



State of New Jersey  
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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

**FINAL DECISION**

**June 30, 2015 Government Records Council Meeting**

Anonymous  
Complainant

Complaint No. 2015-02

v.

Ocean City Historic Preservation Commission (Cape May)  
Custodian of Record

At the June 30, 2015 public meeting, the Government Records Council (“Council”) considered the June 23, 2015 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 record is a draft document and because draft documents in their entirety comprise ACD material, the Custodian lawfully denied access to the record. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. See In re Liquidation of Integrity Ins. Co., 165 N.J. 75 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (2004). See also Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009) and Shea v. Vill. of Ridgewood (Bergen), GRC Complaint No. 2010-79 (February 2011).

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 30<sup>th</sup> Day of June, 2015

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: July 2, 2015**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
June 30, 2015 Council Meeting**

**Anonymous<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-2**

**v.**

**Ocean City Historic Preservation Commission (Cape May)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** “Pursuant to the common law access to government records and C.47:1A-8 I am requesting a copy of the draft map which updates the historic district provided by the City of Ocean City City Council. Please send via return e-mail.”

**Custodian of Record:** Linda MacIntyre

**Request Received by Custodian:** September 12, 2014<sup>3</sup>

**Response Made by Custodian:** September 19, 2014

**GRC Complaint Received:** January 6, 2015

**Background<sup>4</sup>**

**Request and Response:**

On September 12, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 19, 2014, the fifth (5<sup>th</sup>) business day following receipt of said request, the Custodian responded in writing, acknowledging the request as an OPRA request and denying same as seeking inter-agency or intra-agency advisory, consultative, or deliberative (“ACD”) material pursuant to N.J.S.A. 47:1A-1.1.

**Denial of Access Complaint:**

On January 6, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that the request was provided

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Dorothy F. McCrosson, Esq., (Ocean City, NJ).

<sup>3</sup> The Complainant submitted subsequent/modified requests to the Custodian; however, the September 12, 2014, request is the only request that formed the basis of the instant complaint, as verified in section 2 of the complaint.

<sup>4</sup> 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.

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to the Custodian on September 12, 2014, and that the Custodian subsequently denied the request as deliberative material.

The Complainant states that media reports indicated that members of an Ocean City Council Subcommittee met with members of the Ocean City Historic Preservation Commission (“HPC”) and the City Solicitor and created a proposed updated map. The Complainant states that he requested the draft map, which updates the historic district provided by the City Council, but was denied access to the record as deliberative material. The Complainant contends that said record is an item submitted by members of the public, who also happen to be City Council members, and that the record is not deliberative material and should be released under OPRA.

Statement of Information:

On January 15, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on September 12, 2014, and responded in writing on September 19, 2014.

The Custodian certifies that she spoke with the HPC Recording Secretary, the City Solicitor, and Councilman Allegretto to determine whether a draft map updating the historic district was provided to the HPC. The Custodian certifies that she was advised that no map was presented to the HPC and that City Council did not have a map updating the historic district; therefore the requested document does not exist.

However, the Custodian further certifies that she determined that on or about September 9, 2014, a meeting of the Ocean City Historic District was held. The Custodian certifies that several Councilmen as well as the Custodian’s Counsel were present at the meeting and that Councilman Ball asked the other Councilmen about changes to the district boundaries while referencing two (2) pages of the historic district he had obtained from the Ocean City tax map which had been shaded in two different colors and annotated with notes (“tax map excerpts”). The Custodian further certifies that she learned that the tax map excerpts to which Mr. Ball referred were created by another Councilman following a drive through the historic district and that same were shared with other City Council members prior to the meeting as a basis for discussion about homes in the historic district which do not appear to be historic. The Custodian certifies that the Councilmen were considering whether changes in the boundaries should be considered and recommended to City Council in the form of a draft ordinance.

The Custodian certifies that the notes and shading on the tax map excerpts were pre-decisional because they were created prior to the adoption of any policy or decision. The Custodian further certifies that the tax map excerpts were used in the deliberative process of the Councilmen as they considered the historic nature of certain homes located in the district. The Custodian certifies that if the tax map excerpts are found to be responsive to the OPRA request, they are exempt from disclosure under the ACD exemption of OPRA and the common law deliberative process privilege. The Custodian cites to two (2) federal court decisions and an unpublished New Jersey Superior Court decision in support of her argument to deny access.

The Custodian certifies that the tax map excerpts have not been destroyed because there is a three (3) year retention requirement preventing destruction until January 1, 2018.

## Analysis

### Unlawful Denial of Access

Preliminarily, the GRC has determined that the Complainant's request seeks records under a common law right of access, not under OPRA. Although the GRC has no authority to adjudicate a common law cause of action, here the Custodian accepted the Complainant's request as an OPRA request and responded accordingly. As such, the GRC will proceed with the adjudication under OPRA.

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 first certified that no records exist that are responsive to the request but then went on to present a scenario in the alternative that coincided with the Complainant's narrative describing the formation of an "updated map." There is no question that the "tax map excerpts" described by the Custodian, and the "updated map" described by the Complainant, are one and the same. Therefore, the tax map excerpts exist as a record responsive to the request. The Custodian certified that if the tax map excerpts are found to be responsive to the OPRA request, they are exempt from disclosure as 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 BOE, GRC Complaint No. 2004-93 (April 2006), the Council stated that:

[N]either 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 Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (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 (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 the decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr. v. NJ Dep't of Educ., 198 N.J. 274 (2009).

The deliberative process privilege was discussed at length in Integrity. 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. Coll. Hosp., 99 N.J. 346 (1985). Integrity, 165 N.J. 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.

Id. at 84-85 (citations omitted).

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

The 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, 165 N.J. at 88 (*citing McClain*, 99 N.J. at 361-62).

The Council has repeatedly held that draft records of a public agency fall within the deliberative process privilege. In Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009), the Council, in upholding the custodian’s denial as lawful, determined that the requested record was a draft document and that draft documents in their entirety are ACD material pursuant to N.J.S.A. 47:1A-1.1. Subsequently, in Shea v. Vill. of Ridgewood (Bergen), GRC Complaint No. 2010-79 (February 2011), where the custodian certified that a requested letter was a draft that had not yet been reviewed by the municipal engineer, the Council concluded that the requested letter was exempt from disclosure under OPRA as ACD material.

Here, the Complainant specifically requested a “...*draft* map which updates the historic district provided by the...City Council.” (Emphasis added.)

Therefore, because the evidence of record indicates that the requested record is a draft document, and because draft documents in their entirety comprise ACD material, the Custodian lawfully denied access to the record. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. See In re Liquidation of Integrity, 165 N.J. 75 and In re Readoption With Amendments, 182 N.J. 149. See also Dalesky, GRC 2008-61 and Shea, GRC 2010-79.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that because the evidence of record indicates that the requested record is a draft document and because draft documents in their entirety comprise ACD material, the Custodian lawfully denied access to the record. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. See In re Liquidation of Integrity Ins. Co., 165 N.J. 75 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (2004). See also Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009) and Shea v. Vill. of Ridgewood (Bergen), GRC Complaint No. 2010-79 (February 2011).

Prepared By: John E. Stewart

Reviewed By: Joseph D. Glover  
Executive Director

June 23, 2015