



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

February 24, 2011 Government Records Council Meeting

Stephen M. Shea
Complainant

Complaint No. 2010-79

v.

Village of Ridgewood (Bergen)
Custodian of Record

At the February 24, 2011 public meeting, the Government Records Council (“Council”) considered the February 15, 2011 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 evidence of record indicates that the requested letter is a draft document, and because draft documents in their entirety comprise advisory, consultative and deliberative material, the Custodian lawfully denied access to the requested letter from Jovan Mehandzic, Assistant Engineer, to M. Disko related to the installation of artificial turf at Ridgewood High School. N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-6. In re Readoption with Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004) and Beck and Sean T. Kean v. Barbara O’Hare, Superior Court of New Jersey, Law Division – Mercer County, Docket No. MER-L-2411-07 (November 26, 2007); Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009).

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 24th Day of February, 2011



Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: March 1, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 24, 2011 Council Meeting**

**Stephen M. Shea¹
Complainant**

GRC Complaint No. 2010-79

v.

**Village of Ridgewood (Bergen)²
Custodian of Records**

Records Relevant to Complaint: Copy of the two (2) or three (3) page letter from Jovan Mehandzic, Assistant Engineer, to M. Disko related to the installation of artificial turf at Ridgewood High School.

Request Made: March 30, 2010

Response Made: April 1, 2010

Custodian: Heather Mailander

GRC Complaint Filed: April 12, 2010³

Background

March 30, 2010

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the record relevant to this complaint listed above on an official OPRA request form.

March 31, 2010

Letter from Stephanie Evans, Deputy Village Clerk, to Custodian's Counsel. Ms. Evans states that Jovan Mehandzic, Assistant Engineer, asserts that the requested letter is just a preliminary draft that the Village Engineer, Christopher Rutishauser, has not yet reviewed. The Custodian states that Mr. Mehandzic is not a licensed engineer. Ms. Evans asks if the letter should be released.

March 31, 2010

Memorandum from Ms. Evans to Mr. Mehandzic, enclosing the Complainant's OPRA request. Ms. Evans requests that Mr. Mehandzic provide her with a response to the OPRA request before April 8, 2010. Ms. Evans asks Mr. Mehandzic if the department has records responsive to the request, and if so, could he compile such records and send them to the Clerk's office with the required copying cost thereof.

¹ No legal representation listed on record.

² Represented by Matthew Rogers, Esq. (Ridgewood, NJ).

³ The GRC received the Denial of Access Complaint on said April 13, 2010.

April 1, 2010

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the second (2nd) business day following receipt of such request. The Custodian states that access to the requested record is denied because the requested record is only a draft and has not been reviewed by the Village Engineer. The Custodian asserts that the requested letter has not yet been sent and that there will be changes made to the letter once it is reviewed. The Custodian maintains that because the requested letter is a draft copy, it is exempt from disclosure under OPRA.

April 12, 2010

Denial of Access Complaint filed with the Government Records Council ("GRC"), attaching a copy of the Custodian's response to the Complainant's OPRA request dated April 1, 2010. The Complainant does not make any argument supporting his complaint.

The Complainant agrees to mediate this complaint.⁴

April 14, 2010

Telephone call from the Custodian to the GRC. The Custodian requests guidance as to the disclosability of draft documents.

April 15, 2010

Telephone call from the GRC to the Custodian. The GRC informs the Custodian that generally, draft documents are exempt from disclosure as advisory, consultative or deliberative material ("ACD"), but cases are fact-sensitive.

April 19, 2010

Letter from the Custodian to the Complainant. The Custodian states that the GRC has already ruled that the requested record is exempt from disclosure under OPRA because it constitutes ACD material.⁵ The Custodian states that ACD material is excluded from the definition of a government record under N.J.S.A. 47:1A-1.1. The Custodian advises the Complainant to refer to Parave-Fogg v. Lower Alloways Creek Township, 2006-51 (August 2006).

May 6, 2010

Offer of Mediation sent to both parties.

May 7, 2010

Letter from the Complainant to the GRC. The Complainant informs the GRC that he is confused because the Custodian's letter to him dated April 19, 2010 states that this case has already been adjudicated.

May 7, 2010

Letter from the GRC to the Complainant. The GRC informs the Complainant that the GRC has not yet adjudicated the instant case. The GRC states that the Custodian telephoned the GRC requesting guidance as to the disclosability of draft documents, and further states that

⁴ The Agreement to Mediate lacks the Complainant's signature.

⁵ At the time of this letter, the GRC had not made any ruling on this particular case. Accordingly, the Custodian's assertion that this case had already been adjudicated is erroneous.

the Custodian was informed that generally speaking, draft documents are exempt from disclosure as ACD material, but that cases are fact-sensitive. The GRC states that the Custodian knows, or should know, that the GRC does not publish a decision on a Denial of Access Complaint unless Council action was taken which resulted in an Interim Order or Final Decision.

May 7, 2010

The Custodian agrees to mediate the Complaint.

May 11, 2010

The Complainant declines mediation and requests that the GRC begin a full investigation.

May 13, 2010

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

May 19, 2010

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated March 30, 2010
- Memorandum from Stephanie Evans, Deputy Clerk, to Jovan Mehandzic dated March 31, 2010
- E-mail from Stephanie Evans to Custodian’s Counsel dated March 31, 2010
- Custodian’s Agreement to Mediate dated May 7, 2010
- Letter from the Custodian to the Complainant dated April 1, 2010
- Letter from the Custodian to the Complainant dated April 19, 2010
- Copy of OPRA

The Custodian states that requested document is a general administrative record that is internal correspondence that undergoes periodic administrative review as a draft. The Custodian certifies that the record is part of record series 0503-0002 (Correspondence – Administrative Internal), and qualifies as ACD material pursuant to N.J.S.A. 47:1A-1.1 and cites Parave-Fogg v. Lower Alloways Creek Twp. (Salem), GRC Complaint No. 2006-51. The Custodian certifies that the Complainant initially responded to a notice sent to neighbors regarding a Planning Board hearing on the major soil permits for Ridgewood High School Field and Stevens Field. The Custodian certifies that the soil permits are necessary because the Board of Education wishes to make artificial turf fields. The Custodian further certifies that the Complainant went to the Ridgewood Engineering Office to discuss the proposed turf fields and asked Jovan Mehandzic, Assistant Engineer, what the soil volume calculations were for the fields. The Custodian certifies that Mr. Mehandzic noticed that the calculations were not on the plans for the proposed turf fields and further certifies that Mr. Mehandzic knew he had written a draft letter containing these soil volume calculations for review by Christopher Rutishauser, the Village Engineer.

The Custodian certifies that Mr. Mehandzic verbally read the soil volume calculations contained in the draft letter to the Complainant. The Custodian certifies that the Complainant then requested a copy of the letter pursuant to OPRA. The Custodian certifies that access to

the letter requested by the Complainant was denied because the requested letter was a draft and had yet to be reviewed and revised by the Village Engineer.

The Custodian certifies that the Complainant's OPRA request was received on March 30, 2010 and that she and Ms. Evans submitted both a written request and e-mailed request to the Assistant Engineer, who is not a licensed engineer, to provide responsive records to the Clerk's Office. The Custodian certifies that Mr. Mehandzic received and read the e-mail on March 31, 2010 at 11:55 a.m. The Custodian certifies that Mr. Mehandzic responded with a copy of the draft letter and stated to the Custodian that he had some concerns about releasing the letter, as it is a draft. The Custodian certifies that the requested letter was a preliminary draft which the Village Engineer had not yet reviewed.

The Custodian certifies that the Assistant Clerk e-mailed a copy of the OPRA request and the responsive letter to Custodian's Counsel on March 31, 2010. The Custodian certifies that Custodian's Counsel called the Assistant Clerk and informed her that the OPRA request could not be fulfilled because the letter was only a draft.

The Custodian certifies that after receiving the Custodian's response to the OPRA request, the Complainant came to the Custodian's office and stated that he still believed that this letter was public information. The Custodian asserts that she spoke with the GRC and was informed that the requested record fell under the ACD exemption. The Custodian references Parave-Fogg v. Lower Alloways Creek Township, 2006-61 (April 2006) and N.J.S.A. 47:1A-1.1 in support of her assertion that the requested record was exempt from disclosure under OPRA as ACD material. The Custodian states that on April 19, 2010, she sent a letter to the Complainant stating that the letter was exempt from disclosure under OPRA as ACD material.

The Custodian states that she believes that the Complainant received a copy of the final version of the letter that was approved by the Village Engineer. The Custodian asserts that when the Complainant received the Assistant Clerk's letter that the OPRA request was closed, he verbally contacted the Custodian and stated that access to the requested record should not have been denied.

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.

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 ...”
(Emphasis added.) N.J.S.A. 47:1A-1.1.

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.

In the matter before the Council, the Custodian asserts that the requested letter is exempt from disclosure under OPRA because it is a draft document which is ACD material. 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.”

In O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006), the complainant requested handwritten notes taken by the school board secretary during a Board of Education meeting. The Council concluded that the Board Secretary’s handwritten notes taken during the June 22, 2004 executive session meeting are exempt from disclosure under the “inter-agency, intra-agency advisory, consultative, or deliberative” privilege pursuant to N.J.S.A. 47:1A-1.1.

In doing so, the Council stated that “neither the statute nor the courts have defined the terms... ‘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. 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 deliberative process privilege was discussed at length 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, 492 A.2d 991.

In In Re Liquidation of Integrity, *supra*, 165 N.J. at 84-5, 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.

- i. Deliberative materials do not include purely factual materials.
- ii. 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.
- c. 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*.
- d. 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*.
- e. 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*.

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 New Jersey Appellate Division has also reached this conclusion with regard to draft documents. In Home News v. Board of Education of the Borough of Spotswood, 286 N.J. Super. 380 (App. Div. 1996), a reporter sought access to the Board’s 1994 budget workbook which the trial court characterized as “...worksheets reflecting presentations and analyses of budgetary information, gathered by the business administrator and others...” *Id.* at 387. The court in Home News, affirming the trial court’s holding that the newspaper was not entitled to disclosure of the workbook, noted “...[the workbook] was no more subject to disclosure than any other papers reflecting work in progress toward the goal of producing a document that will eventually become a public record.” *Id.* at 387-88.

Draft documents were also discussed in the unreported section of In re Readoption, *supra*. Upon reviewing 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 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.* On the other hand, appellant certainly has full access to all regulations and statutory revisions ultimately adopted. We see, therefore, no basis justifying a conclusion that the presumption of nondisclosure has been overcome.” *Id.* (Emphasis added.)

More recently, in the unpublished opinion Jennifer Beck and Sean T. Kean v. Barbara O’Hare, Superior Court of New Jersey, Law Division – Mercer County, Docket No. MER-L-2411-07 (November 26, 2007), the court reviewed an action to challenge an OPRA request that was denied in part by the custodian because one of the records, a draft final report, was determined to be exempt from disclosure as inter-agency or intra-agency advisory, consultative or deliberative material (“ACD”). After finding that the withheld record was intra-agency, the court turned to the issue of whether the record fell within the ACD exemption. In considering this issue, the court found Home News relevant, observing “...Home News...support[s] the notion that preliminary or draft reports are exempt from disclosure.” *Id.* at 21.

In the instant complaint, the Custodian certified that the SPCR provided recommendations and suggestions concerning the operation of the Police Department and that the Borough Council was reviewing the record with the intention of releasing it to the public when complete; therefore it remains a draft document.

In David Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009), the Council determined that because the evidence of record indicated that the Special Police Committee Report requested by the Complainant was a draft document, and because draft documents in their entirety comprise advisory, consultative or deliberative material, the Custodian lawfully denied the Complainant access to the Special Police Committee Report pursuant to N.J.S.A. 47:1A-1.1.

In the instant case, the Custodian has certified that the requested letter is a draft which had not yet been reviewed by the Village’s Engineer at the time of the Complainant’s OPRA request. The decisions of the GRC and the Superior Court maintaining the lawful exemption of draft documents as ACD material are dispositive; consistent with the Custodian’s certification, the Complainant’s request is for a draft letter that had yet to be reviewed by the Village of Ridgewood Engineer. Accordingly, the letter sought by the Complainant is not an official record and is exempt from disclosure under OPRA as ACD material.

Therefore, because the evidence of record indicates that the requested letter is a draft document, and because draft documents in their entirety comprise advisory, consultative and deliberative material, the Custodian lawfully denied access to the requested letter from Jovan Mehandzic, Assistant Engineer, to M. Disko related to the installation of artificial turf at Ridgewood High School. N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-6. In re Readoption with Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004) and Jennifer Beck and Sean T. Kean v. Barbara O’Hare, Superior Court of New Jersey, Law Division – Mercer County, Docket No. MER-L-2411-07 (November 26, 2007); Dalesky, supra.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council finds that because the evidence of record indicates that the requested letter is a draft document, and because draft documents in their entirety comprise advisory, consultative and deliberative material, the Custodian lawfully denied access to the requested letter from Jovan Mehandzic, Assistant Engineer, to M. Disko related to the installation of artificial turf at Ridgewood High School. N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-6. In re Readoption with Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004) and Beck and Sean T. Kean v. Barbara O'Hare, Superior Court of New Jersey, Law Division – Mercer County, Docket No. MER-L-2411-07 (November 26, 2007); Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009).

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 15, 2011