



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

June 25, 2019 Government Records Council Meeting

Lewis J. DeEugenio, Jr.
Complainant

Complaint No. 2016-254

v.

Borough of Glassboro (Gloucester)
Custodian of Record

At the June 25, 2019 public meeting, the Government Records Council (“Council”) considered the June 18, 2019 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 complied with the Council’s December 18, 2018 Interim Order because she responded in the prescribed time frame providing the appropriate number of copies of responsive records. Further, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.
2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to the withheld proposals, maps, and ordinance mark-up under the exemption for records constituting inter-agency or intra-agency advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-6.**
3. Because there has been no unlawful denial of access here, the Council should decline to address whether a knowing and willful violation occurred.
4. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian’s conduct. Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the *in camera* review confirmed that the requested records constitute ACD material, and therefore were lawfully withheld from access at the time of the request. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 71.

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 2019

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 28, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Council Staff
June 25, 2019 Council Meeting**

**Lewis J. DeEugenio, Jr.¹
Complainant**

GRC Complaint No. 2016-254

v.

**Borough of Glassboro (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: “All written reports or recommendations (one complete copy of each) that the Glassboro Borough Council [(“Borough Council”)] received, reviewed, or otherwise considered in connection with the [Borough] Council’s decision to adopt Ordinance #16-26 to expand Glassboro’s permit-only parking restrictions to include additional streets.”

Custodian of Record: Karen Cosgrove³

Request Received by Custodian: August 25, 2016

Response Made by Custodian: August 26, 2016; September 1, 2016

GRC Complaint Received: September 8, 2016

Records Submitted for *In Camera* Examination: Proposals, recommendations, and maps related to parking permits and zoning.

Background

December 18, 2018 Council Meeting:

At its December 18, 2018 public meeting, the Council considered the December 11, 2018 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The GRC must conduct an *in camera* review of the seven (7) responsive records to determine the validity of the Custodian’s assertion that the records are exempt from access under OPRA as constituting advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).

¹ Represented by William M. Horner, Esq. (Salem, NJ).

² Represented by Gary M. Marek, Esq., of the Law Offices of Gary M. Marek, Esq. (Mt. Laurel, NJ).

³ The original Custodian of Record was Patricia A. Frontino.

2. **The Custodian shall deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁶ that the records provided are the records 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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On December 19, 2018, the Council distributed its Interim Order to all parties on. On December 27, 2019, the Custodian, through Counsel, responded to the Council's Interim Order. The Custodian provided nine (9) copies of seven (7) identified records withheld from disclosure as constituting inter-agency or intra-agency advisory, consultative, or deliberative material ("ACD"). N.J.S.A. 47:1A-1.1. The Custodian also provided a certification and document index identifying each record.

On January 3, 2019, the Complainant, through Counsel, provided a reply to the Custodian's Response. The Complainant provided his reasoning for filing the OPRA request, asserting his suspicions that the parking prohibitions were proposed for reasons other than for the public welfare. The Complainant noted that the Custodian certified that the proposed recommendations regarding the parking permits were not adopted by the Borough Council. The Complainant asserted that this meant that the responsive records are necessary for him to determine whether the Borough Council chose to prohibit parking on his street over the recommendations of the police department.

The Complainant argued that even if the Government Records Council ("GRC") finds that the records constitute ACD material, his need for the records overrides the Council's interest in confidentiality. The Complainant asserted that the records directly relate to the ordinance at issue, and that the content contained within the records cannot be found via another source. The Complainant argued that he is not seeking records containing the actual deliberations, but rather the materials utilized during said deliberations. The Complainant also argued that frank and independent discussion by the Borough Council would not be hindered by disclosing the records,

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 the GRC physically receives them 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."

as the issue of on-street parking has been a public matter, and these particular recommendations were not implemented by the Borough Council.

On January 9, 2019, the Custodian, through Counsel, responded to the Complainant's reply. The Custodian first contended that the proceedings before other agencies are unrelated to the instant complaint and therefore would be improper to discuss in this forum. The Custodian then asserted that the Complainant does not seem to take issue with the Custodian's designation of the submitted records as ACD materials, but rather insists that his need for the records should outweigh the designation. The Custodian contended that the Complainant's need for the records does not change their nature, and that the Complainant should seek the records via other avenues, and not via OPRA.

Analysis

Compliance

At its December 18, 2018 meeting, the Council ordered the Custodian to provide nine (9) copies of the withheld records for *in camera* review. On December 19, 2018, 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 December 28, 2018, accounting for the holidays.

On December 27, 2018, the fourth (4th) business day after receipt of the Council's Order, the Custodian, via Counsel, responded in writing, providing nine (9) copies of the records withheld in their entirety. The Custodian also simultaneously provided certified confirmation of Compliance to the Council Staff.

Therefore, the Custodian complied with the Council's December 18, 2018 Interim Order because she responded in the prescribed time frame providing the appropriate number of copies of responsive records. Further, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.

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 excludes from the definition of a government record ACD 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 . . . [ACD] 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, 88 (2000); In re Readoption with Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004).

In Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83, 89-90 (App. Div.) (certif. denied, 233 N.J. 484 (2018)), the Appellate Division discussed the deliberative process privilege at length regarding a request for draft meeting minutes, stating:

The applicability of the deliberative process privilege is government by a two-prong test. The judge must determine both that a document is (1) "pre-decisional," meaning it was "generated before the adoption of an agency's police or decision;" and (2) deliberative, in that it "contain[s] opinions, recommendations, or advice about agency policies." Educ. Law Ctr. v. Dep't of Educ., 198 N.J. 274, 286 (2009) (quoting [Integrity, 165 N.J. at 84-85]). If a document stratifies both prongs, it is exempt from disclosure under OPRA pursuant to the deliberative process privilege.

Regarding the first prong, the court stated that "a draft is not a final document. It has been prepared for another person or persons' editing and eventual approval." Id. at 90. Therefore, the court held that draft meeting minutes are pre-decisional since they are subject to revision and not yet approved for public release. Id. at 90-91.

Regarding the second prong, the court held that "the document must be shown to be closely related to the formulation or exercise of . . . policy-oriented judgment or [to] the process by which policy is formulated." Id. at 91 (quoting Ciesla v. N.J. Dep't of Health & Sr. Servs., 429 N.J. Super. 127, 138 (App. Div. 2012) (internal quotations omitted)). The court found that the requested draft minutes, as compiled by the writer in attendance at the meeting, were subject to additions, suggestions, and other edits from the members of the public body. Id. Thus, the draft minutes satisfied the second prong of the test. Id. at 92.

Finally, in Eastwood v. Borough of Englewood Cliffs (Bergen), GRC Complaint No. 2012-121 (June 2013), the mayor, during a special meeting, showed members of the public the conceptual drawings of a redevelopment plan on a tablet device. Despite a public airing of the document, the custodian later denied a copy of the drawings, arguing that they constituted ACD material and were therefore exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1. The Council 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. The ACD exemption is always held in light of the Integrity test.

[Id. at 4.]

Thus, despite the mayor's decision to show the ACD material at a public meeting, the Council held that OPRA intended that the ACD privilege 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, 429 N.J. Super. at 127).

The GRC conducted an *in camera* examination on the submitted records. Upon review, the results of this examination support the Custodian's claim that all of the records constitute ACD material. Initially, the records satisfy the first prong of the analysis. The identified proposals, maps, and ordinance mark-up were created in anticipation of revising ordinances regarding parking permits and zoning. Moreover, the responsive records included the original proposal and map as well as subsequent revisions, with marked amendments contained therein. Thus, the records constitute draft documents and are therefore pre-decisional. See Ciesla, 429 N.J. Super. at 140-41.

As to the second prong, each proposal and ordinance mark-up contain policy recommendations and/or proposed revisions to the relevant ordinances regarding parking zones and permitting. Additionally, the maps illustrate the revised parking zones outlined by their respective proposal variations. That the records include amended versions of the same document demonstrate their deliberative nature, satisfying the second prong. See Id. Moreover, the Complainant does not refute the Custodian's certification that the records contain recommendations provided to the Borough Council. See Complainant's Letter to the GRC, dated January 3, 2019.

Although the Complainant noted that the recommendations were not implemented by the Borough Council, that fact does not affect the privilege's applicability. See Ciesla, 429 N.J. Super. at 140. Moreover, the privilege invariably includes material utilized by the Borough Council to formulate policy, not just those records detailing the actual deliberations amongst the Borough Councilmembers. See Ciesla, 429 N.J. Super. at 139-40.

Lastly, the Complainant asserted that the records should be disclosed even if it were found that they qualify for the privilege based upon his need for the records overriding the Borough Council's confidentiality concerns. This argument amounts to a request under the common-law right of access. See Educ. Law Ctr., 198 N.J. at 302-03. However, the case law is clear that the GRC does not have jurisdiction over common-law issues of public access to records. Ciesla, 429 N.J. Super. at 146-48.

Thus, the Custodian lawfully denied access to the withheld records because they fell within the ACD exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. For this reason, no disclosure is warranted.

Knowing & Willful

Because there has been no unlawful denial of access here, the Council should decline to address whether a knowing and willful violation occurred.

Prevailing Party Attorney's Fees

OPRA provides that:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . .; or in lieu of filing an action in Superior Court, file a complaint with the Government Records Council A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

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

In Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006), the court held that a complainant is a “prevailing party” if he achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. Additionally, the court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Id.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, 196 N.J. at 71, (quoting Buckhannon Bd. & Care Home v. West Virginia Dep’t of Health & Human Res., 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties . . .” Id. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Further, the Supreme Court expressed concern that the catalyst theory would spawn extra litigation over attorney's fees. Id. at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

However, the Court noted in Mason that Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72 (citing Teeters, 387 N.J. Super. at 429). See also Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), certif. denied, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court accepted the application of the catalyst theory within the context of OPRA, stating that:

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6. Under the prior RTKL, “[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$500.00.” N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a **prevailing party**; and (2) eliminate the \$500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.

[Mason at 73-76 (2008).]

The Court in Mason further held that:

[R]equestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) “a factual causal nexus between plaintiff's litigation and the relief ultimately achieved”; and (2) “that the relief ultimately secured by plaintiffs had a basis in law.” Singer v. State, 95 N.J. 487, 495, [certif. denied] (1984).

[Id. at 76.]

Here, the Complainant initially sought access to reports and recommendations received, reviewed, or considered by the Borough Council in adopting an ordinance pertaining to parking permits and zoning. The Custodian denied access to the request, asserting that the located responsive records constitute ACD material.

In determining whether the Complainant is a prevailing party, the evidence of record must establish a casual nexus existed between the filing of this complaint and disclosure of records. Having reviewed the evidence, the GRC does not find that such a casual nexus exists. Based upon the findings of the *in camera* review, the requested records constituted ACD material. Thus, at the time of the subject OPRA request, no unlawful denial of access occurred, and the Custodian was under no obligation to provide the records to the Complainant.

Therefore, the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters, 387 N.J. Super. at 432. Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason, 196 N.J. at 71. Specifically, the *in camera* review confirmed that the requested records constitute ACD material, and therefore were lawfully withheld from access at the time of the request. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 71.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian complied with the Council's December 18, 2018 Interim Order because she responded in the prescribed time frame providing the appropriate number of copies of responsive records. Further, the Custodian simultaneously provided certified confirmation of compliance to the Council Staff.
2. **The *In Camera* Examination set forth above reveals the Custodian has lawfully denied access to the withheld proposals, maps, and ordinance mark-up under the exemption for records constituting inter-agency or intra-agency advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-6.**
3. Because there has been no unlawful denial of access here, the Council should decline to address whether a knowing and willful violation occurred.
4. The Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Teeters v. DYFS, 387 N.J. Super. 423, 432 (App. Div. 2006). Additionally, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 71 (2008). Specifically, the *in camera* review confirmed that the requested records constitute ACD material, and therefore were lawfully withheld from access at the time of the request. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. See N.J.S.A. 47:1A-6, Teeters, 387 N.J. Super. at 432, and Mason, 196 N.J. at 71.

Prepared By: Samuel A. Rosado
Staff Attorney

June 18, 2019



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

December 18, 2018 Government Records Council Meeting

Lewis J. DeEugenio, Jr.
Complainant

Complaint No. 2016-254

v.

Borough of Glassboro (Gloucester)
Custodian of Record

At the December 18, 2018 public meeting, the Government Records Council (“Council”) considered the December 11, 2018 Findings and Recommendations of the Council Staff 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 GRC must conduct an *in camera* review of the seven (7) responsive records to determine the validity of the Custodian’s assertion that the records are exempt from access under OPRA as constituting advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,³ that the records provided are the records 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.
4. The Council defers analysis of whether the Complainant is a prevailing party 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 the GRC physically receives them 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 18th Day of December, 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: December 19, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
December 18, 2018 Council Meeting**

**Lewis J. DeEugenio, Jr.¹
Complainant**

GRC Complaint No. 2016-254

v.

**Borough of Glassboro (Gloucester)²
Custodial Agency**

Records Relevant to Complaint: “All written reports or recommendations (one complete copy of each) that the Glassboro Borough Council received, reviewed, or otherwise considered in connection with the Council’s decision to adopt Ordinance #16-26 to expand Glassboro’s permit-only parking restrictions to include additional streets.”

Custodian of Record: Patricia A. Frontino

Request Received by Custodian: August 25, 2016

Response Made by Custodian: August 26, 2016; September 1, 2016

GRC Complaint Received: September 8, 2016

Background³

Request and Response:

On August 25, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 26, 2016, the Custodian responded in writing, stating that the request was invalid as overly broad. On or before September 1, 2016, counsel for the Complainant contacted the counsel for the Custodian and clarified and limited the request to “written reports or recommendations regarding proposed expansion of the parking by permit Ordinance to include additional streets in the Ridge area.”

On September 1, 2016, the Complainant responded to the Custodian in writing, identifying seven (7) responsive records but denying access to all. The Custodian stated that each record is protected from disclosure as constituting inter-agency or intra-agency advisory, consultative, or deliberative material (“ACD”) pursuant to N.J.S.A. 47:1A-1.1. See Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 284 (2009).

¹ Represented by William M. Horner, Esq. (Salem, NJ).

² Represented by Gary M. Marek, Esq., of the Law Offices of Gary M. Marek, Esq. (Mt. Laurel, 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Denial of Access Complaint:

On September 8, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that he submitted his request on August 25, 2016. The Complainant contended that he was twice denied access by the Custodian, and was informed by counsel that the denials were inappropriate, initiating this complaint.

Statement of Information:

On March 17, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on August 25, 2016. The Custodian certified that she responded in writing on August 26, 2016, asserting that the request was invalid as overly broad. The Custodian then certified that the Complainant’s Counsel contacted the Custodian’s Counsel and clarified the request. The Custodian then responded to the clarified request on September 1, 2016, denying access to the requested records.

The Custodian contended that the responsive records were protected from access under OPRA as constituting ACD material. N.J.S.A. 47:1A-1.1. See Educ. Law Ctr., 1985 N.J. at 276, In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004), and Bergen Cnty Improvement Auth. v. Norther Jersey Media, 370 N.J. Super. 504, 516 (App. Div. 2004). The Custodian contended that each record was predecisional, and that disclosure would reveal the advice and deliberations that occurred between members of the Glassboro Police Department (“GPD”) and the Glassboro Borough Council (“Council”). The Custodian contended that each record was prepared by members of the GPD and provided to the Council for consideration on whether to adopt a permit parking ordinance.

Accordingly, the Custodian asserted that there was no unlawful denial of access. N.J.S.A. 47:1A-6.

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. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁴ 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

⁴ Paff v. N.J. Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

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.]

In the instant matter, the Custodian asserted that the records at issue constitute ACD material and are therefore not subject to access under OPRA. N.J.S.A. 47:1A-1.1. The Custodian provided descriptions of the responsive records as part of the SOL.

Notwithstanding the Custodian’s description of the responsive records, a “meaningful review” is necessary to determine whether all withheld and redacted records reasonably fall within the ACD exemptions. The GRC must thus review same in order to determine the full applicability of exemptions. Such an action is not uncommon, as the GRC will routinely perform an *in camera* review in similar circumstances. See Pouliot v. N.J. Dep’t of Educ., GRC Complaint No. 2015-281 (Interim Order dated January 31, 2017).

Therefore, the GRC must conduct an *in camera* review of the seven (7) responsive records to determine the validity of the Custodian’s assertion that the records are exempt from access under OPRA as constituting ACD material. 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.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the seven (7) responsive records to determine the validity of the Custodian's assertion that the records are exempt from access under OPRA as constituting advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
2. **The Custodian shall deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 1 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁷ that the records provided are the records 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.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Samuel A. Rosado
Staff Attorney

December 11, 2018

⁵ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

⁶ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁷ "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."