



State of New Jersey
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LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

August 28, 2018 Government Records Council Meeting

Doreen Janes
Complainant

Complaint No. 2016-295

v.

Ramapo College
Custodian of Record

At the August 28, 2018 public meeting, the Government Records Council (“Council”) considered the August 21, 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 the Council find that the Custodian lawfully denied access to both the preliminary report and redacted portions of the final report under the “inter-agency or intra-agency advisory, consultative, or deliberative material” exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Specifically, the preliminary report is exempt under OPRA as a draft document. See Ciesla v. N.J. Dept. of Health & Senior Serv., 429 N.J. Super. 127 (App. Div. 2012); Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009). Additionally, the redacted portions of the final report were exempt under the “inter-agency or intra-agency advisory, consultative, or deliberative material” exemption because said material was advisory and deliberative nature. Giambri v. Sterling High Sch. Dist. (Camden), GRC Complaint Nos. 2014-393, *et seq.* (September 2015).

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 28th Day of August, 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: August 30, 2018

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
August 28, 2018 Council Meeting**

**Doreen Janes¹
Complainant**

GRC Complaint No. 2016-295

v.

**Ramapo College²
Custodial Agency**

Records Relevant to Complaint: Copies of the preliminary and final reports created by Grant, Thornton, LLP., to include maps, spreadsheets, plans, models, organizational charts, tables, sketches, graphs, diagrams, policy changes, data, statistics, facts, figures, records, statements, accounts, documents, files numbers, suggestions, bids and accounts.in 2015 and 2016.

Custodian of Record: Michael A. Tripodi, Esq.

Request Received by Custodian: June 15, 2016 and September 29, 2016

Response Made by Custodian: June 27, 2016 and October 11, 2016

GRC Complaint Received: November 9, 2016

Background³

Request and Response:

On June 15, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 27, 2016, the Custodian responded in writing seeking clarification on a portion of the request and noting that an extension until July 5, 2016 was necessary. On July 5, 2016, the Custodian again responded in writing denying access a draft report under the “inter-agency or intra-agency advisory, consultative, or deliberative (“ACD”) material” exemption. N.J.S.A. 47:1A-1.1. The Custodian further noted that no final report existed. On September 6, 2016, the Complainant e-mailed the Custodian stating that she believed the Grant, Thornton report was no longer pre-decisional. The Complainant asked the Custodian to advise whether she should submit a new OPRA request for the report.

On September 29, 2016, the Complainant submitted a second (2nd) OPRA request to the Custodian seeking the above-mentioned records. On October 11, 2016, the Custodian responded in writing stating that he needed an extension until October 18, 2016 to redact the requested report.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Lauren Jensen.

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.

On October 18, 2016, the Custodian again responded to the Complainant's OPRA request in writing denying access to the preliminary report as ACD material. N.J.S.A. 47:1A-1.1. The Custodian further stated that he was granting access to the final report (167 pages) with redactions for information deemed exempt under the ACD exemption.

Denial of Access Complaint:

On November 9, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that she initially requested copies of the preliminary and final reports and was denied under the ACD exemption. The Complainant stated that in September 2016, Ramapo College ("Ramapo") announced that they were considering "12 month employees going to 10 months" and made supervisory changes. The Complainant argued that she was subsequently told that this announcement was based on the report, so she submitted her second OPRA request. The Complainant stated that she received a copy of the final report, but it was redacted.

Statement of Information:

On December 7, 2016, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's first (1st) OPRA request on June 15, 2016. The Custodian certified that, after a brief extension of time, he responded in writing on July 5, 2016 denying access to the preliminary report under the ACD exemption and noting that no final report existed. The Custodian certified that he received the Complainant's second (2nd) OPRA request on September 29, 2016. The Custodian affirmed that, also after a short extension, he responded in writing on October 18, 2016 denying access to the preliminary report. The Custodian further certified that he disclosed the final report, with redactions, to the Complainant at that time.

The Custodian certified that the records at issue here were a draft and final report prepared by Grant Thornton, LLP., an independent audit, tax, and advisory firm. The Custodian affirmed that Ramapo contracted with Grant, Thornton to "perform an organizational review across various departments to develop recommendations to improve efficiency, effectiveness, and service delivery." See Final Report at 5. The Custodian certified that Grant, Thornton worked with Ramapo employees to draft and finalize the reports at issue here.

The Custodian contended that he lawfully denied access to both the preliminary report and redactions portions of the final report under the ACD exemption. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274 (2009); Ciesla v. N.J. Dep't of Health & Senior Serv., 429 N.J. Super. 127 (App. Div. 2012). The Custodian argued that it was well established that draft documents were covered under the ACD exemption. Ciesla, 429 N.J. Super. at 140. Further, the Custodian asserted that the GRC and New Jersey Superior Court has held that independent consultant reports were not unlike internal deliberative material produced by an agency's employees. See N. Jersey Media Grp. v. Borough of Paramus, 2009 N.J. Super. Unpub. LEXIS 2066 (App. Div. 2009); Rademacher v. Borough of Eatontown, GRC Complaint No. 2004-18 (November 2005). Further, the Custodian contended that precedential case law in New Jersey mirrors federal case law in finding that independent consultant reports were deliberative. See Dep't of the Interior v. Klamath, 532 U.S. 1, 8-11 (2001); Nat'l Inst. Of Military Justice v. U.S. Dep't of

Defense, 512 F.3d 677, 687 (D.C. Cir. 2008); Hunton & Williams v. U.S. Dep’t of Justice, 590 F.3d 272, 280 (4th Cir. 2010).

Regarding the first (1st) OPRA request, the Custodian argued that he appropriately denied access to same. The Custodian contended that the preliminary report was a draft document containing preliminary recommendations subject to the ACD exemption. Further, the Custodian certified that no final report existed at the time that the Complainant submitted her first (1st) OPRA request.

Regarding the second (2nd) OPRA request, the Custodian argued that he again appropriately responded. The Custodian argued that the preliminary report remained ACD as a draft document. The Custodian further contended that the final report was similarly comprised of ACD material: the sole purpose of the report was to “perform an organizational review across various departments to develop recommendations to improve efficiency, effectiveness, and service delivery.” See Final Report at 5.

The Custodian argued that even though the entire final report fell under the ACD exemption, he redacted and disclosed the report in the interest of transparency. The Custodian averred that the redactions were limited to “opinions, recommendations, or advice” that pre-dated Ramapo’s potential actions. The Custodian included as part of the SOI the redacted final report and a complete Vaughn Index. The Custodian detailed some of the redactions to the report such as “Key Themes” on pages 6 and 7 because they related “to potential improvements to efficiency, effectiveness, and service delivery.” The Custodian further noted that the “General Observations” chart on pages 12 through 16 because they related to the forgoing and contained recommendations based on those points. The Custodian contended that it was thus clear that the redacted information was part of the process Ramapo used to formulate a decision and that disclosure would reflect the deliberative aspects of said process. N.J.S.A. 47:1A-1.1; Educ. Law Ctr., 198 N.J. at 295. The Custodian argued that although he was not required to complete the Index, the redactions and Index allowed the Complainant to assess the applicability of the ACD exemption. Burke v. Brandes, 429 N.J. Super. 169, 178 (App. Div. 2012)(citing Paff v. N.J. Dep’t of Labor, 379 N.J. Super. 346, 354 (App. Div. 2005)).

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.

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, 198 N.J. at 285 (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.

A custodian claiming an exception to the disclosure requirements under OPRA on that 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.

In Giambri v. Sterling High Sch. Dist. (Camden), GRC Complaint Nos. 2014-393, 2014-396 & 2014-401 (September 2015), the custodian disclosed to the complainant a record entitled “Concept Paper” redacting a vast majority of same, with the exception of seventeen (17) individual words. The custodian argued that she properly withheld a majority of the paper, which related to providing options for development of a District-owned tract of land. Based on limited unredacted information present in the record, the Council ordered an *in camera* review of the paper, as contemplated in Paff, 379 N.J. Super. 346. The *in camera* review revealed that the redacted information fell within the ACD exemption. Thus, the Council determined that the custodian lawfully denied access to the redacted portions of the paper. Id. at 5 (citing Educ. Law Ctr., 198 N.J. at 285, 301-302).

The Council has also 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. Village of Ridgewood (Bergen), GRC Complaint No. 2010-79 (February 2011), the custodian certified that a requested letter was a draft that had not yet been reviewed by the municipal engineer. The Council, looking to relevant case law, concluded that the requested letter was exempt from disclosure under OPRA as ACD material. See also Ciesla v. N.J. Dep’t of Health and Senior Serv., GRC Complaint No. 2010-38 (May 2011)(aff’d Ciesla, 429 N.J. Super. 127) (holding that a draft staff report was exempt from disclosure as ACD material); Libertarians for Transparent Gov’t v. Gov’t Records Council, 453 N.J. Super. 83 (app. Div. 2018)(cert. denied ___ N.J. ___ (2018)).

In the instant complaint, two reports are at issue. The first was a preliminary report that the Custodian denied access to under the ACD exemption. In the SOI, the Custodian certified that the preliminary report was a draft document exempt under the ACD exemption. The second was the

final report, which the Custodian disclosed with a number of redactions under the ACD exemption. The Custodian argued in the SOI that the redactions were lawful under N.J.S.A. 47:1A-1.1.

Turning first to the preliminary report, the evidence of record suggests that a lawful denial of access occurred here. First, the term preliminary overtly suggests that the report was unfinished or in draft form at the time the Complainant requested in it June, 2016. Second, the preliminary report was superseded by a finalized report in August 2016. Thus, following Ciesla, 429 N.J. Super. 127, and relevant GRC case law, it is clear that the Custodian lawfully denied access to the preliminary report.

Turning next to the final report, the evidence of record supports that Giambri, GRC 2014-393, *et seq.* is controlling in part. As part of the SOI, the Custodian provided to the GRC the entire redacted report, as well as a Vaughn Index. Based on this information and in looking to Giambri, the GRC is persuaded that the Custodian lawfully redacted and disclosed the report.⁴ For supporting evidence, a majority of the report contained charts entitled “Opportunities For Improvement.” Each of those charts included subheadings for “Observations,” “Risk/Impact,” and “Recommendations.” Each chart was also accompanied by a “Future State Organization Chart.” The report included additional charts within the “Proposed Action Plan” section with sub-headings for “Recommendations,” “Potential Benefits” for those recommendations, and the “Level of Effort” to implement them. Further, and similar to the intent of the paper at issue in Giambri, the final report here was clearly created for Ramapo to utilize in determining whether to make staffing changes. The report thus conforms to the two-prong ACD test contemplated in Educ. Law Ctr., 198 N.J. 274 and employed in Giambri, GRC 2014-393, *et seq.*

However, the GRC must note that in Paff, 379 N.J. Super. 346, the court held that the GRC had a responsibility to perform an *in camera* review where “necessary to a determination of the validity of a claimed exemption,” (Id. at 355). The court also held that it did not “imply that *in camera* review is required in a case in which the document is per se exempt from access under OPRA.” Id. Here, and where this matter departs from Giambri, the GRC has enough information to determine that the redacted information fell within the ACD exemption, thus negating the need for an *in camera* review. Specifically, the Council only had the benefit of seventeen (17) individual words over the entire paper at issue in Giambri. On the other hand, the Custodian here more minimally redacted the report and left unredacted the content regarding the final report’s focus and headings. Disclosure of the forgoing information provided adequate insight into the redacted portions of the report allowing the GRC to reach a conclusion absent an *in camera*. Thus, it is clear that the report is similar to the “Concept Paper” in Giambri.

Accordingly, the Custodian lawfully denied access to both the preliminary report and redacted portions of the final report under the ACD exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Specifically, the preliminary report is exempt under OPRA as a draft document. See

⁴ To the extent that the Complainant insinuated in the Denial of Access Complaint that the ACD exemption no longer applied because Ramapo enacted certain policies, the GRC notes the following: in Eastwood v. Borough of Englewood Cliffs (Bergen), GRC Complaint No. 2012-121 (June 2013), the Council held that conceptual drawings shown to the public during a meeting were still exempt as ACD material because they met the two-prong ACD test. The Council reasoned that “the ACD exemption is not akin to a privilege that can be waived . . . similar to the attorney-client privilege exemption.” Id. at 4.

Ciesla, 429 N.J. Super. 127; Dalesky, GRC 2008-61. Additionally, the redacted portions of the final report were exempt under the ACD exemption because said material was advisory and deliberative nature. Giambri, GRC 2014-393, *et seq.*

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that the Custodian lawfully denied access to both the preliminary report and redacted portions of the final report under the “inter-agency or intra-agency advisory, consultative, or deliberative material” exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Specifically, the preliminary report is exempt under OPRA as a draft document. See Ciesla v. N.J. Dept. of Health & Senior Serv., 429 N.J. Super. 127 (App. Div. 2012); Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009). Additionally, the redacted portions of the final report were exempt under the “inter-agency or intra-agency advisory, consultative, or deliberative material” exemption because said material was advisory and deliberative nature. Giambri v. Sterling High Sch. Dist. (Camden), GRC Complaint Nos. 2014-393, *et seq.* (September 2015)

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August 21, 2018