



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

September 28, 2021 Government Records Council Meeting

David Weiner
Complainant

Complaint No. 2020-145

v.

County of Essex
Custodian of Record

At the September 28, 2021 public meeting, the Government Records Council (“Council”) considered the September 21, 2021 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 emergency evacuation plans for 320-321 University Avenue constitute “inter-agency or intra-agency advisory, consultative, or deliberative material” because they were in draft form and thus exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. Dep’t of Educ., 198 N.J. 274, 284 (2009); Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009). Therefore, the Custodian did not unlawfully deny access to these 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 28th Day of September 2021

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: September 30, 2021

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**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 28, 2021 Council Meeting**

**David Weiner¹
Complainant**

GRC Complaint No. 2020-145

v.

**County of Essex²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. “Any documents delineating” the Essex County Division of Family Assistance and Benefits (“DFAB”) emergency evacuation plan for 320-321 University Avenue, including “emergency evacuation drills.”
2. “Any documents delineating” DFAB’s emergency evacuation plan for 320-321 University Avenue, including rapid removal of all disabled employees.
3. “Any documents delineating” DFAB’s emergency evacuation plan for 320-321 University Avenue, including names and titles of “Marshalls” and “their assistants for each applicable respective floor/area of the structure.”

Custodian of Record: Olivia Schumann, Esq.
Request Received by Custodian: May 7, 2020
Response Made by Custodian: May 7, 2020
GRC Complaint Received: July 30, 2020

Background³

Request and Response:

On May 7, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On the same day, the Custodian responded in writing extending the response time frame through May 28, 2020 due on “effort(s) to contain the spread of the novel coronavirus.” On May 28, 2020, the Custodian responded in writing extending the time frame through June 18, 2020 due to the lack of in-office DFAB staff due to the ongoing public health emergency.

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

On June 16, 2020, the Custodian responded in writing denying access to the Complainant's OPRA request because DFAB employee Albert Fusco stated that no records existed, and an evacuation plan was still being drafted. The Custodian noted that OPRA and precedential case law support the nondisclosure of draft documents under the "inter-agency or intra-agency advisory, consultative, or deliberative [("ACD")] material" exemption. N.J.S.A. 47:1A-1.1; Ciesla v. N.J. Dep't of Health and Senior Serv., 429 N.J. Super. 127, 132 (App. Div. 2012) (affirming Ciesla v. N.J. Dep't of Health and Senior Serv., GRC Complaint No. 2010-38 (June 2012)). The Custodian noted that she was disclosing seven (7) pages of records showing the publicly posted evacuation routes for 302-321 University Avenue.

Denial of Access Complaint:

On July 30, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that he was unlawfully denied access to the subject OPRA request but did not provide any additional arguments in support of his position.

Statement of Information:⁴

On December 11, 2020, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on May 7, 2020. The Custodian certified that her search included seeking assistance from Mr. Fusco from DFAB. The Custodian certified that following a few extensions, she responded in writing on June 16, 2020 denying access to the Complainant's OPRA request under the ACD exemption. N.J.S.A. 47:1A-1.1.

The Custodian contended that she lawfully denied access to the subject OPRA request because the records sought were in draft form and thus exempt under the ACD exemption. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. Dep't of Educ., 198 N.J. 274, 284 (2009); Ciesla v. N.J. Dep't of Health & Sr. Servs., 429 N.J. Super. 127, 132 (App. Div. 2012). The Custodian argued that at the time of the request, emergency evacuation plans for the property in question were not yet finalized. The Custodian noted that the emergency evacuation plans remained in draft form at the time of the complaint filing.

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.

⁴ On September 9, 2020, this complaint was referred to mediation. On November 25, 2020, this complaint was referred back to the GRC for adjudication.

OPRA provides that the definition of a government record “shall not include . . . [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 Ctr., 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. See Educ. Law Ctr., 198 N.J. at 286. 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.

The Council has also repeatedly held that draft records 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 study of the local police department 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 in draft form and 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 Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div. 2018) (holding that draft minutes were exempt from disclosure as ACD material); 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)).

In the matter before the Council, the Complainant sought emergency evacuation plans for 320-321 University Avenue. The Custodian denied access to the OPRA request because the requested records were in draft form and thus ACD material. The Custodian subsequently certified in the SOI that the requested records were in draft form at the time the subject OPRA request and the instant complaint were submitted. Precedential case law supports the non-disclosure of draft minutes as decided in Educ. Law Ctr., as well as Dalesky.

Accordingly, the requested emergency evacuation plans for 320-321 University Avenue constitute ACD material because they were in draft form and thus exempt from disclosure under

OPRA. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. 198 N.J. 274; Dalesky, GRC 2008-61. Therefore, the Custodian did not unlawfully deny access to these records. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the requested emergency evacuation plans for 320-321 University Avenue constitute “inter-agency or intra-agency advisory, consultative, or deliberative material” because they were in draft form and thus exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. Dep’t of Educ., 198 N.J. 274, 284 (2009); Dalesky v. Borough of Raritan (Somerset), GRC Complaint No. 2008-61 (November 2009). Therefore, the Custodian did not unlawfully deny access to these records. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso
Executive Director

September 21, 2021