



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

December 13, 2016 Government Records Council Meeting

Paula Brown
Complainant

Complaint No. 2016-177

v.

Township of Cedar Grove (Essex)
Custodian of Record

At the December 13, 2016 public meeting, the Government Records Council (“Council”) considered the December 6, 2016 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) and In re Readoption With Amendments of Death Penalty Regulations, 182 N.J.149 (2004). See also Edwards v. City of Jersey City, GRC Complaint No. 2002-71 (February 2004), Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006), 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 13th Day of December, 2016

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: December 14, 2016

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 13, 2016 Council Meeting**

Paula Brown¹
Complainant

GRC Complaint No. 2016-177

v.

Township of Cedar Grove (Essex)²
Custodial Agency

Records Relevant to Complaint: A copy of “a document that spells out the Hilltop agreement between the township, K. Hovanian and Essex County. Tom Tucci referenced it in a conversation I had with him last week”

Custodian of Record: Kathleen Stutz
Request Received by Custodian: May 27, 2016
Response Made by Custodian: June 6, 2016
GRC Complaint Received: June 30, 2016

Background³

Request and Response:

On May 27, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 6, 2016, the fifth (5th) business day following receipt of said request, the Custodian responded in writing, informing the Complainant that the requested record is denied because it has not been finalized yet, and therefore constituted advisory, consultative, or deliberative (“ACD”) material exempt from disclosure under N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On June 30, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant states that she provided the OPRA request to the Custodian on May 27, 2016, and that the Custodian responded on June 6, 2016, denying the request as exempt ACD material.

¹ No legal representation listed on record.

² Represented by Joshua A. Zielinski, Esq., of McElroy, Deutsch, Mulvaney & Carpenter, LLP (Newark, NJ).

³ 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.

The Complainant states that the requested record is a writing that describes a transaction between the Township, Essex County, and developer K. Hovanian, specifying certain obligations of the County which must be met. The Complainant states that the document relates to the developer's right to build a housing complex in Cedar Grove. The Complainant states that the housing complex was approved in June 2015, and it was at that time that the document "was said" to have been finalized when the council voted its approval. The Complainant contends that she had a conversation with the Township Manager, wherein he referenced the document and suggested she obtain a copy of it, but the Township Clerk refused to disclose it.

Statement of Information:

On July 14, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on May 27, 2016, and responded in writing on June 6, 2016. The Custodian certifies that the record responsive to the request is a 56 page draft redevelopment agreement between the Township of Cedar Grove and K. Hovnanian at Cedar Grove Urban Renewal, LLC. The Custodian further certifies that after conferring with the Township Manager and the Township Attorney, she concluded that said agreement is a draft document subject to further negotiations; therefore she denied the Complainant access to the record as ACD material pursuant to N.J.S.A. 47:1A-1.1.

The Custodian attached to the SOI a certification of Thomas Tucci, dated July 14, 2016. Mr. Tucci avers that he is the Township Manager for the Township of Cedar Grove. Mr. Tucci certifies that he had a telephone conversation with the Complainant the week of May 16, 2016, wherein he recalls the Complainant asking him if a ballfield was to be constructed as part of the Hilltop Redevelopment Project. Mr. Tucci further certifies that he informed the Complainant that a ballfield is referenced in the proposed Redevelopment Agreement for the Hilltop Redevelopment Project. Mr. Tucci certifies that Cedar Grove and K. Hovnanian are continuing to negotiate terms and exchange drafts of the agreement. Mr. Tucci also certifies that the requested agreement is not final and is subject to further revisions.

The Custodian's Counsel states that the document requested by the Complainant is a draft redevelopment agreement between the Township and K. Hovnanian, which will govern the parties' rights and responsibilities for the Hilltop Redevelopment Area, located within Cedar Grove. Counsel states that the agreement contains provisions that have been proposed by the parties to effectuate the redevelopment plan and that it is still being revised by the parties. Moreover, Counsel states that the governing body has not yet voted on or approved the final language of the agreement. In support thereof, Counsel references the certification of Township Manager Thomas Tucci, dated July 14, 2016, which is attached to the SOI.

Counsel argues that draft documents generally comprise ACD material exempt from disclosure. Counsel also cites to Educ. Law Ctr. v. NJ Dep't of Educ., 198 N.J. 274, 299 (2009), as holding that a draft document is protected by the deliberative process privilege if it is used in the decision-making process and its disclosure would reveal the nature of the deliberations that occurred during that process. Counsel argues that the requested record is a draft document and is therefore exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1. Counsel

states that once the agreement has been finalized and approved by the governing body it will be subject to disclosure as a public record.

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.

The Complainant is seeking a written agreement that the Custodian denied because the Custodian asserted it is a draft that has not been finalized and approved by the governing body and is still subject to revision. As such, the Custodian denied the draft agreement as ACD material pursuant to N.J.S.A. 47:1A-1.1. Although the Complainant claimed that the housing complex was approved in June 2015, and it was at that time that the document was finalized, she offered no evidence to refute the custodian’s certification that the document had not been finalized. Therefore, the evidence of record reflects that the responsive record is indeed a draft document.

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).

Federal and State courts have consistently held that draft records of a public agency fall within the deliberative process privilege. See United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993); Archer v. Cirrincione, 722 F.Supp. 1118 (1989); Coalition to Save Horsebarn Hill v. Freedom of Information Commission., 73 Conn.App. 89, 806 A.2d 1130 (2002). 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.”

Likewise, the Council has long held that draft records of a public agency fall within the deliberative process privilege. In Edwards v. City of Jersey City, GRC Complaint No. 2002-71 (February 2004), the Council noted that, in general, drafts are deliberative materials. In Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006), the Council determined that all draft documents, including draft meeting minutes, are entitled to the protection of 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.

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 Edwards, GRC 2002-71, Parave-Fogg, 2006-51, 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) and In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (2004). See also Edwards v. City of Jersey City, GRC Complaint No. 2002-71 (February 2004), Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006), 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

December 6, 2016