



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
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VINCENT P. MALTESE, Chairman
COMMISSIONER SUSAN BASS LEVIN
COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

June 27, 2007 Government Records Council Meeting

Edmund Haemmerle, III
Complainant

Complaint No. 2006-106

v.

Washington Township (Mercer)
Custodian of Record

At the June 27, 2007 public meeting, the Government Records Council ("Council") considered the June 20, 2007 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 Executive Director respectfully recommends the Council find that:

1. Based on the Custodian's May 4, 2007 certification, the Custodian has complied with the Council's April 25, 2007 Interim Order in providing the Complainant with the requested e-mail sent January 27, 2006 from Mary Caffery to Mayor David Fried within five (5) business days of receiving the Council's Order.
2. Based on the information supplied by both parties which was on record at the time of the GRC's April 25, 2007 meeting, the GRC reasonably concluded that the Custodian had unlawfully denied access to page one (1) of the requested e-mail sent January 27, 2006 from Mary Caffery to Mayor David Fried because nothing in the record suggested otherwise. However, in the Custodian's certification dated May 4, 2007, the Custodian certified that she provided page one (1) of the requested e-mail to the Complainant on May 23, 2006. Therefore, based on the Custodian's certification under penalty of perjury, the Council should amend its April 25, 2007 Interim Order to state that because the Custodian certifies that she released page one (1) of the requested e-mail to the Complainant on May 23, 2006, the Custodian has not unlawfully denied access to the requested record.

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 27th Day of June 2007

Vincent Maltese, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: July 5, 2007



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GOVERNMENT RECORDS COUNCIL

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ACTING COMMISSIONER LUCILLE DAVY
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DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

April 25, 2007 Government Records Council Meeting

Edmund J. Haemmerle, III
Complainant

Complaint No. 2006-106

v.

Township of Washington (Mercer)
Custodian of Record

At the April 25, 2007 public meeting, the Government Records Council ("Council") considered the April 18, 2007 *In Camera* 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:

1. The Custodian has complied with the Council's February 28, 2007 Interim Order in supplying the Council with the requested e-mail from Mary Caffery to Mayor Fried dated Friday, January 27, 2006 within five (5) business days of receiving the Council's *in camera* request.
2. The Custodian unlawfully denied access to page one (1) of the requested e-mail as it contains the sender, receiver and date information which does not fall within OPRA's advisory, consultative or deliberative exemption. Thus, the Custodian should release said page to the Complainant.
3. The Custodian was proper in withholding pages two (2) and three (3) of the requested e-mail which contains Mayor David Fried's draft letter beginning with "Dear Residents," which the Custodian certifies was never finalized nor sent out to the residents of the Township, because the requested e-mail is considered pre-decisional and deliberative and is therefore not considered a government record subject to public access as it constitutes advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. Thus, pages two (2) and three (3) of the requested e-mail should not be released to the Complainant.
4. **The Custodian shall comply with # 2 of these Conclusions and Recommendations within five (5) business days from receipt of this decision on the basis of the Council's above determination and shall provide certified confirmation of compliance pursuant to *N.J. Court Rules, 1969 R. 1:4-4 (2005)* to the Executive Director.**



Interim Order Rendered by the
Government Records Council
On The 25th Day of April, 2007

Vincent P. Maltese, Chairman
Government Records Council

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

Robin Berg Tabakin, Secretary
Government Records Council

Decision Distribution Date: April 27, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
April 25, 2007 Council Meeting**

**Edmund J. Haemmerle, III¹
Complainant**

GRC Complaint No. 2006-106

v.

**Township of Washington (Mercer)²
Custodian of Records**

Records Relevant to Complaint:

1. E-mail entitled “FW: Washington Twp. Fire Department Did You Know?” sent January 28, 2006 from Mary Caffery to JoDGirl@ XXXX and Mayor David Fried
2. E-mail sent January 27, 2006 from Mary Caffery to Mayor David Fried³

Request Made: May 15, 2006

Response Made: May 23, 2006, January 31, 2007 and February 6, 2007

Custodian: Michelle Auletta

GRC Complaint Filed: May 27, 2006

Background

February 28, 2007

Interim Order of the Government Records Council. At the February 28, 2007 public meeting, the Government Records Council (“Council”) considered the February 21, 2007 Executive Director’s Findings and Recommendations and all related documents submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. Therefore, the Council found that:

1. Because the requested e-mail entitled, “FW: Washington Township Fire Department...Did You Know?” was made or received in the Mayor’s conduct of official government business, the e-mail is considered a government record pursuant to N.J.S.A. 47:1A-1.1 and Donal Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006).
2. The Custodian failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 because neither the First Amendment nor the N.J. Constitution, Article I, Paragraph 6 contain exemptions from disclosure to government records. As such, the Custodian initially unlawfully denied access to the requested e-mail. However, on January 31, 2007, the Business Administrator released page one of the requested e-mail to the Complainant,

¹ Represented by John Pilles, Esq. However, the Complainant requests that his attorney not be contacted regarding this matter.

² Represented by Mark Roselli, Esq. (Hamilton Square, NJ).

³ An additional record was requested. However, said record is not the subject of this complaint.

including her typed comments.⁴ Further, the Custodian released the requested e-mail in its entirety to the Complainant on February 6, 2007.

3. The Council should conduct an *in camera* review of the requested e-mail sent January 27, 2006 from Mary Caffery to Mayor David Fried in order to verify if the Custodian's claimed ACD exemption is valid pursuant to Paff v. Department of Labor, 379 N.J. Super. 346, 354-355 (App. Div. 2005).

March 2, 2007

Interim Order distributed to both parties.

March 14, 2007

In camera letter requesting documents sent to both parties.

March 15, 2007

Certification of the Custodian with the following attachments:

- Six (6) copies of Document Index regarding e-mail sent January 27, 2006 from Mary Caffery to Mayor David Fried, and
- Six (6) copies of e-mail sent January 27, 2006 from Mary Caffery to Mayor David Fried.

The Custodian certifies that the e-mail sent January 27, 2006 from Mary Caffery to Mayor David Fried is three (3) pages. The Custodian certifies that page one (1) of said e-mail contains only the sender, receiver and date information. The Custodian certifies that pages two (2) and three (3) of the requested e-mail contain a draft letter from Mayor David Fried to the residents of the Township. Additionally, the Custodian certifies that pages two (2) and three (3) were withheld in their entirety as advisory, consultative and deliberative ("ACD") material pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9.a. and N.J.S.A. 47:1A-9.b. because the Mayor's draft letter was never finalized nor sent out to the residents of the Township.

Analysis

After completing the *in camera* inspection of the e-mail sent January 27, 2006 from Mary Caffery to Mayor David Fried, the Council should find that because page one (1) contains the sender, receiver and date information, said page should be released to the Complainant. Additionally, because pages two (2) and three (3) of the requested e-mail contain Mayor David Fried's draft letter beginning with "Dear Residents," which the Custodian certifies was never finalized nor sent out to the residents of the Township, the Council should find that the Mayor's draft letter (pages two (2) and three (3) of the requested e-mail) is considered pre-decisional and deliberative and is therefore not considered a government record subject to public access as it constitutes advisory, consultative or deliberative ("ACD") material pursuant to N.J.S.A. 47:1A-1.1. Thus, pages two (2) and three (3) of the requested e-mail should not be released to the Complainant.

⁴ This e-mail may have been exempt from disclosure as inter-agency, intra-agency advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-1.1. However, the Custodian released it before the GRC rendered its decision on the issue.
Edmund J. Haemmerle, III v. Township of Washington (Mercer), 2006-106 – *In Camera* Findings and Recommendations of the Executive Director

OPRA excludes from the definition of a government record “inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-1.1.

It is evident that this phrase is intended to exclude, from the definition of a government record, the types of documents that are the subject of the “deliberative process privilege.” That privilege has long been recognized by federal courts. *See Kaiser Alum. & Chem. Corp. v. United States*, 157 F. Supp. 939 (1958); *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 150 (1975). It has also been codified in the federal Freedom of Information Act (“FOIA”). 5 U.S.C. §552(b)(5). Most recently, the New Jersey Supreme Court adopted the privilege. *In re Liquidation of Integrity Insurance Co.*, 165 N.J. 75 (2000).

The judiciary set forth the legal standard for applying the deliberative process privilege as follows:

- (1) The initial burden falls on the government agency to establish that matters are both *pre-decisional* and *deliberative*.
 - a. Pre-decisional means that the records were generated before an agency adopted or reached its decision or policy.
 - b. Deliberative means that the record contains opinions, recommendations, or advice about agency policies or decisions.
 - c. Deliberative materials do not include purely factual materials.
 - d. Where factual information is contained in a record that is deliberative, such information must be produced so long as the factual material can be separated from its deliberative context.
 - e. The exemption covers recommendations, draft documents, proposals, suggestions, and other subjective documents *which reflect the personal opinions of the writer rather than the policy of the agency*.
 - f. Documents which are protected by the privilege are those which *would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is only a personal position*.
 - g. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves *whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency*.

Thus, the Custodian unlawfully denied access to page one (1) of the requested e-mail as it contains the sender, receiver and date information which does not fall within OPRA’s ACD exemption. However, the Custodian was proper in withholding pages two (2) and three (3) of the requested e-mail as the Mayor’s draft letter contained therein constitutes advisory, consultative or deliberative material, which is not considered a government record pursuant to N.J.S.A. 47:1A-1.1.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council find that:

1. The Custodian has complied with the Council's February 28, 2007 Interim Order in supplying the Council with the requested e-mail from Mary Caffery to Mayor Fried dated Friday, January 27, 2006 within five (5) business days of receiving the Council's *in camera* request.
2. The Custodian unlawfully denied access to page one (1) of the requested e-mail as it contains the sender, receiver and date information which does not fall within OPRA's advisory, consultative or deliberative exemption. Thus, the Custodian should release said page to the Complainant.
3. The Custodian was proper in withholding pages two (2) and three (3) of the requested e-mail which contains Mayor David Fried's draft letter beginning with "Dear Residents," which the Custodian certifies was never finalized nor sent out to the residents of the Township, because the requested e-mail is considered pre-decisional and deliberative and is therefore not considered a government record subject to public access as it constitutes advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. Thus, pages two (2) and three (3) of the requested e-mail should not be released to the Complainant.
4. **The Custodian shall comply with # 2 of these Conclusions and Recommendations within five (5) business days from receipt of this decision on the basis of the Council's above determination and shall provide certified confirmation of compliance pursuant to *N.J. Court Rules, 1969 R. 1:4-4 (2005)* to the Executive Director.**

Prepared By:

Dara Lownie
Senior Case Manager

Approved By:

Catherine Starghill
Executive Director

April 18, 2007



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INTERIM ORDER

February 28, 2007 Government Records Council Meeting

Edmund Haemmerle, III
Complainant

Complaint No. 2006-106

v.

Township of Washington (Mercer)
Custodian of Record

At the February 28, 2007 public meeting, the Government Records Council (“Council”) considered the February 21, 2007 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:

1. Because the requested e-mail entitled, “FW: Washington Township Fire Department...Did You Know?” was made or received in the Mayor’s conduct of official government business, the e-mail is considered a government record pursuant to N.J.S.A. 47:1A-1.1 and Donal Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006).
2. The Custodian failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 because neither the First Amendment nor the N.J. Constitution, Article I, Paragraph 6 contain exemptions from disclosure to government records. As such, the Custodian initially unlawfully denied access to the requested e-mail. However, on January 31, 2007, the Business Administrator released page one of the requested e-mail to the Complainant, including her typed comments.¹ Further, the Custodian released the requested e-mail in its entirety to the Complainant on February 6, 2007.
3. The Council should conduct an *in camera* review of the requested e-mail sent January 27, 2006 from Mary Caffery to Mayor David Fried in order to verify if the Custodian’s claimed ACD exemption is valid pursuant to Paff v. Department of Labor, 379 N.J. Super. 346, 354-355 (App. Div. 2005).

¹ This e-mail may have been exempt from disclosure as inter-agency, intra-agency advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-1.1. However, the Custodian released it before the GRC rendered its decision on the issue.



Interim Order Rendered by the
Government Records Council
On The 28th Day of February 2007

Chairman
Government Records Council

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

Robin Berg Tabakin, Vice Chairman & Secretary
Government Records Council

Decision Distribution Date: March 2, 2007

**Findings and Recommendations of the Executive Director
February 28, 2007 Council Meeting**

Edmund Haemmerle, III²

GRC Complaint No. 2006-106

Complainant

v.

Township of Washington (Mercer)³

Custodian of Records

Records Relevant to Complaint:

1. E-mail entitled "FW: Washington Twp. Fire Department Did You Know?" sent January 28, 2006 from Mary Caffery to JoDGirl@ XXXX and Mayor David Fried
2. E-mail sent January 27, 2006 from Mary Caffery to Mayor David Fried⁴

Request Made: May 15, 2006

Response Made: May 23, 2006, January 31, 2007 and February 6, 2007

Custodian: Michelle Auletta

GRC Complaint Filed: May 27, 2006

Background

May 15, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant seeks the records relevant to the complaint listed above.

May 23, 2006

Custodian's response to the OPRA request. The Custodian responds to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. The Custodian's responses to the Complainant's requests are outlined in the table below:

Complainant's Request	Custodian's Response
E-mail entitled "FW: Washington Twp. Fire Department Did You Know?" sent	This document is being withheld pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as it is not

² Represented by John Pilles, Esq. However, the Complainant requests that his attorney not be contacted regarding this matter.

³ Represented by Mark Roselli, Esq. (Hamilton Square, NJ).

⁴ An additional record was requested. However, said record is not the subject of this complaint.

January 28, 2006 from Mary Caffery to Jodgirl@ XXXX and Mayor David Fried	considered a public record, as well as under the First Amendment of the US Constitution, Article 1 ¶ 6, 18. The Township Attorney has advised that this e-mail was originated by a private party at a private home e-mail and is protected under the freedom of speech amendment and is not a public record.
E-mail sent January 27, 2006 from Mary Caffery to Mayor David Fried	This document is being withheld pursuant to <u>N.J.S.A. 47:1A-1.1</u> , <u>N.J.S.A. 47:1A-9.a.</u> , and <u>N.J.S.A. 47:1A-9.b.</u> as deliberative process privilege material, which is not disclosable under OPRA's advisory, consultative, or deliberative ("ACD") exemption.

May 27, 2006

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- List of Mayor Fried's postings on NJ.com dated from Sept 6, 2005 to April 8, 2006
- Original e-mail entitled "Washington Twp Fire Department...Did you know?"
- Blank e-mail from Mary Caffery to dfried@XXXX dated January 27, 2006
- Redacted e-mail from Mary Caffery to JoDGirl@XXXX, dfried@XXXX, and gnlewen@XXXX dated January 28, 2006 entitled, "FW: Washington Twp Fire Department...Did you know?"
- OPRA request submitted by Jason Belmont on behalf of the International Association of Fire Fighters ("IAFF") dated February 16, 2006
- Letter from Custodian to Jason Belmont dated March 1, 2006
- Complainant's OPRA request dated May 15, 2006
- Article from the *Trenton Times* entitled "Web of Intrigue Spun in Washington Twp" dated May 16, 2006
- Letter from Custodian to Complainant dated May 23, 2006
- List of Executive Orders with exemptions to disclosure

The Complainant states that the first document in question is an e-mail that his local chapter of the International Association of Fire Fighters ("IAFF") initially created as an internet letter promoting the department as well as a request for voters to approve the department's budget on Election Day. The Complainant claims that following a separate OPRA request submitted by another individual in February 2006, the Custodian released a redacted copy of said e-mail to the requestor. The Complainant states that the Custodian's response to his request, submitted on May 15, 2006, is that the requested e-mail is protected under the First Amendment and not a public record. The Complainant contends the Custodian's assertion is invalid as the Custodian released the same e-mail in a separate request to another requestor.

Regarding the e-mail dated January 27, 2006 from Mary Caffery to Mayor David Fried, the Complainant claims that said e-mail was released to another requestor in a separate request made in February 2006. The Complainant contends that this e-mail should be evaluated as the Custodian is now claiming it is exempt under the deliberative process privilege.

June 6, 2006

Offer of Mediation sent to both parties.

June 6, 2006

The Complainant declines mediation and requests that the GRC begin a full investigation of this complaint. The Custodian also did not agree to mediate this complaint.

June 6, 2006

Request for Statement of Information sent to the Custodian.

June 8, 2006

Letter from Beth Dupnak, the Deputy Municipal Clerk, advising all parties that Michele Auletta, the Municipal Clerk, handled the original request and is out on sick leave for six (6) weeks. The Deputy Clerk also states that she will be acting in the capacity of the Municipal Clerk and Custodian.

June 9, 2006

Custodian's Statement of Information ("SOI") with the following attachments:

- Letter from Mary Caffery to Director of Division of Pensions and Benefits dated February 10, 2006
- E-mail from Mary Caffery to Mayor Fried dated February 19, 2006
- Letter from Custodian to Complainant dated May 23, 2006
- Letter from the Deputy Municipal Clerk dated June 8, 2006 advising all parties that she is the Acting Clerk in the absence of the Municipal Clerk

The Custodian certifies that she received the Complainant's OPRA request on May 16, 2006 and provided a written response on May 23, 2006. She certifies that the requested e-mail entitled, "FW: Washington Township Fire Department...Did You Know?" was not released to the Complainant pursuant to N.J.S.A. 47:1A-1.1 because it is not a public record and is not responsive to the request. The Custodian certifies that this e-mail is not considered a public record under N.J.S.A. 47:1A-1.1 because it is an e-mail between private citizens. The Custodian also certifies that while public officials are included as recipients to this e-mail, the e-mail was sent and received on private, personal computers. As such, the Custodian asserts that the e-mail cannot be considered a government record subject to public access.

The Custodian additionally certifies that she did not release the requested e-mail pursuant to the First Amendment to the U.S. Constitution, as well as Article 1, paragraph

6 of the N.J. Constitution. The Custodian asserts that if the GRC concludes that the requested e-mail is a government record, it should still be considered exempt from disclosure under free speech principles. The Custodian contends that OPRA should not apply to e-mails whose recipients include public officials as well as private residents, and whose e-mail addresses are exclusively private. The Custodian cites O'Keefe v. Passaic Valley Water Comm., 132 N.J. 234, 24-42 (1993). Additionally, the Custodian asserts that the First Amendment protects a public official's right, in certain circumstances, to speak as a citizen addressing matters of public interest and cites Garcetti v. Ceballos, 126 S.Ct. 1951 (2006). The Custodian contends that a similar free speech protection is contained in Article I, Paragraph 6 and cites New Jersey Coalition Against War in the Middle East v. J.M.B. Reality Corp., 138 N.J. 326 (1994).

Regarding the Complainant's request for an e-mail dated January 27, 2006 from Mary Caffery to Mayor Fried, the Custodian certifies that she did not release said e-mail because it is not a public record pursuant to N.J.S.A. 47:1A-1.1. She also certifies that she withheld the document because it is deliberative process privilege material pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9.a. and N.J.S.A. 47:1A-9.b. The Custodian states that the deliberative process privilege was formally recognized in In re Liquidation of Integrity Ins. Co., 165 N.J. 75 (2000). The Custodian states that the Court defines the privilege as a doctrine that permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated. The Custodian certifies that the requested e-mail, dated January 27, 2006 from Mary Caffery to Mayor Fried, is both pre-decisional and contains opinions, recommendations and advice about agency policies. The Custodian certifies that the document is a draft letter from the Mayor of Washington Township to Washington Township residents regarding potential positions that the Mayor could take regarding the Fire District and the Municipal Building. The Custodian contends that the entire document should be considered deliberative in nature as any factual information contained therein is intertwined with the advice and opinions, and that releasing the factual information alone would be impractical.

Further, the Custodian asserts that the Complainant cannot overcome the presumption against disclosure as his need for the material is neither compelling nor substantial and does not override the government's interest in non-disclosure. The Custodian asserts that the Mayor's interest in maintaining the confidentiality of the document is characterized by the Supreme Court as the free and candid exchange of ideas and opinions between and within government agencies as stated in Loigman v. Kimmelman, 102 N.J. 98, 106 (1986).

January 30, 2007

E-mail from Custodian's Counsel to GRC. Counsel requests that the GRC stay its preliminary decision pending confirmation from the Complainant that he is withdrawing his complaint.

January 30, 2007

E-mail from Complainant to GRC. The Complainant states that he is not withdrawing his complaint.

January 31, 2007

Letter from Mary Caffery, Business Administrator to Custodian. The Business Administrator states that she has attached one of the requested e-mails subject of this complaint (“FW: Washington Township Fire Department...Did You Know?”). The Business Administrator asserts that she initially withheld the requested e-mail because she did not want to set a precedent that her private e-mail account would be open to OPRA regarding activity that is not an official action in her capacity as Business Administrator for the Township.

February 1, 2007

Letter from GRC to Custodian. The GRC states that recent news reports have revealed facts about the denial of access complaint subject of this complaint that neither party previously disclosed to the GRC. Specifically, that there are notes from Mary Caffery, Business Administrator, on one of the requested e-mails at issue. The GRC states that GRC precedent establishes that an elected official’s personal e-mails are disclosable under OPRA when they fit the statutory definition of a government record (i.e. a record made, maintained, kept on file, or received in the course of official government business) pursuant to Donal Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006). Additionally, GRC states that there is GRC precedent which establishes that handwritten notes are generally exempt from disclosure as advisory, consultative or deliberative (“ACD”) material pursuant to Martin O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006). Moreover, GRC states that it may change its position in this matter based on a complete account of all the relevant facts, and that absent the Complainant withdrawing his complaint, the GRC will move forward in its investigation of this matter.

February 2, 2007

E-mail from Custodian’s Counsel to GRC. Counsel states that it is his understanding that the Business Administrator released one of the requested e-mails to the Complainant. As such, Counsel requests that the Complainant withdraw that portion of this complaint.

February 2, 2007

E-mail from Complainant to GRC. The Complainant asserts that he has only received one page of the three page e-mail, which he requested in his May 15, 2006 OPRA request. The Complainant requests that the GRC ensure that the Township releases all the requested records.

February 2, 2007

E-mail from Custodian’s Counsel to GRC. The Custodian’s Counsel states that he will follow up with the Business Administrator to determine exactly what was released to the Complainant. Additionally, Counsel states that he will follow up with the Complainant’s union representatives, as Counsel claims that he understood that all fire

district related denial of access complaints, regardless of who filed them, would be withdrawn.

February 6, 2007

E-mail from Complainant to Custodian's Counsel. The Complainant asserts that he has only received the first page of a multi-page e-mail. As such, the Complainant states that he cannot determine whether Mary Caffery, Business Administrator, appended comments, rebuttals, etc. in her e-mail to Mayor Fried. The Complainant asserts that he is entitled to receive the entire requested e-mail, as well as any reply e-mails pertaining to the original e-mail requested.

February 6, 2007

E-mail from Custodian to the GRC. The Custodian states that the Complainant's OPRA request dated May 15, 2006, was for a copy of the e-mail entitled "FW: Washington Twp Fire Department...Did you know?" sent from Mary Caffery, Business Administrator to Mayor Fried on January 28, 2006. The Custodian contends that she provided the Complainant with said e-mail in its entirety on January 31, 2007. The Custodian claims that subsequent pages of the requested e-mail which the Complainant claims he has not yet received, is a separate e-mail that was sent to Mary Caffery, Business Administrator. The Custodian states that the Complainant did not submit an OPRA request for said e-mail, only the e-mail Mary Caffery, Business Administrator sent to Mayor Fried. Additionally, the Custodian states that as the Complainant attached this second e-mail to his Denial of Access Complaint, the Custodian did not provide pages two (2) and three (3) of the requested e-mail to the Complainant. However, the Custodian states that she will release both e-mails to the Complainant.

Regarding any reply e-mails to the e-mail requested by the Complainant, the Custodian states that she has not received any requests for such. The Custodian also asserts that she is not aware of any replies to the requested e-mail.

February 6, 2007

Custodian releases the requested e-mail entitled "FW: Washington Twp Fire Department...Did you know?" sent from Mary Caffery, Business Administrator to Mayor Fried on January 28, 2006 in its entirety to the Complainant.

February 8, 2007

Letter from the Secretary of the State Records Committee of the Division of Archives and Records Management ("DARM") to Custodian. The Secretary states that he is revoking authorization # 69-499 to destroy any of the public records listed on the Township's "Request and Authorization for Records Disposal" form dated December 31, 2006. The Secretary states that the reason for this revocation is that it appears that records listed on the form are involved in litigation with the GRC. The Secretary requests that the Custodian verify in writing that she has received this revocation notice and that the Township has not destroyed any of the records listed on the disposal request dated December 31, 2006.

February 8, 2007⁵

Letter from Custodian to the Secretary of the State Records Committee of DARM. The Custodian certifies that she has not destroyed any records pertaining to GRC Complaint No. 2006-106.

Analysis

Whether the Custodian unlawfully denied access to the requested e-mails?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ... The terms *shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA also provides:

“*[t]he provisions of this act...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.*” (Emphasis added.) N.J.S.A. 47:1A-9.a.

⁵ Additional submissions were submitted by the parties. However, these submissions repeat previous statements made by the parties.

Additionally, OPRA states:

“[t]he provisions of this act... shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record. (Emphasis added.) N.J.S.A. 47:1A-9.b.

The First Amendment to the United States Constitution state, in part, that:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” U.S. Const. Amend. I.

The New Jersey State Constitution provides that:

“[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press...” N.J. Const. Art. I § 6.

The Complainant states that he submitted his OPRA request on May 15, 2006. The Custodian certifies that she received the Complainant’s OPRA request on May 16, 2006 and provided a written response on May 23, 2006, the sixth (6th) business day following the date of the request.

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. 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.

Complainant’s Request for an E-mail Entitled “FW: Washington Twp. Fire Department Did You Know?”

The Complainant states that the Custodian denied him access to this e-mail by claiming that it was not a government record and is protected under the First Amendment. The Complainant claims that the Custodian’s reasoning for denying him access is legally inaccurate because the same e-mail was provided to another individual in response to a separate OPRA request made in February 2006.

The Custodian certifies that the requested e-mail entitled, “FW: Washington Township Fire Department...Did You Know?” was not released to the Complainant pursuant to N.J.S.A. 47:1A-1.1 because it is not a public record and is not responsive to

the request. The Custodian certifies that this e-mail is not considered a public record under N.J.S.A. 47:1A-1.1 because it is an e-mail between private citizens. The Custodian certifies that while public officials are included as recipients to this e-mail, the e-mail was sent and received on private, personal computers. As such, the Custodian asserts that the e-mail cannot be considered a government record subject to public access. The Custodian additionally certifies that she did not release the requested e-mail pursuant to the First Amendment to the U.S. Constitution as well as Article I, Paragraph 6 of the N.J. Constitution. The Custodian asserts that if the GRC concludes that the requested e-mail is a government record, it should still be considered exempt from disclosure under free speech principles.

However, on January 31, 2007, the Business Administrator released the requested e-mail to the Complainant, including her typed notes. The Business Administrator asserts that she withheld the requested e-mail because she did not want to set a precedent that her private e-mail account would be open to OPRA regarding activity that is not an official action in her capacity as Business Administrator for the Township. The Custodian's Counsel requests that as the Complainant was provided with a copy of the requested e-mail, he withdrew that portion of his complaint. However, the Complainant asserts that he only received page one of a three page e-mail. The Complainant requests that the GRC ensure that the Township releases all the requested records.

Further, on February 6, 2007, the Custodian released the requested e-mail entitled, "FW: Washington Township Fire Department...Did You Know?" to the Complainant in its entirety.

The requested e-mail in question is a government record as defined by N.J.S.A. 47:1A-1.1, because it is made, maintained, kept on file, or received during the course of the Mayor's official business. The Custodian alleged that due to the location of the record, in the personal e-mail accounts of the Mayor and Mary Caffery, it is not considered a government record. In Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006), the GRC held that:

"...the definition of a government record is not restricted by the location of the record. The definition states in part that, it is, 'made, maintained or kept on file...' N.J.S.A. 47:1A-1.1. In this case, the Mayor has utilized his home computer/personal e-mail to communicate with various individuals regarding Borough business...The Council has previously decided that, '...Requiring material to be made, maintained, kept or received "in the course of official business" by an officer or official *does not mean that a record must be generated or received during regular office hours or official meetings. Nor does a document become a government record only if the sender intends it to be...*'(Emphasis added.) Seerey v. Upper Pittsgrove Township (GRC Case No. 2003-38)."

Therefore, to the extent that the record falls within the definition of "government records" under OPRA and are maintained in the Mayor's personal e-mail account, this

record should have been released in accordance with OPRA. The location of the records does not limit the Custodian from obtaining government records and providing access to those records pursuant to OPRA.

In addition to the Custodian's assertion that the requested e-mail is not a government record pursuant to OPRA, the Custodian contends that the e-mail is exempt from disclosure under free speech principles provided under the First Amendment to the U.S. Constitution as well as Article I, Paragraph 6 of the N.J. Constitution.

N.J.S.A. 47:1A-9.a. provides that OPRA shall not abrogate any exemption of a public record from public access made pursuant to any other statute. The Custodian's assertion that the First Amendment to the U.S. Constitution, as well as Article I, Paragraph 6 of the N.J. Constitution, exempts the requested e-mail from disclosure is legally inaccurate. Neither the First Amendment nor the N.J. Constitution, Article I, Paragraph 6 contain exemptions from disclosure of government records and thus N.J.S.A. 47:1A-9.a. doesn't work to allow the First Amendment or the N.J. Constitution to supersede the access allowed under OPRA.

However, on January 31, 2007, the Business Administrator released page one (1) of the requested e-mail to the Complainant, including her typed comments. Additionally, the Custodian released the entire requested e-mail to the Complainant on February 6, 2007. As the requested e-mail at issue in this complaint included typewritten comments, it is possible that said comments would have been exempt from disclosure as inter-agency, intra-agency advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-1.1. However, the e-mail was prematurely disclosed to the Complainant before the GRC rendered its decision in this matter.

Therefore, because the requested e-mail entitled, "FW: Washington Township Fire Department...Did You Know?" was made, maintained, kept on file, or received in the Mayor's conduct of official government business, the e-mail is considered a government record pursuant to N.J.S.A. 47:1A-1.1. Additionally, the Custodian failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 because neither the First Amendment nor the N.J. Constitution contain exemptions from disclosure of government records. As such, the Custodian initially unlawfully denied access to the requested e-mail. However, on January 31, 2007, the Business Administrator released page one of the requested e-mail to the Complainant, including her typed comments.⁶ Further, the Custodian released the requested e-mail in its entirety to the Complainant on February 6, 2007.

Complainant's Request for an E-mail Sent January 27, 2006 from Mary Caffery to Mayor David Fried

The Complainant states that the Custodian denied him access by asserting that the requested e-mail is exempt from disclosure as it constitutes deliberative process material.

⁶ This e-mail may have been exempt from disclosure as inter-agency, intra-agency advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-1.1. However, the Custodian released it before the GRC rendered its decision on the issue.

However, the Complainant claims that this assertion is false as the same e-mail was released to another individual in response to a separate OPRA request made in February 2006.

The Custodian certifies that she did not release said e-mail to the Complainant as it is not a public record pursuant to N.J.S.A. 47:1A-1.1. The Custodian also certifies that she withheld the document as it is deliberative process privilege material pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9.a. and N.J.S.A. 47:1A-9.b. The Custodian certifies that the requested e-mail, dated January 27, 2006 from Mary Caffery to Mayor Fried, is both pre-decisional and deliberative as it contains opinions, recommendations and advice about agency policies. She certifies that the document is a draft letter from the Mayor of Washington Township to Washington Township residents regarding potential positions that the Mayor could take regarding the Fire District and the Municipal Building. The Custodian asserts that the entire document should be considered deliberative in nature as any factual information contained therein is intertwined with the advice and opinions. Further, the Custodian asserts that releasing the factual information alone would be impractical.

OPRA excludes from the definition of a government record “inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-1.1.

It is evident that this phrase is intended to exclude, from the definition of a government record, the types of documents that are the subject of the “deliberative process privilege.” That privilege has long been recognized by federal courts. *See Kaiser Alum. & Chem. Corp. v. United States*, 157 F. Supp. 939 (1958); *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 150 (1975). It has also been codified in the federal Freedom of Information Act (“FOIA”). 5 U.S.C. §552(b)(5). Most recently, the New Jersey Supreme Court adopted the privilege. *In re Liquidation of Integrity Insurance Co.*, 165 N.J. 75 (2000).

The judiciary set forth the legal standard for applying the deliberative process privilege as follows:

- The initial burden falls on the government agency to establish that matters are both *pre-decisional* and *deliberative*.
 - a. Pre-decisional means that the records were generated before an agency adopted or reached its decision or policy.
 - b. Deliberative means that the record contains opinions, recommendations, or advice about agency policies or decisions.
 - c. Deliberative materials do not include purely factual materials.
 - d. Where factual information is contained in a record that is deliberative, such information must be produced so long as the factual material can be separated from its deliberative context.

- e. The exemption covers recommendations, draft documents, proposals, suggestions, and other subjective documents *which reflect the personal opinions of the writer rather than the policy of the agency.*
- f. Documents which are protected by the privilege are those which *would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is only a personal position.*
- g. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves *whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency.*

In O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006), the Council stated that “neither the statute nor the courts have defined the terms ‘intra-agency’ or ‘advisory, consultative, or deliberative’ in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. Strictly factual segments of an otherwise deliberative document are not exempted from disclosure. In re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, supra at 73 (App. Div. 2004).”

Additionally, in Dina Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), the Council held that “...the Custodian has not unlawfully denied access to the requested meeting minutes as the Custodian certifies that at the time of the request said minutes had not been approved by the governing body and as such, they constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.”

Thus, the Council should conduct an *in camera* review of the requested e-mail sent January 27, 2006 from Mary Caffery to Mayor David Fried in order to verify if the Custodian’s claimed ACD exemption is valid pursuant to Paff v. Department of Labor, 379 N.J. Super. 346, 354-355 (App. Div. 2005).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

4. Because the requested e-mail entitled, "FW: Washington Township Fire Department...Did You Know?" was made or received in the Mayor's conduct of official government business, the e-mail is considered a government record pursuant to N.J.S.A. 47:1A-1.1 and Donal Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006).
5. The Custodian failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 because neither the First Amendment nor the N.J. Constitution, Article I, Paragraph 6 contain exemptions from disclosure to government records. As such, the Custodian initially unlawfully denied access to the requested e-mail. However, on January 31, 2007, the Business Administrator released page one of the requested e-mail to the Complainant, including her typed comments.⁷ Further, the Custodian released the requested e-mail in its entirety to the Complainant on February 6, 2007.
6. The Council should conduct an *in camera* review of the requested e-mail sent January 27, 2006 from Mary Caffery to Mayor David Fried in order to verify if the Custodian's claimed ACD exemption is valid pursuant to Paff v. Department of Labor, 379 N.J. Super. 346, 354-355 (App. Div. 2005).

Prepared By:

Dara Lownie
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Approved By:

Catherine Starghill, Esq.
Executive Director

February 21, 2007

⁷ This e-mail may have been exempt from disclosure as inter-agency, intra-agency advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-1.1. However, the Custodian released it before the GRC rendered its decision on the issue.