



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

February 24, 2011 Government Records Council Meeting

Arnold Rozsansky
Complainant

Complaint No. 2010-89

v.

Township of Lakewood (Ocean)
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 requested 2009 Budget Manual is advisory, consultative or deliberative material because it contains notes and recommendations used by the Municipal Manager to prepare the final Township budget for presentation to and adoption by the governing body, the requested 2009 Budget Manual is deliberative in nature and thus exempt from disclosure under OPRA as advisory, consultative or deliberative material. N.J.S.A. 47:1A-1.1; In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000); Tonia Hobbs v. Township of Hillside (Union), GRC Complaint No. 2009-286 (November 2010).

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**

**Arnold Rozsansky¹
Complainant**

GRC Complaint No. 2010-89

v.

**Township of Lakewood (Ocean)²
Custodian of Records**

Record Relevant to Complaint: 2009 Budget Manual from the Township Manager's office

Request Made: April 21, 2010

Response Made: April 21, 2010

Custodian: Mary Ann Del Mastro

GRC Complaint Filed: April 27, 2010³

Background

April 21, 2010

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

April 21, 2010

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the same day as the receipt of such request. The Custodian states that access to the requested record is denied because pursuant to OPRA the record is exempt from disclosure as inter-agency or intra-agency advisory, consultative or deliberative material.

April 27, 2010

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:⁴

- Complainant's OPRA request dated April 21, 2010
- Letter from the Custodian to the Complainant dated April 21, 2010

¹ Represented by Walter M. Luers, Esq., of the Law Offices of Walter M. Luers, LLC. (Oxford, NJ).

² Represented by Jan L. Wouters, Esq., of Bathgate, Wegener & Wolf (Lakewood, NJ).

³ The GRC received the Denial of Access Complaint on said date.

⁴ The Complainant attached an additional document not relevant to the adjudication of this matter.
Arnold Rozsansky v. Township of Lakewood (Ocean), 2010-89 – Findings and Recommendations of the Executive Director

The Complainant states that he is a reporter for the Lakewood Shopper, a local paper with over 20,000 readers. The Complainant asserts that he is gathering information for a series of articles describing mismanagement and waste in the Lakewood Township budget. The Complainant states that he attempted to view the Lakewood Township 2009 Budget Manual by filing a written OPRA request and that the request was denied.

The Complainant agrees to mediate this complaint.

May 11, 2010

Offer of Mediation sent to the Custodian.

May 12, 2010

The Custodian agrees to mediate the complaint.

May 12, 2010

The case is sent to mediation.

May 21, 2010

The case is referred back from mediation.

May 21, 2010

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

May 24, 2010

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated April 21, 2010
- Letter from the Custodian to the Complainant dated April 21, 2010

The Custodian certifies that the requested 2009 Budget Manual is a compilation of the initial budget requests from Department Heads that contains notes and recommendations before those items are reviewed for accuracy. The Custodian certifies that this is consistent with Township policies, ordinances, and other procedures. The Custodian certifies that the records are pre-decisional materials that the Municipal Manager utilizes in preparing a budget for presentation to and adoption by the governing body. The Custodian cites N.J.S.A. 47:1A-1.1 in support of her argument that this qualifies as inter-agency or intra-agency advisory, consultative, or deliberative (“ACD”) material which is exempt from disclosure under OPRA.

The Custodian certifies that the Complainant’s OPRA request was denied the same day that it was received. The Custodian states that she relies on the findings of the GRC in Donna Antonucci v. City of Hoboken (Hudson), GRC Complaint No. 2009-125 (February 2010). The Custodian points out that in Antonucci, the Council determined that a record containing suggested budget cuts proposed before the adoption of the budget was pre-decisional and deliberative and therefore qualified for the ACD exemption from disclosure.

June 3, 2010

Facsimile from the Complainant to the GRC. The Complainant responds to the Custodian's SOI and states that on April 21, 2010, he went to the Lakewood Clerk's office to find out how much the members of the Lakewood Shade Tree Commission were paid in 2009. The Complainant asserts that he spoke with Frank Edwards, the Township Manager, who reviewed the 2009 Budget Manual and informed him what the payments were. The Complainant maintains that Mr. Edwards was able to do this because the 2009 Budget Manual contains information regarding actual Township expenditures, and the Complainant further argues that the 2009 Budget Manual appears to be the only Township document that is a compilation of all Township expenditures.

The Complainant argues that as an investigative reporter, this information is invaluable to his reporting. The Complainant requests that the GRC order the Custodian to disclose the requested 2009 Budget Manual.

June 14, 2010

Letter from Frank Edwards, Township Manager, to the GRC. Mr. Edwards states that on April 21, 2010, the Complainant visited the Lakewood Township Clerk's office and inquired how much members of the Lakewood Shade Tree Commission were paid in 2009. Mr. Edwards asserts that he told the Complainant that the members of the Shade Tree Commission were not compensated. Mr. Edwards maintains he did not refer to the 2009 Budget Manual when he made this statement.

Mr. Edwards states that the Complainant later came to his office and verbally asked to know the salaries of the three (3) employees charged to the Shade Tree component of the Public Works Budget. Mr. Edwards asserts that he could have sent the Complainant to the Finance Office for the answer since it is the repository for all of the Township's financial information, but Mr. Edwards states that as a matter of convenience, he referred to the 2009 Budget Manual to provide the requested information to the Complainant.

Mr. Edwards argues that the statement that the 2009 Budget Manual is the only document that has a compilation of all 2009 Township expenditures is false and inaccurate. Mr. Edwards states that the 2009 Budget Manual includes proposed budgeted amounts and recommendations. Mr. Edwards maintains that all Township expenditures are recorded under the control of the Finance Director and can be obtained from the Finance Director. Mr. Edwards maintains that the 2009 Budget Manual contains information submitted by Department Heads prior to the adoption of the Township budget and that the 2009 Budget Manual is not the final budget because it has not been corrected for mistakes, errors, changes or inaccuracies. Mr. Edwards states that expenditures are subject to purchase orders and that every expenditure has a purchase order, except for salaries which are kept in the Finance Office with a record of all salary payments. Mr. Edwards maintains that the requested information is readily obtainable from the Finance Director.

September 24, 2010

Letter from the Complainant's Counsel to the GRC. The Complainant's Counsel states that the Custodian does not deny that the requested 2009 Budget Manual contains every expenditure made by Lakewood, and that instead, the Custodian contends that the 2009 Budget Manual contains both expenditures and proposed budgeted amounts and

recommendations. Counsel argues that the burden of proof resides with the Custodian pursuant to N.J.S.A. 47:1A-6. Counsel asserts that the requested 2009 Budget Manual contains information that is factual and information that is deliberative. Counsel concludes by stating that the 2009 Budget Manual should be provided to his client with appropriate redactions of any deliberative material.

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.

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 the instant complaint, the Complainant requested a copy of the Township’s 2009 Budget manual. The Custodian contends that the 2009 Budget Manual is a draft document that contains information submitted by Department Heads prior to the adoption of the Township budget and has not been corrected for mistakes, errors, changes or inaccuracies. Accordingly, the Custodian asserts that the material in the Budget Manual is comprised of advisory, consultative, and deliberative (“ACD”) material that is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1.

The ACD exemption was examined in O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006). In O’Shea, 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.

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*.
 1. Pre-decisional means that the records were generated before an agency adopted or reached its decision or policy.
 2. 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.
 3. 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*.
 4. 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*.
 5. 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*.
- (2) Please note that if an *in camera* inspection were conducted by the courts, the process would include the following:

Once it has been determined that a record is deliberative, there is a presumption against disclosure and the party seeking the document has the burden of establishing his or her compelling or substantial need for the record.

1. That burden can be met by a showing of:
 - i. the importance of the information to the requesting party,
 - ii. its availability from other sources **and**
 - iii. the effect of disclosure on frank and independent discussion of contemplated government policies.

In Tonia Hobbs v. Township of Hillside (Union), GRC Complaint No. 2009-286 (November 2010), the complainant sought copies of each department's proposed 2010 budget, among other records. The evidence of record established that the requested budget was a draft document which was not finalized by the Township at the time of the request. The Council therefore determined that because each department's proposed 2010 budgets sought by the complainant contained ACD material because each department's 2010 proposed budgets were used to assist the Mayor in preparing the 2010 final Township budget, each department's proposed 2010 budgets were deliberative in nature and thus exempt from disclosure under OPRA as advisory, consultative or deliberative material. N.J.S.A. 47:1A-1.1; In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000).

In the instant case, the Complainant has requested the Township's 2009 Budget Manual, which the Custodian certified is comprised of the Township's proposed and unapproved financial plans. The Custodian certified in the SOI that the requested 2009 Budget Manual is a compilation of the initial budget requests from Department Heads that contains notes and recommendations before those items are reviewed for accuracy, and further certified that the requested 2009 Budget Manual constitutes pre-decisional materials that the Municipal Manager utilizes in preparing a budget for presentation to and adoption by the governing body.

Therefore, because the requested 2009 Budget Manual is ACD material because it contains notes and recommendations used by the Municipal Manager to prepare the final Township budget for presentation to and adoption by the governing body, the requested 2009 Budget Manual is deliberative in nature and thus exempt from disclosure under OPRA as advisory, consultative or deliberative material. N.J.S.A. 47:1A-1.1; In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000); Tonia Hobbs v. Township of Hillside (Union), GRC Complaint No. 2009-286 (November 2010).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the requested 2009 Budget Manual is advisory, consultative or deliberative material because it contains notes and recommendations used by the Municipal Manager to prepare the final Township budget for presentation to and adoption by the governing body, the requested 2009 Budget Manual is deliberative in nature and thus exempt from disclosure under OPRA as advisory, consultative or deliberative material. N.J.S.A. 47:1A-1.1; In Re Liquidation of

Integrity Insurance Co., 165 N.J. 75 (2000); Tonia Hobbs v. Township of Hillside (Union), GRC Complaint No. 2009-286 (November 2010).

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 15, 2011