



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

June 27, 2017 Government Records Council Meeting

Jeffrey S. Feld
Complainant

Complaint No. 2015-333

v.

NJ Division of Local Government Services
Custodian of Record

At the June 27, 2017 public meeting, the Government Records Council (“Council”) considered the June 20, 2017 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s May 23, 2017 Interim Order because she responded in the prescribed time frame, provided nine (9) copies of the records requested for an *in camera* review, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to the records, or redacted portions thereof, listed in the document index pursuant to N.J.S.A. 47:1A-6.**
3. The GRC declines to address whether the Custodian knowingly and willfully violated OPRA because: 1) she lawfully denied access to the responsive report; and 2) she did not commit any OPRA violations with respect to the subject OPRA request.

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 27th Day of June, 2017

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: June 30, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
June 27, 2017 Council Meeting**

**Jeffrey S. Feld¹
Complainant**

GRC Complaint No. 2015-333

v.

**New Jersey Division of Local Government Services²
Custodial Agency**

Records Relevant to Complaint: Electronic records via e-mail of the “two [(2)] prepared scripts read into the record” at the Local Finance Board’s (“LFB”) September 9, 2015 hearing, including the list of exhibits relied upon and reviewed.³

Custodian of Record: Colleen Kelly
Request Received by Custodian: September 10, 2015
Response Made by Custodian: September 21, 2015
GRC Complaint Received: October 27, 2015

Records Submitted for *In Camera* Examination: Staff report, dated September 9, 2015.

Background

May 23, 2017 Council Meeting:

At its May 23, 2017 public meeting, the Council considered the May 16, 2017 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. By a majority vote, the Council adopted said findings and recommendations. The Council, therefore, found that:

1. The GRC must conduct an *in camera* review of the responsive staff report to determine the validity of the Custodian’s assertion that the record was exempt under OPRA as “inter-agency or intra-agency advisory, consultative, or deliberative” material and/or under the deliberative process privilege. N.J.S.A. 47:1A-1.1. See *Paff v. NJ Dep’t of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 2 above), a document or redaction**

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Melanie Walter.

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

Jeffrey S. Feld v. New Jersey Division of Local Government Services, 2015-333 – *In Camera* Findings and Recommendations of the Executive Director

index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁶ that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On May 24, 2017, the Council distributed its Interim Order to all parties. On May 30, 2017, the Custodian responded to the Council's Interim Order. The Custodian certified that she received the Council's Order on May 24, 2017. The Custodian further certified that, in accordance with the Order, she was providing nine (9) copies of the unredacted staff report (3 pages) for an *in camera* review.

Analysis

Compliance

At its May 23, 2017 meeting, the Council ordered the Custodian to submit nine (9) copies of the responsive report for an *in camera* review. The Council also ordered the Custodian to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On May 24, 2017, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on June 1, 2017.

On May 30, 2017, the third (3rd) business day after receipt of the Council's Order, the Custodian submitted to the GRC nine (9) copies of the requested report for an *in camera* review. Additionally, the Custodian provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's May 23, 2017 Interim Order because she responded in the prescribed time frame, provided nine (9) copies of the records requested for an *in camera* review, and simultaneously provided certified confirmation of compliance to the Executive Director.

⁴ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁵ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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. N.J.S.A. 47:1A-6.

OPRA provides that the definition of a government record “shall not include . . . inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material.” When the exception is invoked, a governmental entity may “withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.” Educ. Law Center v. N.J. Dep't of Educ., 198 N.J. 274, 285 (2009)(*citing* NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The New Jersey Supreme Court has also 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. Educ. Law Ctr., 198 N.J. 274.

The custodian claiming an exception to the disclosure requirements under OPRA on this basis must initially satisfy two conditions: 1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity's policy or decision; and 2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. Id. at 286 (internal citations and quotations omitted). The key factor in this determination is whether the contents of the document reflect “formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated.” Id. at 295 (adopting the federal standard for determining whether material is “deliberative” and *quoting* Mapother v. Dep't of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies these two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government's interest in confidentiality. Id. at 286-87.

Additionally, in Eastwood v. Borough of Englewood Cliffs (Bergen), GRC Complaint No. 2012-121 (June 2013), the Mayor, during a Township special meeting, showed members of the public the conceptual drawings of a redevelopment plan on a tablet device. The Custodian later denied a copy of the drawings in response to the Complainant’s OPRA request, arguing that they constituted ACD material and were therefore exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1. The GRC held that:

[T]he 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.

Id. at 4.

Thus, despite the Mayor's decision to show the ACD material at a public meeting, OPRA intends that the ACD privilege can be preserved in the public interest. That interest protects a privilege that "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. (citing Ciesla v. NJ Dep't of Health and Senior Serv., 429 N.J. Super. 127 (App. Div. 2012)).

The GRC conducted an *in camera* examination on the submitted report. The report contains addresses the legal question of Complainant's standing and makes a recommendation based upon a legal analysis of the issue. The author of the report, taken in its totality, laid out the facts and procedural history, applied relevant law to those facts, and provided recommendations to the LFB that answer the issue in question. It is also clear that the author created the report in anticipation of the LFB's September 9, 2015 meeting and prospective decision on the Complainant's standing issue. Thus, the entire record should be considered ACD material. This determination also applies to the factual portion of the record in accordance with the Supreme Court's decision in Educ. Law Ctr., because the facts were a critical part to the author's recommendations. Based on all of the foregoing, the report stands firmly on the two conditions necessary to fall within the ACD exemption: 1) the report is pre-decisional; and 2) it contains recommendations to the LFB regarding the Complainant's standing issue.

Further, the GRC notes that the LFB read the factual information from the report into the record at its September 9, 2015 meeting. However, in accordance with the Council's decision in Eastwood, GRC 2012-121, the entire report is still nonetheless exempt under the ACD exemption. The LFB did not waive the privilege through verbal disclosure of factual information from the report at the meeting.

Thus, the Custodian lawfully denied access to the responsive report because it constitutes ACD material not subject to disclosure under OPRA. N.J.S.A. 47:1A-1.1.

Finally, the GRC declines to address whether the Custodian knowingly and willfully violated OPRA because: 1) she lawfully denied access to the responsive report; and 2) she did not commit any OPRA violations with respect to the subject OPRA request.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's May 23, 2017 Interim Order because she responded in the prescribed time frame, provided nine (9) copies of the records requested for an *in camera* review, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to the records, or redacted portions thereof, listed in the document index pursuant to N.J.S.A. 47:1A-6.**

3. The GRC declines to address whether the Custodian knowingly and willfully violated OPRA because: 1) she lawfully denied access to the responsive report; and 2) she did not commit any OPRA violations with respect to the subject OPRA request.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

June 20, 2017



State of New Jersey
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

INTERIM ORDER

May 23, 2017 Government Records Council Meeting

Jeffrey S. Feld
Complainant

Complaint No. 2015-333

v.

NJ Division of Local Government Services
Custodian of Record

At the May 23, 2017 public meeting, the Government Records Council (“Council”) considered the May 16, 2017 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The GRC must conduct an *in camera* review of the responsive staff report to determine the validity of the Custodian’s assertion that the record was exempt under OPRA as “inter-agency or intra-agency advisory, consultative, or deliberative” material and/or under the deliberative process privilege. N.J.S.A. 47:1A-1.1. See Paff v. NJ Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Interim Order Rendered by the
Government Records Council
On The 23rd Day of May, 2017

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: May 24, 2017

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 23, 2017 Council Meeting**

**Jeffrey S. Feld¹
Complainant**

GRC Complaint No. 2015-333

v.

**New Jersey Division of Local Government Services²
Custodial Agency**

Records Relevant to Complaint: Electronic records via e-mail of the “two [(2)] prepared scripts read into the record” at the Local Finance Board’s (“LFB”) September 9, 2015 hearing, including the list of exhibits relied upon and reviewed.³

Custodian of Record: Colleen Kelly
Request Received by Custodian: September 10, 2015
Response Made by Custodian: September 21, 2015
GRC Complaint Received: October 27, 2015

Background⁴

Request and Response:

On September 10, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 21, 2015, the Custodian responded in writing, denying access to a responsive “intra-agency” staff report under the “inter-agency or intra-agency advisory, consultative, or deliberative” (“ACD”) material exemption.

Denial of Access Complaint:

On October 27, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that he submitted the subject OPRA request after the LFB’s September 9, 2015 ruling that he did not have standing to challenge the LFB’s approval of the City of Orange’s 2014 Budget. The Complainant questioned

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Melanie Walter.

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

⁴ 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.

Jeffrey S. Feld v. New Jersey Division of Local Government Services, 2015-333 – Findings and Recommendations of the Executive Director

whether the responsive report was ACD in nature. Further, the Complainant questioned whether the ACD exemption expired when the LFB ruled on his standing issue.

Statement of Information:⁵

On March 10, 2016, Alyssa Pane filed a Statement of Information (“SOI”) on behalf of the Custodian.⁶ Therein, Ms. Pane certified that the Custodian received the Complainant’s OPRA request on September 10, 2015. Ms. Pane certified that the Custodian responded in writing on September 21, 2015, denying access to the responsive report as ACD material not subject to disclosure.

The Custodian’s Counsel also submitted a letter brief on behalf of the Custodian, arguing that the Custodian lawfully denied access to the responsive report as ACD material. N.J.S.A. 47:1A-1.1. Counsel stated that a staff member generated the report as part of LFB’s investigation into the Complainant’s standing issue, on which the LFB ruled at its September 9, 2015 meeting. Counsel averred that an LFB staff member created the report to advise the LFB on the issue, thereby allowing the LFB to render a decision on the standing issue. Counsel averred that the report reflected policy and decisional recommendations and was an overview of legal advice made by staff and counsel for the LFB.

Additionally, Counsel contended that the report was exempt under the deliberative process privilege. Ciesla v. NJ Dep’t of Health & Senior Serv., 429 N.J. Super. 127, 137 (App. Div. 2012) (*citing* Educ. Law Ctr. v. NJ Dep’t of Educ., 198 N.J. 274, 284 (2009), providing that the ACD exemption “has been construed to encompass the deliberative process privilege . . .”). Counsel argued that deliberative process privilege allows an agency to deny access to records “that reflect advisory opinions, recommendations, and deliberations” as part of its decision making process. Ibid. (*quoting* In Re: Liquidation of Integrity Ins. Co., 165 N.J. 75, 83 (2000)). Further, Counsel averred that the two-prong test for deliberative process privilege entails: 1) proving that the record was pre-decisional (generated before the adoption of an agency’s policy or decision); and 2) showing that the record included opinions, recommendations, or advice. Id. at 138.

Counsel argued that, in applying the above, it is clear that the responsive report falls within the deliberative process privilege exemption. Specifically, Counsel averred that a staff member created the report as part of the LFB’s fact-finding and recommendation process on the standing issue. Counsel asserted that the report demonstrated the issues considered, the progress of internal deliberations on those issues, and ultimate decision made on how to proceed. Counsel asserted that the report is exactly the type of record contemplated by the ACD and deliberative process privilege exemptions. Further, Counsel asserted that disclosure would chill open and frank discussion within the decision-making process. Counsel also argued that disclosure would

⁵ The complaint was referred to mediation on December 1, 2015. Following unsuccessful efforts to mediate the matter, the complaint was referred back from mediation on February 23, 2016.

⁶ The Custodian was on extended leave and unavailable at the time that the GRC requested an SOI from her. Jeffrey S. Feld v. New Jersey Division of Local Government Services, 2015-333 – Findings and Recommendations of the Executive Director

necessarily reveal the staff member's policy recommendations and the LBF's decision-making process.⁷

Analysis

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.

In Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁸ that accepted the custodian's legal conclusion for the denial of access without further review. The Appellate Division noted that "OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." Id. The Court stated that:

[OPRA] also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

Further, the Court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

⁷ Counsel also noted that the Complainant already possessed records indicating the LBF's final determination, including the transcript from the September 9, 2015 meeting and the subsequent resolution.

⁸ Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

Jeffrey S. Feld v. New Jersey Division of Local Government Services, 2015-333 – Findings and Recommendations of the Executive Director

Here, the record at issue is a report⁹ that was created by a staff member regarding the Complainant's standing to challenge its approval of the City of Orange's 2014 Budget. In the SOI, Custodian's Counsel argued that the report was ACD in nature and provided additional arguments on how the report fell within the deliberative process privilege. Specifically: 1) the report was created prior to the LFB's September 9, 2015 decision finding that the Complainant did not have standing to challenge its prior budget approval; and 2) the report contained policy and decisional recommendations. Notwithstanding Counsel's description of the content of the staff report, the GRC must review same in order to determine the full applicability of ACD exemption and deliberative process privilege.

Therefore, the GRC must conduct an *in camera* review of the responsive staff report to determine the validity of the Custodian's assertion that the record was exempt under OPRA as ACD material and/or under the deliberative process privilege. N.J.S.A. 47:1A-1.1. See Paff, 379 N.J. Super. at 346.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the responsive staff report to determine the validity of the Custodian's assertion that the record was exempt under OPRA as "inter-agency or intra-agency advisory, consultative, or deliberative" material and/or under the deliberative process privilege. N.J.S.A. 47:1A-1.1. See Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian must deliver¹⁰ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 2 above), a document or redaction index¹¹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹² that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

⁹ Both parties agree that the report is the record responsive to the Complainant's OPRA request.

¹⁰ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

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Jeffrey S. Feld v. New Jersey Division of Local Government Services, 2015-333 – Findings and Recommendations of the Executive Director

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

May 16, 2017