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LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

May 21, 2019 Government Records Council Meeting

Robert S. Daniel
Complainant

Complaint No. 2017-163

v.

Township of West Orange (Essex)
Custodian of Record

At the May 21, 2019 public meeting, the Government Records Council (“Council”) considered the May 14, 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 the requested draft resolutions are exempt from disclosure under the “inter-agency or intra agency advisory, consultative, or deliberative material” exemption. N.J.S.A. 47:1A-1.1; Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div.) (certif. denied, 233 N.J. 484 (2018)); Eastwood v. Borough of Englewood Cliffs (Bergen), GRC Complaint No. 2012-121 (June 2013); Chang v. Town of West New York (Hudson), GRC Complaint No. 2014-213 (Interim Order dated February 24, 2015). Thus, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6.

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 21st Day of May 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: May 22, 2019



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
May 21, 2019 Council Meeting**

**Robert S. Daniel¹
Complainant**

GRC Complaint No. 2017-163

v.

**Township of West Orange (Essex)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of draft Planning Board (“Board”) resolutions transmitted between members of the Board and the applicant in “PB-17-04 GBSJ properties” attached to multiple e-mails,³ as well as the draft resolution voted on at the June 7 Board meeting.⁴

Custodian of Record: Madelyn Longo
Request Received by Custodian: July 17, 2017
Response Made by Custodian: July 17, 2017
GRC Complaint Received: August 2, 2017

Background⁵

Request and Response:

On July 15, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On July 17, 2017, the Custodian responded in writing denying access to all draft resolutions under the “inter-agency or intra agency advisory, consultative, or deliberative [(“ACD”)] material” exemption. N.J.S.A. 47:1A-1.1. The Custodian also denied access to the final resolution stating that no record existed at that time.

Denial of Access Complaint:

On August 2, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that in response to a previous OPRA request, he received five (5) e-mails indicating that draft resolutions were attached. The

¹ No legal representation listed on record.

² Represented by Richard D. Trenk, Esq., of Trenk, DiPasquale, Della Fera & Sodono, P.C. (West Orange, NJ).

³ The e-mails in question were provided as part of a response to a prior OPRA request. As part of that response, the Custodian denied access to the draft resolutions, prompting the subject OPRA request.

⁴ The Complainant requested an additional record that is not at issue in this complaint.

⁵ 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.

Complainant noted that he submitted the subject OPRA request because the Custodian did not provide those resolutions to him.

The Complainant disputed that the draft resolutions were exempt as ACD material under OPRA. The Complainant asserted that the ACD exemption only applied to documents shared and circulated between government officials and their consultants. The Complainant argued that this situation is different: the Board (through its attorney) shared draft resolutions with the applicant's attorney. The Complainant thus argued that the ACD exemption could no longer apply once the Board attorney shared the draft resolutions with a third party.

Statement of Information:

On August 29, 2017, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on July 17, 2017. The Custodian affirmed that she responded in writing on the same day denying the requested records under the ACD exemption.

The Custodian argued that she lawfully denied access to the requested draft resolutions, totaling approximately eighteen (18) pages. The Custodian cited to the Council's history of determining that draft records were exempt from disclosure. See Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (March 2007) (holding that draft minutes were exempt from disclosure as ACD material per N.J.S.A. 47:1A-1.1) and Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006). The Custodian further asserted that in Shea v. Village of Ridgewood (Bergen), GRC Complaint No. 2010-79 (February 2011), the Council held that the requested draft records were exempt as ACD material. The Custodian noted that the Council "reiterated its position" in Anonymous v. Ocean City Historic Pres. Comm'n (Cape May), GRC Complaint No. 2015-02 (June 2015). The Custodian contended that her denial was consistent with the forgoing.

Additional Submissions:

On September 9, 2017, the Complainant submitted a letter to the GRC refuting the SOI. Therein, the Complainant reiterated his Denial of Access Complaint position that the drafts were shared with a third party, thus negating the ACD exemption. The Complainant also argued that the GRC's "Citizens Guide to OPRA" (Second Edition – July 2011) described the basic principles of OPRA, and common law more specifically:

If the information requested is a "public record" under common law and the requestor has a legally recognized interest in the subject matter contained in the material, then the material must be disclosed if the individual's right of access outweighs the State's interest in preventing disclosure.

Id. at 5.

The Complainant further argued that the “Citizen’s Guide” provided that “[a]ny limitations on the right of access to government records must be interpreted in favor of the public’s right of access.” Id. at 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.

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 (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. at 276 (quoting Integrity, 165 N.J. at 83)]. 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 by their very nature, 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 ‘the formulation or exercise of . . . policy-oriented judgment or [to] the process by which policy is formulated.’” Ciesla v. N.J. Dep’t of Health & Sr. Servs., 429 N.J. Super. 127, 138 (App. Div. 2012) (quoting McGee v. Twp. of E. Amwell, 416 N.J. Super. 602, 619-20 (App. Div. 2010)). Id. at 91. 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.

Further, the GRC has previously held that text of a draft resolution contained within an e-mail was exempt from disclosure under the ACD exemption. In Chang v. Town of West New York (Hudson), GRC Complaint No. 2014-213 (Interim Order dated February 24, 2015), the Council reviewed an e-mail *in camera* to determine whether the custodian lawfully denied access to it. The e-mail comprised of two (2) parts, with the second being the text of a draft resolution. The Council held that this portion of the e-mail should not be disclosed because the “resolution contained in the body of the [e]-mail is in draft form.” Citing Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006) Ciesla v. N.J. Dep’t of Health & Senior Serv., Div. of Health Care Quality & Oversight, GRC Complaint No. 2010-38 (Final Decision dated May 24, 2011); Wolosky v. Sparta Bd. of Educ. (Sussex), GRC Complaint No. 2010193 (November 2011); Hyland v. Twp. of Lebanon, et al, GRC Complaint Nos. 2012-227 and 2012-228 (Interim Order dated June 24, 2014).

Finally, in Eastwood v. Borough of Englewood Cliffs (Bergen), GRC Complaint No. 2012-121 (June 2013), the Mayor, during a Township special meeting, showed members of the public the conceptual drawings of a redevelopment plan on a tablet device. Notwithstanding, 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 GRC held that:

[T]he ACD exemption is not akin to a privilege that can be waived through voluntary disclosure to the public similar to the attorney-client privilege exemption. ACD material is a description, not a privilege. Therefore, ACD material does not lose its character as ACD merely because it was shown in public. 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. 127).

Here, the Complainant’s OPRA request sought draft Board resolutions, as well as the draft resolution voted on “at the June 7 Board meeting.” The Custodian denied access to the

Complainant's OPRA request stating that said records were exempt from disclosure under the ACD exemption. This complaint followed, wherein the Complainant argued that the ACD exemption no longer applied because the Board shared the draft resolutions with a third party. In the SOI, the Custodian maintained that she denied access to the responsive records as draft documents.

Applying all relevant case law to the issue before the Council, the GRC is satisfied that the Custodian lawfully denied access to the draft resolutions under OPRA as ACD material. Initially, neither party disputes the draft nature of the resolutions at issue here. Further, the GRC has provided a long history of case law above confirming that draft documents are exempt from disclosure under OPRA. Thus, the requested resolutions are exempt from disclosure under the ACD exemption. Further, the Complainant's argument that the resolutions were no longer ACD because they were shared with a third party is incorrect. As stated in Eastwood, GRC 2012-121, the ACD exemption cannot be waived simply because it was shared with outside entities or members of the public. Thus, whether the Board collaborated with the third party to draft the resolution is of no moment.

Accordingly, the requested draft resolutions are exempt from disclosure under the ACD exemption. N.J.S.A. 47:1A-1.1; Libertarians, 453 N.J. Super. 83; Eastwood, GRC 2012-121; Chang, GRC 2014-213. Thus, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6.

Finally, the GRC briefly addresses the Complainant's common law discussion to the extent that he believed the GRC should order disclosure based on this principle. First, the GRC does not have the authority to address a requestor's common law right to access records. N.J.S.A. 47:1A-7(b); Rowan, Jr. v. Warren Hills Reg'l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013); Kelly v. N.J. Dep't of Transp., GRC Complaint No. 2010-215 (November 2011) at 2. Second, the Complainant referenced the common law explanation contained in the "Citizen's Guide to OPRA" in his September 9, 2017 letter, but omitted an important part of that section. Under the section heading "Are there other ways to request access to government records besides OPRA," the "Citizen's Guide" alerts readers of the following regarding common law challenges:

Note that any challenge to a denial of a request for records under the common law cannot be made to the [GRC], as the [GRC] only has jurisdiction to adjudicate challenges to denials of OPRA requests. A challenge to the denial of access under the common law can be made by filing an action in Superior Court. Additionally, the GRC cannot provide any guidance on how to submit a request under the common law.

[Id. at 5.]

Thus, it is clear that the GRC could not assess any common law right the Complainant may have had to the draft resolutions at issue here. For these reasons, the GRC has not, and cannot weigh disclosure of the requested resolutions on a common law basis.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that the requested draft resolutions are exempt from disclosure under the “inter-agency or intra agency advisory, consultative, or deliberative material” exemption. N.J.S.A. 47:1A-1.1; Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div.) (certif. denied, 233 N.J. 484 (2018)); Eastwood v. Borough of Englewood Cliffs (Bergen), GRC Complaint No. 2012-121 (June 2013); Chang v. Town of West New York (Hudson), GRC Complaint No. 2014-213 (Interim Order dated February 24, 2015). Thus, the Custodian lawfully denied access to said records. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso
Acting Executive Director

May 14, 2019