



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

June 25, 2013 Government Records Council Meeting

Lauren J. Eastwood
Complainant

Complaint No. 2012-121

v.

Borough of Englewood Cliffs (Bergen)
Custodian of Record

At the June 25, 2013 public meeting, the Government Records Council (“Council”) considered the June 18, 2013 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 responsive drawings are exempt from access as “inter-agency or intra-agency advisory, consultative or deliberative” material. N.J.S.A. 47:1A-1.1; In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); Ciesla v. NJ Dept. of Health & Senior Services, 429 N.J. Super. 127 (App. Div. 2012). Thus, the Custodian did not unlawfully deny access to the responsive 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 25th Day of June, 2013

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

Steven Ritardi, Esq., Acting Chair
Government Records Council

Decision Distribution Date: June 27, 2013



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 25, 2013 Council Meeting**

**Lauren J. Eastwood¹
Complainant**

GRC Complaint No. 2012-121

v.

**Borough of Englewood Cliffs (Bergen)²
Custodian of Records**

Records Relevant to Complaint: Electronic copy via e-mail of the conceptual drawings of the B3 zone showed to the public at the Borough of Englewood Cliffs' ("Borough") February 18, 2012 Budget Workshop and any related material.³

Request Made: March 9, 2012

Response Made: March 23, 2012

GRC Complaint Filed: April 18, 2012⁴

Background⁵

Request and Response:

On March 9, 2012, the Complainant submitted an Open Public Records Act ("OPRA") request to the Borough. On March 22, 2012, the Custodian's Counsel sent a memorandum to the Borough Planning Board advising that the responsive drawings are "inter-agency or intra-agency advisory, consultative or deliberative" ("ACD") material and thus exempt from OPRA. N.J.S.A. 47:1A-1.1. On March 23, 2012, Elena Salas, Municipal Assistant, responded on behalf of the original Custodian stating that access to the responsive records is denied as ACD material.

Denial of Access Complaint:

On April 18, 2012, the Complainant filed a complaint with the Government Records Council ("GRC"). The Complainant states that at a February 18, 2012 special meeting, the Mayor, on his own accord, used an iPad to show members of the public, including the Complainant, conceptual drawings of a redevelopment plan for the B3 zone. The Complainant

¹ No legal representation listed on record.

² Lisette M. Duffy, Custodian of Records. Represented by Michael Kates, Esq., of Kates, Nussman, Rapone, Ellis & Farhi, LLP (Hackensack, NJ). The original custodian of record was Ms. Susan Spohn.

³ The Complainant requested additional records that are not at issue in this complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

disputes Ms. Salas' denial of access to the drawings as ACD material because the Mayor voluntarily showed them to members of the public. The Complainant contends that the ACD exemption no longer applied the moment the Mayor displayed the drawings to members of the public.

Statement of Information:

On June 8, 2012, the Custodian submitted a Statement of Information ("SOI"). The Custodian certifies that the Borough received the Complainant's OPRA request on March 9, 2012. The Custodian certifies that, to the best of her knowledge, the Borough responded on March 23, 2012 denying access to the responsive record.

The Custodian argues that the drawings contained on the iPad were created by a member of the Planning Board to better illustrate his position to other members and were informal. The Custodian asserts that the drawings do not reflect the position of the Planning Board as a whole and are informal drafts of a proposed plan. The Custodian thus contends that the drawings meet the two-pronged ACD test because they are "pre-decisional" and essential to the recommendation or opinion of a Planning Board member intended to facilitate discussion and debate about the B3 zone. In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75 (2000) at 83-85 (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975)). See also Jordan v. United States Dep't of justice, 591 F.2d 753, 773 (D.C. Cir. 1978)(explaining that the deliberative process privilege is designed to ensure that an agency is judged by policy adopted, not policy merely considered. *Id.* at 772-773). The Custodian argued that should the drawings be disclosed under OPRA, same would likely cause confusion on the Planning Board's position regarding the B3 zone because the ideas contained therein have not been fully vetted.

Analysis⁶

Unlawful Denial of Access

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 defines a "government record" as:

"any paper ... data processed or image processed document, information stored or maintained electronically ... or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State ... or that has been received in the course of his or its official business ... *The terms shall not include inter-agency or*

⁶ There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

intra-agency advisory, consultative, or deliberative material.” (Emphasis added.)
N.J.S.A. 47:1A-1.1.

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’ 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).” *Id.*

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 Integrity, *supra*. 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), Integrity, *supra*, 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.” Integrity, supra, at 88, *citing McClain, supra*, at 361-62.

Here, the Complainant argued that the ACD exemption no longer applied to the responsive drawings because the Mayor showed them to members of the public at a February 18, 2012 special meeting.

For the responsive drawings to be exempt as ACD material, they must meet the two (2) requirements set forth in Integrity, supra: the drawings were “... generated before the adoption of an agency's policy or decision” and the drawings “...must be deliberative in nature, containing opinions, recommendations, or advice about agency policies.” *Id.* Here, the Custodian argued in the SOI that records were informal drawings made by a member of the Planning Board to illustrate a redevelopment plan that the Planning Board had not yet adopted. The Custodian further asserted that the drawings did not reflect the Planning Board’s position and were informal drafts.

Notwithstanding the fact that the Mayor showed members of the public the conceptual drawings at a Township special meeting, the ACD exemption is not akin to a privilege that can be waived through voluntary disclosure to the public similar to the attorney-client privilege exemption. ACD material is a description, not a privilege. Therefore, ACD material does not lose its character as ACD merely because it was shown in public. The ACD exemption is always held in light of the Integrity test. The GRC is satisfied that the Custodian adequately argued that the drawings met both prongs of the test: (1) the drawings were created prior to any action taken on a formal plan regarding the B3 Zone; and (2) the drawings were created by a single Planning Board member to illustrate his ideas and facilitate discussion and debate. It is further clear that, at the time of the OPRA request, the drawings did not reflect the adopted position of the Planning Board. *See Ciesla v. NJ Dept. of Health & Senior Services*, 429 N.J. Super. 127 (App. Div. 2012)(“[t]he privilege bars the ‘disclosure of proposed policies before they have been fully vetted and adopted by a government agency,’ thereby ensuring that an agency is not judged by a policy that was merely considered. *Ibid.* It also avoids the confusion that could result from the release of information concerning matters that do not bear on an agency's chosen course. *Ibid.*” (*citing Educ. Law Ctr.* at 286). *Id.* at 137-138.)

Therefore, the responsive drawings are exempt from access as ACD material. N.J.S.A. 47:1A-1.1; Integrity, supra; Ciesla, supra. Thus, the Custodian did not unlawfully deny access to the responsive records. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the responsive drawings are exempt from access as “inter-agency or intra-agency advisory, consultative or deliberative” material. N.J.S.A. 47:1A-1.1; In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); Ciesla v. NJ Dept. of Health & Senior Services, 429 N.J. Super. 127 (App. Div. 2012). Thus, the Custodian did not unlawfully deny access to the responsive records. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

June 18, 2013