



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

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

March 29, 2022 Government Records Council Meeting

Mark Liebeskind
Complainant

Complaint No. 2021-8

v.

Borough of Highland Park (Middlesex)
Custodian of Record

At the March 29, 2022 public meeting, the Government Records Council (“Council”) considered the March 22, 2022 Supplemental 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 Complainant has failed to establish in his request for reconsideration of the Council’s January 25, 2022 Final Decision that either 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on a mistake or new evidence. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Thus, the Complainant’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 29th Day of March 2022

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: March 31, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
**Supplemental Findings and Recommendations of the Executive Director
March 29, 2022 Council Meeting**

**Marc Liebeskind¹
Complainant**

GRC Complaint No. 2021-8

v.

**Borough of Highland Park (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Copies of the “results of the planner’s service of design options for structural parking and identifying the development densities necessary to support it” as discussed in Resolution No. 3-20-122.

Custodian of Record: Joan Hullings
Request Received by Custodian: November 24, 2020
Response Made by Custodian: December 21, 2020
GRC Complaint Received: January 11, 2021

Background

January 25, 2022 Council Meeting:

At its January 25, 2022 public meeting, the Council considered the January 18, 2022 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, found that:

[T]he Custodian lawfully denied access to responsive spreadsheet containing redevelopment scenarios 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; Educ. Law Ctr. v. Dep’t of Educ., 198 N.J. 274 (2009). Specifically, spreadsheet is exempt under the ACD exemption because said material was advisory and deliberative nature. Giambri v. Sterling High Sch. Dist. (Camden), GRC Complaint No. 2014-393, *et seq.* (September 2015).

¹ No legal representation listed on record.

² Represented by Lucille E. Davy, Esq. of Mason, Griffin & Pierson, P.C. (Princeton, NJ).

Procedural History:

On January 27, 2022, the Council distributed its Final Decision to all parties. On February 4, 2022, the Complainant filed a request for reconsideration of the Council's Final Decision based on a mistake and "new evidence." The Complainant asserted that new evidence discovered after the filing of this complaint proved that the Borough of Highland Park ("Borough") was not using the responsive spreadsheet for deliberations. The Complainant thus argued that the Council erred in determining the spreadsheet was exempt without performing an *in camera* review.

The Complainant argued that on December 10, 2021, the Borough issued a Request for Proposal ("RFP") to solicit developers for the redevelopment tract. The Complainant noted that LRK, Inc. was not retained at that time to design any development project. The Complainant also argued that the Borough knew as early as September 2021 that "Tract D" identified in redevelopment plan was private property not available for redevelopment. The Complainant contended that any discussion of "Tract D" was thus no longer "inter-agency, or intra-agency advisory, consultative, or deliberative ["ACD"] material."

The Complainant also argued that the Council was required to perform an *in camera* review here but failed to do so. Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005). The Complainant asserted that the Council previously required *in camera* reviews where it could not determine if a denial was unlawful without a "meaningful review." Rodriguez v. Kean Univ., GRC Complaint No. 2016-40 (Interim Order dated March 28, 2017) (requiring that twelve (12) e-mails be provided for *in camera* review based on the custodian's claim that they contained ACD and other exempt information). The Complainant argued that the Appellate Division also reversed a Council decision for failure to perform an *in camera* review. Katon v. N.J. Dep't of Law & Pub. Safety, 2015 N.J. Super. Unpub. LEXIS 256 (App. Div. 2015). The Complainant contended that the Council erred in relying on its finding in Giambri, GRC 2014-393, and should have conducted an *in camera* review to determine if the spreadsheet contained "raw, neutral data" not subject to the ACD exemption, in part or whole. Educ. Law Ctr., 198 N.J. 274. See also Pouliot v. N.J. Dep't of Educ., GRC Complaint No. 2015-281 (July 2019). The Complainant thus argued that the Council "abuse[d]" its discretion in finding no *in camera* was necessary here.

The Complainant thus requested that the Council reconsider the instant matter and order disclosure of the spreadsheet based on new evidence. The Complainant further requested that, in the alternative, the Council order an *in camera* review of the spreadsheet to determine its disclosability in part or whole.

On February 15, 2022, Custodian's Counsel submitted objections to the request for reconsideration. Counsel contended that the Complainant's "new evidence" as to the availability of "Tract D" is of no moment to the Borough's redevelopment process. Counsel noted that New Jersey redevelopment laws do not require municipalities to consider only vacant properties for redevelopment. Counsel thus argued that the Complainant has not provided "new evidence" requiring reconsideration here.

Counsel further argued that the Council did not make a mistake by not requiring an *in camera* review of the spreadsheet. Counsel contended that the Complainant's cited decisions are all distinguishable from the facts in this complaint. Counsel further noted that the Council expressed considerably its reasoning for concluding that the spreadsheet was exempt absent an *in camera* review. Counsel thus contended that the Council correctly held that the spreadsheet "with various calculations of development densities" was exempt from OPRA.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's Final Decision dated January 25, 2022 on February 4, 2022, six (6) business days from the issuance of the Council's Decision.

Applicable case law holds that:

"A party should not seek reconsideration merely based upon dissatisfaction with a decision." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. "Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement." Ibid.

[In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).]

Upon review of the parties' submissions, the Government Records Council ("GRC") rejects the Complainant's request for reconsideration. Specifically, the GRC does not find compelling the Complainant's alleged "new evidence" for multiple reasons. First, as stated on the request for reconsideration form, "new evidence" is defined as documentation "that *could not* have been provided prior" to the issuance of a decision. Both documents submitted here were known to

the Complainant well prior to the Council's Final Decision. Second, neither document impacts the Borough's ability to consider redevelopment plans and concepts prior to releasing the RFP in December 2021. Third, neither the ownership status of "Tract D" nor the issuance of the RFP months after 1) the Borough entered into a professional services agreement with LRK for redevelopment planning; 2) the Complainant submitted his OPRA request; and 3) the Custodian responded denying access to the responsive spreadsheet, change the fact that the Borough was actively deliberating on redevelopment concepts at the time of the subject OPRA request.

Further, the GRC rejects the Complainant's argument that the Council "abuse[d]" its discretion in not ordering an *in camera* review. Instead, the Council plainly set forth the reasoning behind not needing an *in camera* review in accordance with Giambri, GRC 2014-393, *et seq.* The Complainant cites to prior Council decisions that required review of e-mails, a fairly common practice, and not redevelopment documents such as the spreadsheet at issue here. Further, the Complainant relies on Katon, 2015 N.J. Super. Unpub. LEXIS 256 for support but omits that the court upheld a portion of the Council's decision without need for an *in camera* review. Id. at 10-11. Finally, the Complainant misinterprets the Educ. Law Ctr. Court's clear finding that "a record, which contains or involves factual components, is subject to the deliberative process" when meeting the two-prong ACD test. Id. at 299. There is sufficient evidence here, including multiple legal certifications submitted with the Statement of Information, to support the Council's decision absent an *in camera* review.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. The Complainant failed to establish that the complaint should be reconsidered based on a mistake or new evidence. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. Thus, the Complainant's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant has failed to establish in his request for reconsideration of the Council's January 25, 2022 Final Decision that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on a mistake or new evidence. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Thus, the Complainant's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Frank F. Caruso
Executive Director

March 22, 2022



State of New Jersey
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101 SOUTH BROAD STREET
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PHILIP D. MURPHY
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FINAL DECISION

January 25, 2022 Government Records Council Meeting

Marc Liebeskind
Complainant

Complaint No. 2021-8

v.

Borough of Highland Park (Middlesex)
Custodian of Record

At the January 25, 2022 public meeting, the Government Records Council (“Council”) considered the January 18, 2022, 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 Custodian lawfully denied access to responsive spreadsheet containing redevelopment scenarios 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; Educ. Law Ctr. v. Dep’t of Educ., 198 N.J. 274 (2009). Specifically, spreadsheet is exempt under the ACD exemption because said material was advisory and deliberative nature. Giambri v. Sterling High Sch. Dist. (Camden), GRC Complaint No. 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 25th Day of January 2022

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: January 27, 2022

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**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
January 25, 2022 Council Meeting**

**Marc Liebeskind¹
Complainant**

GRC Complaint No. 2021-8

v.

**Borough of Highland Park (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Copies of the “results of the planner’s service of design options for structural parking and identifying the development densities necessary to support it” as discussed in Resolution No. 3-20-122.

Custodian of Record: Joan Hullings
Request Received by Custodian: November 24, 2020
Response Made by Custodian: December 21, 2020
GRC Complaint Received: January 11, 2021

Background³

Request and Response:

On November 24, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 21, 2020, the Complainant e-mailed the Deputy Clerk Jennifer Santiago and asked if the Borough of Highland Park (“Borough”) received his OPRA request. On the same day,⁴ Ms. Santiago responded in writing on behalf of the Custodian disclosing three (3) slide presentations. The Complainant responded contending that the records disclosed did not include information on development densities. The Complainant thus requested that this information be disclosed to him.

On December 22, 2020, Ms. Santiago responded denying access to development densities information remained in draft form and was exempt under the “inter-agency, or intra-agency advisory, consultative, or deliberative [(“ACD”)] material” exemption. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. Dep’t of Educ., 198 N.J. 274 (2009); Ciesla v. N.J. Dep’t of Health and Senior Serv., 429 N.J. Super. 127 (App. Div. 2012). On December 23, 2020, the Complainant e-mailed Ms.

¹ No legal representation listed on record.

² Represented by Lucille E. Davy, Esq. of Mason, Griffin & Pierson, P.C. (Princeton, 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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

⁴ Although the response occurred ten (10) business days beyond the statutorily mandated time frame, the GRC will not address the “deemed” denial issue because the Complainant did not raise it in his Denial of Access Complaint.

Santiago seeking clarification as he did not believe the ACD exemption applied to the information sought. The Complainant thus requested a “more detailed explanation” of how the exemption applied, which is consistent with what occurred in Ciesla, or he would consider the denial to be unlawful.⁵ On December 28, 2020, the Custodian responded advising the Complainant that Educ. Law Ctr., 198 N.J. 274 allowed an agency to deny access to information that assists in the decision-making process. Id. The Custodian stated that the requested development densities information is being used in the redevelopment process, which the Complainant knew was in its early stages. The Custodian noted that documents supporting the Borough’s final decision will be supplied to the public once the decision has been made.

On December 29, 2020, the Complainant e-mailed the Custodian again disputing the denial of access as contrary to both OPRA and Educ. Law Ctr. The Complainant argued that the ACD exemption was qualified, rather than absolute, and did not apply to the raw development densities information generated through a public contract. The Complainant contended that this is inapposite to the “raw, neutral data” contained in an internal memorandum in Educ. Law Ctr.: the densities information sought here is not similarly contained in a confidential memo. The Complainant further argued that even if the ACD exemption applied, the Borough waived its right to the claim by “publicly disclosing and publicly discussing the design options.” The Complainant lastly questioned whether the ACD exemption applied to the Borough because it only applied to an “agency” that does not cover municipalities because they are “political subdivision[s].”

Denial of Access Complaint:

On January 11, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian unlawfully denied access to the development densities information responsive to the subject OPRA request. The Complainant averred that the redevelopment plan was discussed at virtual meetings on October 26, 27, and 28, 2020, as well as another public meeting held on November 17, 2020. The Complainant noted that the agreement between the Borough and LRK, Inc. required these meetings be held “*after* the information is finalized.” (Emphasis in original). The Complainant stated that during those meetings, attendees were shown slides with various conceptual drawings and development scenarios to include a parking deck for the impacted tracts of land.

The Complainant argued that the ACD exemption should be narrowly construed to avoid allowing a public agency to shield broad categories of records or information. The Complainant alleged that this is especially the case where an agency may be denying access to “shield questionable behavior.” The Complainant contended that information sought was part of a public contract and meant to be discussed publicly. The Complainant further contended that the information was produced by an outside agency for public discussion as set for in the contractual agreement. The Complainant contended that each of these factors proves that the requested information could not be considered ACD material and was thus disclosable under OPRA. The Custodian further disputed that the Borough would incur and harm in their deliberative process by

⁵ The Complainant also noted that Ms. Santiago should consider the subject OPRA request to be “an ongoing request for production of the document or information when it is distributed and finalized.” The GRC notes that OPRA and prevailing case law does not contemplate OPRA requests seeking records on an “ongoing basis.” Paff v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012).

disclosing the data. The Complainant noted that he asked the Custodian to expound on the harm in disclosure but did not receive a response from the Custodian. The Complainant this requested that the GRC perform an *in camera* review of the requested information to determine whether the ACD exemption applied to it.⁶

Statement of Information:

On February 9, 2021, the Custodian filed a Statement of Information (“SOI”) attaching legal certifications from Ms. Santiago and Borough Administrator Josephine T. Jover. The Custodian certified that she received the Complainant’s OPRA request on November 24, 2020. The Custodian certified that Ms. Santiago responded in writing on her behalf on December 21, 2020 disclosing three (3) sets of slides prepared by LRK. See Santiago Cert. ¶ 4. The Custodian certified that the Complainant disputed the response because no density information was disclosed and Ms. Santiago subsequently denied access to an excel spreadsheet containing draft redevelopment scenarios under the ACD exemption. Santiago Cert. ¶ 6. The Custodian affirmed that she subsequently responded to the Complainant’s continued concerns on December 28, 2020 reasserting that the spreadsheet was exempt from disclosure under the ACD exemption.

The Custodian averred that the responsive documents were part of the Borough’s implementation of its 2019 masterplan, wherein LRK was contracted to assist with a downtown redevelopment plan. Jover Cert. ¶ 3-4. The Custodian stated that LRK produced multiple hypothetical concepts through slide presentations and the disputed excel spreadsheet. Jovis Cert. ¶ 4-6. The Custodian noted that while the slide presentations were shared during public meetings, none of those documents relied on any of the information contained in the spreadsheet. Jovis Cert. ¶ 7. The Custodian averred that the Borough has not approved or accepted any of the scenarios contained in the spreadsheet and deliberations on downtown revitalization continue to this day. Jovis Cert. ¶ 7-8.

The Custodian argued that she lawfully denied access to the responsive spreadsheet prepared by LRK because it included various land use scenarios presented for deliberation by the Borough. The Custodian noted that the file did not include “final calculations or numbers” and that none of the information contained within the spreadsheet was shared during the public sessions. The Custodian contended that the spreadsheet was part of the Borough’s deliberative process and fell squarely within the type of documents the Educ. Law Ctr. Court deemed to be protected under the ACD exemption. The Custodian argued that there is no question that the spreadsheet is part of the Borough’s decision-making process and disclosure would “unquestionably reveal ongoing deliberations.”

The Custodian also argued that whether the Borough shared any information with the public does not negate the ACD exemption. See Eastwood v. Borough of Englewood Cliffs (Bergen), GRC Complaint No. 2012-121 (June 2013). The Custodian further asserted that contrary

⁶ The Complainant also included arguments regarding his common law right to access the responsive records. However, 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. Thus, the GRC cannot address the Complainant’s asserted common law right of access.

to the Complainant's allegation of "[mis]behavior," the Borough is simply attempting to protect its deliberation process. The Custodian contended that anyone disagreeing with the Borough's ultimate decision will have access to the underlying documents and remedies only after said decision is made. The Custodian argued that until that point, the spreadsheet is exempt as ACD material. The Custodian thus requested that the Council find that a lawful denial of access occurred here.

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." 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. 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.

Further, in Eastwood, GRC 2012-121, 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).

Finally, in Giambri v. Sterling High Sch. Dist. (Camden), GRC Complaint No. 2014-393, *et seq.* (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 v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005). 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).

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. Thus, there may be situations where the GRC does not need to perform an *in camera* review where the evidence clearly supports that the cited exemption applied to the withheld record.

Here, the Complainant's OPRA request sought the "results of the planner's service of design options for structural parking and identifying the development densities necessary to support it." While the Borough disclosed three (3) slide sets, it denied access to a spreadsheet containing redevelopment scenarios under the ACD exemption. This complaint followed, wherein the Complainant argued that the ACD exemption no longer applied because the Borough shared redevelopment details with the public, which according to the Borough's agreement with LRK would occur after "the information was finalized." The Complainant also contended that the factual components of the withheld record were not ACD material (citing to Educ. Law Ctr.). The Complainant thus requested that the Council perform an *in camera* review of the withheld spreadsheet.

In the SOI, the Custodian maintained that she lawfully denied access to the responsive spreadsheet because it contained various redevelopment scenarios for deliberation. The Custodian further argued that none of the information in the spreadsheet has been publicly disclosed and that

redevelopment discussed remained ongoing at the time of the SOI filing. The Custodian also argued that regardless of whether information was shared with the public, which the spreadsheet was not, Eastwood supports that the ACD exemption would survive such exposure.

Applying all relevant case law to the issue before the Council, the GRC is satisfied that the Custodian lawfully denied access to the spreadsheet without the need for an *in camera* review. In reaching this conclusion, the GRC looks to the Borough's agreement with LRK, the SOI certifications, and to the Council's prior decision in Giambri. For supporting evidence, the spreadsheet referenced is the product of the agreement between the Borough and LRK to produce a redevelopment plan. LRK outlined the scope of its project in a March 3, 2020 memorandum to the Borough, which included the preparation of certain materials (studies, models, and a "Concept Plan") and multiple stakeholder meetings. Of particular interest here is Phase 1 that required LRK create and "[f]inalize" a Concept Plan. Id. The finalized Plan would then be provided to the Borough for their use in commissioning additional types of studies. However, Phase 2 provides that a series of stakeholder meetings be held in order to further "refine[]" the Concept Plan, which "would be used as the basis for the future redevelopment plan." Id. It is clear from the evidence of record here that the Complainant sought, and the Custodian denied access to a record produced by LRK meant to inform the Borough on potential redevelopment plans. These facts coupled with the SOI certification that the Borough's deliberations on redevelopment further confirm the spreadsheet's pre-decisional nature.

Also, and like the intent of the record at issue in Giambri, the spreadsheet here was clearly created for the Borough to utilize in the redevelopment deliberation process. The spreadsheet 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, this matter departs from Giambri in that the GRC has enough information to determine that the spreadsheet fell within the ACD exemption, thus negating the need for an *in camera* review. Also, the Complainant's ACD waiver argument is contrary to the Council's ruling on the issue. Eastwood, GRC 2012-121. Thus, notwithstanding the Custodian's affirmation that no spreadsheet information was discussed at public meetings, such action would not have negated the ACD exemption here.

Accordingly, the Custodian lawfully denied access to responsive spreadsheet containing redevelopment scenarios under the ACD exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6; Educ. Law Ctr., 198 N.J. 274. Specifically, spreadsheet is exempt under the ACD exemption because said material was advisory and deliberative nature. Giambri, GRC 2014-393, *et seq.*

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian lawfully denied access to responsive spreadsheet containing redevelopment scenarios 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; Educ. Law Ctr. v. Dep't of Educ., 198 N.J. 274 (2009). Specifically, spreadsheet is exempt under the ACD exemption because said material was advisory and deliberative nature. Giambri v. Sterling High Sch. Dist. (Camden), GRC Complaint No. 2014-393, *et seq.* (September 2015).

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