



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

September 30, 2009 Government Records Council Meeting

Chris Rogers
Complainant

Complaint No. 2008-267 and 2008-268

v.

Roxbury Board of Education (Morris)
Custodian of Record

At the September 30, 2009 public meeting, the Government Records Council (“Council”) considered the September 23, 2009 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 because the memorandum of agreement and the inter-local agreement are pre-decisional draft documents, they are exempt from disclosure as advisory, consultative and deliberative material pursuant to N.J.S.A. 47:1A-1.1; *see also* Kohn v. Township of Livingston, GRC Complaint No. 2007-319 (July 2008); Haemmerle v. Township of Washington, GRC Complaint No. 2006-106 (June 2007); O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006). The custodian did not, therefore, unlawfully deny access to the requested records. N.J.S.A. 47:1A-6.

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 30th Day of September, 2009



Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: October 6, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 30, 2009 Council Meeting**

**Chris Rogers¹
Complainant**

GRC Complaint Nos. 2008-267 and 2008-268²

v.

**Roxbury Board of Education (Morris)³
Custodian of Records**

Records Relevant to Complaint:⁴

GRC Complaint No. 2008-267

Memorandum of agreement between the Roxbury Education Association and the Roxbury Board of Education regarding the Roxbury Education Association employment contract.

GRC Complaint No. 2008-268

Inter-local agreement between the Roxbury Board of Education and the Roxbury Town Council regarding the proposed turf field located at the Roxbury High School.

Request Made: November 12, 2008

Response Made: November 13, 2008

Custodian: Ruth Ann Quinn

GRC Complaint Filed: December 9, 2008⁵

Background

November 12, 2009

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to GRC Complaints Nos. 2008-267 and 2008-268 on an official OPRA request form.

¹ No legal representation listed on record.

² The Complainant submitted a three (3) item OPRA request to the Roxbury Board of Education. The Custodian granted the Complainant access to Request Item No. 1 and denied Request Items Nos. 2 and 3. The Complainant submitted a separate Denial of Access Complaint for each item to which he was denied access. Because GRC Complaint Nos. 2008-267 and 2008-268 arise from the same OPRA request, the GRC has deemed it appropriate to merge GRC Complaints Nos. 2008-267 and 2008-268.

³ Represented by Mark Zitomer, Esq., of Schwartz Simon Edelstein Celso & Kessler LLC (Morristown, NJ).

⁴ The Complainant requested an additional item that is not the subject of this complaint.

⁵ The GRC received the Denial of Access Complaint on said date.

November 13, 2009

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the first (1st) business day following receipt of such request. The Custodian states that access to the requested records is denied because the records requested are draft agreements that have not been formally adopted by the Roxbury Town Council.

December 9, 2009

Denial of Access Complaints Nos. 2008-267 and 2008-268 filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated November 12, 2009;
- Custodian's response to the OPRA request dated November 13, 2009.

The Complainant states that the Custodian unlawfully denied the Complainant access to records requested.

January 6, 2009

Offer of Mediation sent to both parties. Neither the Complainant nor the Custodian responded to the Offer of Mediation.

January 20, 2009

Request for the Statement of Information ("SOI") sent to the Custodian.

January 26, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated November 12, 2009;
- Custodian's response to the OPRA request dated November 13, 2009.

The Custodian certifies that the unsigned memorandum of agreement between the Roxbury Board of Education and the Roxbury Education Association, as well as the inter-local agreement regarding the proposed turf field, are not government records under OPRA because they are draft documents that were neither finalized nor formally adopted by the Roxbury Board of Education and therefore fall within the advisory, consultative, deliberative exemption set forth in OPRA. The Custodian further certified that the inter-local agreement is a work in progress. The Custodian certifies that 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 ..." N.J.S.A. 47:1A-1.1.

The Custodian certifies that OPRA specifically excluded those records which contain inter-agency or intra-agency advisory, consultative, or deliberative material from the definition of a government record. *Id.* The Custodian certifies that this exclusion protects the types of records that are the subject of the “deliberative process privilege.” Haemmerle v. Washington Township, GRC Complaint No. 2006-106 (June 2007). The Custodian certifies that this privilege was adopted by the New Jersey Supreme Court in In re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000) and is relied upon by the GRC in evaluating OPRA’s advisory, consultative, deliberative exemption. McCormick v. N.J. Dept. of Treasury, GRC Complaint No. 2005-104 (March 2006).

The Custodian certifies that the GRC has consistently held that draft documents are exempt from disclosure pursuant to the exemption for advisory, consultative, or deliberative material. Contano v. Borough of Emerson, GRC Complaint No. 2005-125 (March 2007). See also Parave-Fogg v. Lowe Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006) (holding that unapproved draft meeting minutes are not subject to disclosure under OPRA). Therefore, the Custodian certifies that the denial of access to the inter-local agreement and memorandum of agreement was appropriate.

The Custodian further certifies that government records do not include “information generated by or on behalf of public employers or public employees in connection ... with collective negotiations, including documents and statements of strategy or negotiating position.” N.J.S.A. 47:1A-1.⁶ The Custodian certifies that at the time of the Complainant’s request, the terms and conditions of the tentative agreement between the Roxbury Board of Education and Roxbury Education Association were not approved by the respective parties. The Custodian further certifies that pursuant to N.J.S.A. 47:1A-1,⁷ a record created in connection with collective negotiations, such as an unsigned memorandum of agreement, is exempt from disclosure. The Custodian further certifies that because the memorandum of agreement which was drafted as a possible collective negotiations settlement and contained confidential terms that were not yet public knowledge, the record should be exempt from disclosure pursuant to N.J.S.A. 47:1A-1.⁸ The Custodian requests that the Denial of Access Complaints be dismissed with prejudice.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

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.

⁶ The proper citation for this exemption is N.J.S.A. 47:1A-1.1

⁷ The proper citation for this exemption is N.J.S.A. 47:1A-1.1

⁸ The proper citation for this exemption is N.J.S.A. 47:1A-1.1

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 provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The Custodian responded in writing to the Complainant’s OPRA request on the first (1st) business day stating that access to the memorandum of agreement between the Roxbury Board of Education and the Roxbury Education Association and the inter-local agreement regarding the proposed turf field was denied because the requested records were draft agreements that had yet to be formally adopted by the Roxbury Town Council. The Complainant subsequently filed Denial of Access Complaints 2008-267 and 2008-268 challenging the lawfulness of the Custodian’s denial of access.

OPRA excludes from its 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.”

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... ‘advisory, consultative, or deliberative’ (“ACD”) 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. In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J.149 (App. Div. 2004).

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). Specifically, the New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Education Law Center v. NJ Department of Education, 198 N.J. 274, 966 A.2d 1054, 1069 (2009). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

The courts have consistently held that draft records of a public agency fall within the deliberative process privilege. See U.S. v. Farley, 11 F.3d 1385 (7th Cir. 1993); Pies v. U.S. Internal Rev. Serv., 668 F.2d 1350 (D.C. Cir. 1981); N.Y.C. Managerial Employee Ass'n, v. Dinkins, 807 F.Supp., 955 (S.D.N.Y. 1992); Archer v. Cirrincione, 722 F. Supp. 1118 (S.D. N.Y. 1989); Coalition to Save Horsebarn Hill v. Freedom of Info. Comm., 73 Conn.App. 89, 806 A.2d 1130 (Conn. App. Ct. 2002); pet. for cert. den. 262 Conn. 932, 815 A.2d 132 (2003). As explained in Coalition, the entire draft document is deliberative because in draft form, it “reflect[s] that aspect of the agency’s function that precedes formal and informed decision making.” *Id.* at 95, quoting Wilson v. Freedom of Info. Comm., 181 Conn. 324, 332-33, 435 A.2d 353 (1980).

The deliberative process privilege was also discussed in In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000). There, the court addressed the question of whether the Commissioner of Insurance, acting in the capacity of Liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. *Id.* at 81. The court adopted a qualified deliberative process privilege based upon the holding of McClain v. College Hospital, 99 N.J. 346 (1985), Liquidation of Integrity, *supra*, 165 N.J. at 88. In doing so, the court noted that:

“[a] document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. ... Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. ... Purely factual material that does not reflect deliberative processes is not protected. ... Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the "preponderating policy" and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.” (Citations omitted.) *Id.* at 84-85.

The court further set out procedural guidelines based upon those discussed in McClain:

“[t]he initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.” In Re Liquidation of Integrity, *supra*, 165 N.J. at 88, *citing McClain*, *supra*, 99 N.J. at 361-62.

In the unreported section of In re: Readoption, *supra*, the court reviewed an OPRA request to the Department of Corrections (“DOC”) for draft regulations and draft statutory revisions. The court stated that these drafts were “all clearly pre-decisional and reflective of the deliberative process.” *Id.* at 18. It further held:

“[t]he trial judge ruled that while appellant had not overcome the presumption of non-disclosure as to the entire draft, it was nevertheless entitled to those portions which were eventually adopted. Appellant appeals from the portions withheld and DOC appeals from the portions required to be disclosed. We think it plain that all these drafts, in their entirety, are reflective of the deliberative process.” *Id.*

In Haemmerle v. Township of Washington, GRC Complaint No. 2006-106 (June 2007), the Council held that a letter drafted by the Mayor which was neither finalized nor sent to the residents of the Township of Washington, was pre-decisional as well as deliberative and therefore exempt from public disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1. The GRC further held in Kohn v. Township of Livingston, GRC Complaint No. 2007-319 (July 2008), that draft documents are ACD material until the time that the draft documents are officially approved by the governing body.

In this case, the Complainant sought access to a memorandum of agreement and an inter-local agreement. The Custodian denied access to said agreements on the basis that the agreements constitute ACD material because they were not yet approved. The Custodian has certified that the Roxbury Board of Education has neither finalized nor adopted the inter-local agreement or the memorandum of agreement. The Custodian has also certified that at the time of the request, the inter-local agreement was a work in progress. Therefore, the memorandum of agreement and inter-local agreement are draft documents that precede the adoption of a finalized agreement; the memorandum of agreement and inter-local agreement are therefore pre-decisional, draft documents and as

such are advisory, consultative and deliberative material exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Therefore, because the memorandum of agreement and the inter-local agreement are pre-decisional draft documents, they are exempt from disclosure as advisory, consultative and deliberative material pursuant to N.J.S.A. 47:1A-1.1; *see also* Kohn v. Township of Livingston, GRC Complaint No. 2007-319 (July 2008); Haemmerle v. Township of Washington, GRC Complaint No. 2006-106 (June 2007); O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006). The custodian did not, therefore, unlawfully deny access to the requested records. N.J.S.A. 47:1A-6.

The Custodian argues that the memorandum of agreement is further exempted from disclosure under OPRA because N.J.S.A. 47:1A-1.1 specifically exempts from the meaning of a government record “any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual *or in connection with information generated by or on behalf of public employers or public employees in connection with collective negotiations*, including documents and statements of strategy or negotiating position.” (Emphasis added).

Collective negotiation is the process whereby representatives of the employer and the employees meet for the purposes of reaching agreement on grievance procedures, rates of pay, wages, hours of employment, or other conditions of employment. *See, e.g., Apostolico v. County of Essex*, 142 N.J. Super. 296 (App. Div. 1976); the Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (authorizing collective negotiation with respect to the terms and conditions of public employment).

However, because the memorandum of agreement is exempt from disclosure as a draft record that contains ACD material, the issue of whether the record in question is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 as a collective negotiation record is moot and eliminates the need for further analysis into this issue.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the memorandum of agreement and the inter-local agreement are pre-decisional draft documents, they are exempt from disclosure as advisory, consultative and deliberative material pursuant to N.J.S.A. 47:1A-1.1; *see also* Kohn v. Township of Livingston, GRC Complaint No. 2007-319 (July 2008); Haemmerle v. Township of Washington, GRC Complaint No. 2006-106 (June 2007); O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006). The custodian did not, therefore, unlawfully deny access to the requested records. N.J.S.A. 47:1A-6.

Prepared By: Sherin Keys, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

September 23, 2009