village's posture on the proposed development lay outside the scope of this investigation.

Conclusion:

The COE's issues in this matter are: 1: whether or not there was any proof of a violation of the Citizens' Bill of Rights; and 2. whether there is any indications of a Public Record law violation that should be referred to the State Attorney's Office.

Based upon the evidence adduced by the extensive interviews, this matter should be closed with no further action. It is abundantly clear that, rightly or wrongly, the Village did forward the public record request to Atkins. Atkins apparently believed they responded to the public record request when they responded to a subpoena and a deposition. Eventually, the requestor obtained the information they were seeking. There does not appear to be any hard evidence that the Village deliberately tried to withhold information.

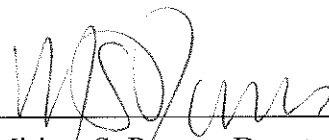


Robert Steinback, COE Investigator

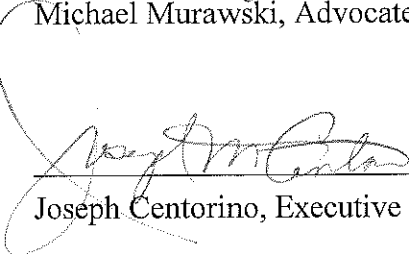
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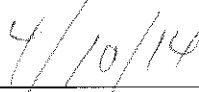
Michael Murawski, Advocate



Miriam S. Ramos, Deputy General Counsel



Joseph Centorino, Executive Director



Date

**CASE
CLOSED**

Date: 4/10/14