



## State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS

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*Governor*

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*Lieutenant Governor*

KIMBERLY K. HOLMES  
*Acting Commissioner*

### FINAL DECISION

#### August 29, 2023 Government Records Council Meeting

Andrew Garcia Phillips  
Complainant

Complaint No. 2021-236

v.

City of Rahway (Union)  
Custodian of Record

At the August 29, 2023 public meeting, the Government Records Council (“Council”) considered the August 22, 2023 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 unlawfully denied access to the requested raw data obtained from the Survey. N.J.S.A. 47:1A-6. Specifically, there is no evidence in the record to support that the data was in draft form at the time of the Complainant’s OPRA request. N.J.S.A. 47:1A-1.1; Libertarians for Transparent Gov’t v. Gov’t Records Council, 453 N.J. Super. 83, 90-91 (App. Div. 2018). However, the GRC declines to require any further action because Custodian’s Counsel disclosed the responsive record to the Complainant on October 25, 2021.

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 29<sup>th</sup> Day of August 2023

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 5, 2023**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
August 29, 2023 Council Meeting**

**Andrew Garcia Phillips<sup>1</sup>  
Complainant**

**GRC Complaint No. 2021-236**

v.

**City of Rahway (Union)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via e-mail of the “complete results” of the downtown strategic plan public survey (“Survey”) conducted via Google form.

**Custodian of Record:** Jeffrey Jotz

**Request Received by Custodian:** September 20, 2021

**Response Made by Custodian:** September 29, 2021

**GRC Complaint Received:** October 8, 2021

**Background<sup>3</sup>**

**Request and Response:**

On September 20, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 29, 2021, the Custodian responded in writing obtaining an extension through October 8, 2021 and noting that the Survey results were still in “draft status but should be approved soon.” On October 7, 2021, the Custodian responded in writing denying access to the requested record on the basis that the Survey results remained incomplete and in draft form. N.J.S.A. 47:1A-1.1.

**Denial of Access Complaint:**

On October 8, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the Custodian unlawfully denied him access to the requested Survey results by asserting they were in draft form. The Complainant contended that he was not seeking “any product produced from the results;” rather, he sought the basic data. The Complainant noted that he waited until the Survey was closed

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Brian Trelease, Esq., of Rainone, Coughlin, Minchello, LLC. (Iselin, NJ).

<sup>3</sup> 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.

and that the Google form results could be easily produced in a spreadsheet, which would satisfy the request.

#### Supplemental Response:

On October 25, 2021, Custodian's Counsel sent a letter to the Complainant advising that in a "good faith" effort to resolve the instant complaint, the City of Rahway ("City") was disclosing the responsive Survey results. Counsel noted that e-mail addresses contained within the disclosed record were redacted under the privacy interest exemption. Counsel thus requested that the Complainant withdraw the instant complaint.

On November 17, 2021, Custodian's Counsel e-mailed the GRC confirming that the responsive record was disclosed to the Complainant. Counsel "demand[ed]" that the Complainant advise whether he intended to withdraw the complaint in order to "avoid incurring additional expenses" associated therewith. On the same day, the Complainant responded advising that he would not withdraw this complaint. The Complainant stated that while he appreciated receipt of the records, he "remain[ed] interested to learn if the [C]ity was justified in its delay and denial" of his OPRA request.

#### Statement of Information:

On November 22, 2021, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that he received the Complainant's OPRA request on September 20, 2021. The Custodian certified that he responded in writing on September 29, 2021 extending the response time frame through October 8, 2021. The Custodian affirmed that he again responded in writing on October 7, 2021 denying the subject OPRA request based upon the "inter-agency or intra-agency advisory, consultative or deliberative [(“ACD”)] material" exemption because the Survey results were in draft form. N.J.S.A. 47:1A-1.1. The Custodian certified that following the filing of this complaint, and in a "good faith" effort to resolve same, Custodian's Counsel disclosed the responsive Survey results to the Complainant on October 25, 2021.

The Custodian argued that a complaint is moot where the controversy contained therein became moot or is academic prior to judicial resolution. Betancourt v. Trinitas Hosp., 415 N.J. Super. 301, 311 (App. Div. 2010); N.J. Div. of Youth & Family Servs. V. W.F., 434 N.J. Super. 288, 297 (App. Div. 2014). The Custodian further argued that for purposes of "judicial economy and restraint" the courts will not typically address an issue hypothetical in nature or where a judgement cannot result in effective relief. Cinque v. N.J. Dep't of Corr., 261 N.J. Super. 242, 243 (App. Div. 1993) certif. denied, 218 N.J. 275 (2014). The Custodian did note that the courts have also addressed "otherwise moot appeal[s]" where the issue is of "substantial importance, likely to reoccur but capable of evading review." Betancourt, 415 N.J. Super. at 311 (internal citation omitted). The Custodian argued that the instant matter is now moot because the contested records were disclosed to the Complainant on October 25, 2021. The Custodian argued that the Complainant acknowledged receipt of the records, but nevertheless requested that this complaint continue out of his own curiosity on whether the City "was justified in its delay and denial. . . ." The Custodian argued that there is no evidence in the record demonstrating that an unlawful denial of access occurred and the City made a "good faith" effort to resolve complaint. The Custodian

argued that the Complainant’s justification for continuing with his complaint does not overcome the mootness issue allowing for continued adjudication. The Custodian thus requested that the GRC dismiss this complaint as moot.

The Custodian also argued that his actions were not knowing and willful in nature. N.J.S.A. 47:1A-11. The Custodian argued that he ultimately disclosed the responsive records after the filing of this complaint but prior to filing the SOI.<sup>4</sup>

#### Additional Submissions:

On November 23, 2021, the GRC e-mailed the Complainant asking whether, based on the SOI filing, he still intended to move through the adjudication process. On November 28, 2021, the Complainant responded stating that his interest in whether the City unlawfully denied access to the responsive record remained and the SOI did not provide any defense. The Complainant noted that he believed the Custodian’s application of the ACD exemption was overly broad and could be used in the future to deny access to “just about any” records. The Complainant further asserted that he believed it likely that the City would conduct additional surveys in the future.

### 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.

Initially, the GRC briefly notes that the Custodian has argued that this complaint is moot because the responsive survey results were disclosed, thus discontinuing this adjudication. Cinque, 261 N.J. Super. at 243; Betancourt, 415 N.J. Super. at 311. In turn, the Complainant has argued that the original denial question remained and that the GRC should render a decision due to the likelihood that this issue may arise again if the City conducts future surveys. The Betancourt court held that while a complaint can be mooted “when a controversy no longer exists, and the disputed issues have become moot[,]” same may proceed “where the underlying issue is one of substantial importance, likely to reoccur but capable of evading review.” Id. (Internal citations omitted).

The evidence here suggests that, contrary to the Custodian’s SOI assertions against the Complainant’s reasoning for not withdrawing his complaint, the controversy has not dissolved through disclosure. Specifically, the City disclosed the records to avoid further litigation and the Complainant has asserted that he still maintains an interest in determining whether he was unlawfully denied access thereto. Further, to consider a complaint moot simply because disclosure occurred after the filing of a complaint sets a potential dangerous future precedent signaling to

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<sup>4</sup> The Custodian also argued that the Complainant was not a prevailing party entitled to an award of attorney’s fees. N.J.S.A. 47:1A-6. However, this issue is not before the GRC because the Complainant is not represented by an attorney and did not seek an award of attorney’s fees as part of his complaint.

public agencies that they can use denials tactically to delay disclosure under after a complaint is filed without threat of an adverse decision against them. It should also be noted that the GRC has previously continued its adjudication process where records were disclosed after the filing of a complaint. See *e.g.* Reilly v. Monmouth Beach Police Dep't (Monmouth), GRC Complaint No. 2015-241 (March 2017); Percella v. City of Bayonne (Hudson), GRC Complaint No. 2017-112, *et seq.* (February 2019);

Turning to the central issue in this complaint, OPRA also 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. v. Dep't of Educ., 198 N.J. 274, 285 (2009) (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.

Regarding draft documents, in Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div. 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 In Re: Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85 (2000))]. If a document satisfies both prongs, it is exempt from disclosure under OPRA pursuant to the deliberative process privilege.

[Id. at 90-91.]

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.

Here, the Complainant sought access to Survey data; the Custodian denied access thereto on the basis that same was in “draft” form. This complaint followed, wherein the Complainant noted that he only sought the basic data collected and not “any product produced from the results.” Further, the Complainant noted that he waited until after the Survey was closed to request the data. Subsequent to the complaint filing, the City disclosed the data to the Complainant and only argued in the SOI that this complaint was moot based on that disclosure. However, the Complainant has argued that the issue of the initial denial remained and that it could arise in the future were the City to conduct additional surveys.

For the Survey data to be considered a draft document under the ACD exemption, it must meet both prongs of the test described in Libertarians, 453 N.J. Super. at 90-91. With the forgoing in mind, the GRC finds no compelling evidence in the record to determine that the raw data obtained from the Survey was somehow in “draft” form at the time of the Complainant’s request. In applying the first prong of the Libertarians test, no evidence suggests that the data was in draft form at the time of the OPRA request. Specifically, the City solicited a voluntary survey and collected the results thereof. The City has not provided any argument to suggest the once of the Survey closed, the raw data was subject to “editing and eventual approval.” Id. at 90. Further, the record contains no evidence or arguments supporting that the raw results of the Survey were in draft form at the time of the OPRA request. Because the data fails to meet the first prong of the test, it is unnecessary to address the applicability of the second prong.<sup>5</sup>

Accordingly, the Custodian unlawfully denied access to the requested raw data obtained from the Survey. N.J.S.A. 47:1A-6. Specifically, there is no evidence in the record to support that the data was in draft form at the time of the Complainant’s OPRA request. N.J.S.A. 47:1A-1.1; Libertarians, 453 N.J. Super. at 90-91. However, the GRC declines to require any further action because Custodian’s Counsel disclosed the responsive record to the Complainant on October 25, 2021.

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<sup>5</sup> The GRC notes that an analysis of the survey results was included as a component of the City’s “Downtown Strategic Plan”. The report is located online under the “Media” tab at <https://nj-rahway.civicplus.com/agendacenter/rahway-city-council-9/?#02142022-265> (accessed June 30, 2023).

## **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Custodian unlawfully denied access to the requested raw data obtained from the Survey. N.J.S.A. 47:1A-6. Specifically, there is no evidence in the record to support that the data was in draft form at the time of the Complainant's OPRA request. N.J.S.A. 47:1A-1.1; Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83, 90-91 (App. Div. 2018). However, the GRC declines to require any further action because Custodian's Counsel disclosed the responsive record to the Complainant on October 25, 2021.

Prepared By: Frank F. Caruso  
Executive Director

August 22, 2023