



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 13, 2018 Government Records Council Meeting

Daniel G. Nee
Complainant

Complaint No. 2016-209

v.

Brick Township Board of Education (Ocean)
Custodian of Record

At the November 13, 2018 public meeting, the Government Records Council (“Council”) considered the November 7, 2018 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:

1. The Custodian did not unlawfully deny access to request item number 1 because the Custodian certified that the record did not exist as of the date of the request and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).
2. Because the evidence of record indicates that the record requested in item number 2 is a draft document and because draft documents in their entirety comprise advisory, consultative or deliberative 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). As such, it is unnecessary for the Council to determine whether the record is also exempt from access as attorney-client privileged material.

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 November, 2018

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: November 15, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
November 13, 2018 Council Meeting**

Daniel G. Nee¹
Complainant

GRC Complaint No. 2016-209

v.

Brick Township Board of Education (Ocean)²
Custodial Agency

Records Relevant to Complaint: Electronic copies of:

1. Termination charge(s) filed against Walter Uszenski
2. Draft document of termination charge(s) against Walter Uszenski³

Custodian of Record: James Edwards, Jr.

Request Received by Custodian: June 14, 2016

Response Made by Custodian: June 17, 2016

GRC Complaint Received: July 25, 2016

Background⁴

Request and Response:

On June 14, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 17, 2016, the third (3rd) business day following receipt of said request, the Custodian responded in writing informing the Complainant that records responsive to request items number 1 and 2 do not exist.

Denial of Access Complaint:

On July 25, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that Walter Uszenski is currently suspended from his position as the school superintendent because he was indicted on criminal charges. The Complainant further asserted that the Custodian’s Counsel was asked at the January 6, 2016 Brick Township Board of Education (“Board”) meeting to review the pending

¹ No legal representation listed on record.

² Represented by Ryan Amberger, Esq., of Montenegro, Thompson, Montenegro & Genz, P.C. (Brick, NJ).

³ There were other records requested that are not relevant to 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

matters related to Mr. Uszenski and present options regarding termination of Mr. Uszenski's contract at the next Board meeting.⁵

The Complainant attached to the complaint as Exhibits B through E several pages of invoices which he alleged were submitted to the Board by the Custodian's Counsel. The invoices reveal that the Custodian's Counsel had conducted research, drafted charges, and revised and finalized a draft of charges for review and discussion with Board personnel. The invoices also reveal that the Custodian's Counsel drafted a statement of initial termination charges. The initials W.U. were used as an identifier in the invoices for the aforementioned services. The Complainant states that the initials W.U. stand for Walter Uszenski. The Complainant contends that the Custodian's denial of records responsive to request items number 1 and 2 under the reasoning that the records do not exist is not consistent with the evidence of record.

Statement of Information:

On August 4, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on June 14, 2016, and responded in writing on June 17, 2016.

The Custodian certified that request item number 1 does not exist because no termination charges had been filed against Walter Uszenski as of the date of the request. With respect to request item number 2, which is a draft document of termination charges against Walter Uszenski, the Custodian certifies that such a document was prepared by the Custodian's Counsel, but as of the date of the request the draft document had not been presented to the Board. The Custodian certifies that the record is exempt from disclosure under N.J.S.A. 47:1A-1.1 because it is intra-agency advisory, consultative or deliberative ("ACD") material and attorney-client privileged.

The Custodian's Counsel asserted that termination charges had not been filed against Walter Uszenski; therefore, the Custodian properly denied the Complainant's request as a nonexistent record. Counsel stated that the draft document of termination charge(s) was prepared by the law firm in response to the Board's instructions to report options regarding termination of Walter Uszenski's contract. Counsel further stated that the draft document has not yet been presented to the Board or to the Custodian, but was only reviewed by the Board Superintendent. As such, Counsel argued that the draft document is exempt from disclosure as ACD and attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1 (citations omitted).

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

⁵ The Complainant attached a copy of the January 7, 2016 meeting minutes to the complaint as Exhibit A which confirmed that the matter was discussed.

“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.

Request item number 1 - termination charge(s) filed against Walter Uszenski

In Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant’s request for billing records existed and the complainant submitted no evidence to refute the custodian’s certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian’s certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified that the records responsive to request item number 1 do not exist. The Custodian’s Counsel elaborated on the Custodian’s denial by stating that at the time of the request, no termination charges had been filed against Walter Uszenski. Further, the Complainant did not submit any evidence to refute the Custodian’s certification. Specifically, the Complainant did not offer any proof that termination charges had been filed against Walter Uszenski as of the date of the request.

The Complainant’s Exhibits B through E reveal that the Custodian’s Counsel had conducted research, drafted charges, and revised and finalized a draft of charges for review and discussion with Board personnel. This is all work in preparation for the filing of termination charges, but there is nothing within the exhibits to indicate that the termination charges were in fact filed. To the contrary, the last entry for W.U. (which the Complainant alleged is the abbreviation for Walter Uszenski) in the attorney invoices attached to the complaint as Exhibit E references a review of correspondence *in preparation* for a conference regarding W.U. This entry was made on February 10, 2016, and indicates that the matter was still in the review and advisory stage. Moreover, the Complainant’s June 14, 2016 request also sought a “[d]raft document of termination charge(s)” which lends credence to the Custodian’s averment that the record was nonexistent as of the date of the request.

Accordingly, the Custodian did not unlawfully deny access to request item number 1 because the Custodian certified that the record did not exist as of the date of the request and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. See Pusterhofer, GRC 2005-49.

Request item number 2 - draft document of termination charge(s) against Walter Uszenski

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 Bd. of Educ., 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 the Liquidation of Integrity Ins. Co., 165 N.J. 75, (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). 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, 165 N.J. 75. 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). Id. 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.

[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 “[d]raft document of termination charge(s) against Walter Uszenski.” (Emphasis added.)

Therefore, because the evidence of record indicates that the record requested in item number 2 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. As such, it is unnecessary for the Council to determine whether the record is also exempt from access as attorney-client privileged material.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian did not unlawfully deny access to request item number 1 because the Custodian certified that the record did not exist as of the date of the request and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer v. N.J. Dep't of Educ., GRC Complaint No. 2005-49 (July 2005).
2. Because the evidence of record indicates that the record requested in item number 2 is a draft document and because draft documents in their entirety comprise advisory, consultative or deliberative 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). As such, it is unnecessary for the Council to determine whether the record is also exempt from access as attorney-client privileged material.

Prepared By: John E. Stewart
Staff Attorney

November 7, 2018