



State of New Jersey
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

April 25, 2023 Government Records Council Meeting

Marc Liebeskind
Complainant

Complaint No. 2021-358

v.

Borough of Highland Park (Middlesex)
Custodian of Record

At the April 25, 2023 public meeting, the Government Records Council (“Council”) considered the April 18, 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 lawfully denied access to responsive maps 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 evidence of record supports that the maps are exempt from disclosure under OPRA because they were in draft form at the time of the subject OPRA request. Libertarians for Transparent Gov’t v. Gov’t Records Council, 453 N.J. Super. 83 (App. Div. 2018).

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 April 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: May 1, 2023



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 25, 2023 Council Meeting**

**Marc Liebeskind¹
Complainant**

GRC Complaint No. 2021-358

v.

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

Records Relevant to Complaint: Copies of the “record” or “records” corresponding to “each corresponding number in the ‘Facility’ column” in a previously disclosed record identified as the “Appendix”.

Custodian of Record: Jennifer Santiago
Request Received by Custodian: December 14, 2021
Response Made by Custodian: December 22, 2021
GRC Complaint Received: December 29, 2021

Background³

Request and Response:

On December 14, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 22, 2021, the Custodian responded in writing denying access to the “document that includes the information” because it was in “draft form” but noted that same would be disclosed once it is finalized. Libertarians for Transparent Gov’t v. Borough of Westwood (Bergen), GRC Complaint No. 2016-214 (Interim Order dated October 30, 2018); Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006). On the same day, the Complainant e-mailed the Custodian contesting the denial of access. The Complainant asserted that he sought “neutral information” and that redactions could be made to the draft document. The Complainant noted that he would file a complaint if he did not receive the responsive record.

On December 27, 2021, the Complainant responded stating that the information sought is part of a map that is in draft form, contains additional information, and cannot be redacted. The

¹ No legal representation listed on record.

² Represented by Edwin W. Schmierer, Esq. and 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.

Custodian further stated that she did not maintain a separate record containing the information sought and had no ability to create a new record. The Custodian reiterated that she would disclose the map as soon as it was finalized.

Denial of Access Complaint:

On December 29, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). Therein, the Complainant contended that the Custodian unlawfully denied him access to “neutral” data. The Complainant argued that it was “unclear how a map could be considered a draft document” and could not be redacted to remove any exempt information. The Complainant further argued that the designation of a document as “draft” does not automatically exempt it. The Complainant requested that the Council conduct an *in camera* review to determine the legitimacy of the Custodian’s denial of access. Katon v. NJ Dep’t of Law & Pub. Safety, 2015 N.J. Super. Unpub. LEXIS 256 (App. Div. 2015).

Statement of Information:

On January 27, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 14, 2021. The Custodian certified that she contacted the Borough Administrator and Level G Associates (“Level G”) to perform a search for responsive records. The Custodian affirmed that the Borough Administrator had no responsive records, and that Gerard Giosa from Level G Associates sent her “three pages of schematic drawings that look like maps of various sections of the [Borough of Highland Park (“Borough”)] and which include the [“Facility”] numbers . . . [and] other information related to the elements of the parking study.” The Custodian certified that she asked Mr. Giosa whether there was a separate list containing the numbers and whether the maps were in draft form. The Custodian affirmed that Mr. Giosa responded stating that no separate list existed, and the maps were not final because they could change before the study was completed, noting that he was not expecting many changes. The Custodian certified that she responded in writing on December 22, 2021 denying access to the responsive records because they were still in “draft” form. N.J.S.A. 47:1A-1.1.

The Custodian stated that in September 2021, the Borough of Highland Park (“Borough”) awarded a contract to Level G to conduct a parking study in connection with the Downtown Redevelopment Plan. The Custodian stated that the study included an analysis of current parking conditions, impacts of potential redevelopment projects, and a parking management plan to address demand. The Custodian stated that the study also included evaluations of potential sites for a centralized parking area. The Custodian noted that on December 13, 2021, the Complainant received the Appendix and subsequently submitted the subject OPRA request.

The Custodian argued that she lawfully denied access to the responsive maps because they were still in draft form at the time of the subject OPRA request and no separate record containing the information existed. The Custodian argued that Libertarians for Transparent Gov’t v. Gov’t Records Council, 453 N.J. Super. 83 (App. Div. 2018) confirmed that a draft document is not final and may be subject to additional change. See N.J.S.A. 47:1A-1.1; Eastwood v. Borough of Englewood Cliffs (Bergen), GRC Complaint No. 2012-121 (June 2013). The Custodian argued

that Level G has confirmed that the maps at issue here were subject to change and not in a finalized version; thus, no unlawful denial of access occurred. Further, the Custodian argued that the Complainant's assertion that she should have redacted the maps is of no moment here because precedential case law supports the denial of a draft document in its entirety.

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 "inter-agency or intra-agency advisory, consultative or deliberative ["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 BOE, 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).

[Id.]

In Libertarians for Transparent Gov't, 453 N.J. Super. 83, 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’s OPRA request sought the “records” that identified the physical location of “Facility” numbers contained within the previously disclosed Appendix. The Custodian responded denying access to maps and stating that they were in draft form and not disclosable under OPRA. Following additional communications between the parties, the Complainant filed this complaint questioning the draft status of the records and arguing that such a designation did not exempt them in their entirety. The Complainant requested that the GRC conduct an *in camera* review. In the SOI, the Custodian maintained that she lawfully denied access to the responsive maps because they were in draft form and thus exempt under N.J.S.A. 47:1A-1.1; Libertarians for Transparent Gov’t, 453 N.J. Super. 83; Eastwood, GRC 2012-121 (June 2013). The Custodian also argued that no other document containing just the data existed and that Mr. Giosa advised her that the maps were still in draft form. The Custodian included in the SOI copies of this exchange in support of her certified statements.

Applying all relevant case law to the issue before the Council, the GRC is satisfied that the Custodian lawfully denied access to the maps because they are in draft form and thus meet the two-prong ACD test. In reaching this conclusion, the GRC is compelled by the Custodian’s SOI certification and the e-mail exchange between her and Mr. Giosa, wherein he advised that the maps “may be revised somewhat before [Level G’s] final report is submitted . . .” The GRC notes that Mr. Giosa stated that he did not expect significant changes; however, and as discussed by the court in Libertarians for Transparent Gov’t, 453 N.J. Super. at 92, the potential that little to no changes are made to the maps before finalization does not affect their status as a draft record. Finally, the Libertarians for Transparent Gov’t court already addressed the issue of redacting and disclosing draft documents:

[T]here can be no requirement for their production in a redacted form . . . In keeping with our reasoning set forth above, [N.J.S.A. 47:1A-5(g)] cannot apply to draft minutes. We have deemed the drafts to be [ACD material] subject to revision. Therefore, the entire document is privileged and exempt until approved by the public body. To produce an entire document redacted would be illogical and serve no purpose.

[Id. at 92-93.]

Relying on the court’s reasoning on the redaction issue, and contrary to the Complainant’s assertion, the GRC finds that the Custodian had no obligation to redact the records because of their designation as draft documents. Nor did the Custodian have an obligation to release the records upon their finalization absent a subsequent OPRA request from the Complainant. See Paff v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012) (holding that the custodian lawfully denied access to draft meeting minutes and that the complainant was “required to submit a new OPRA request” if he wished to obtain them after approval. Id. at 20 (citing Blau v. Union Cnty., GRC Complaint No. 2003-75 (January 2005))).

Accordingly, the Custodian lawfully denied access to responsive maps under the ACD exemption. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Specifically, the evidence of record supports that the maps are exempt from disclosure under OPRA because they were in draft form at the time of the subject OPRA request. Libertarians for Transparent Gov’t, 453 N.J. Super. 83.

In closing, the GRC must note that in Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005), 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.” 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.” Ibid. 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 evidence of record is clear that the responsive maps were in draft form and thus *per se* exempt from disclosure. An *in camera* review would not change the draft nature of the records or the fact that they are exempt as in their entirety as ACD material in accordance with prevailing case law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian lawfully denied access to responsive maps 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 evidence of record supports that the maps are exempt from disclosure under OPRA because they were in draft form at the time of the subject OPRA request. Libertarians for Transparent Gov’t v. Gov’t Records Council, 453 N.J. Super. 83 (App. Div. 2018).

Prepared By: Frank F. Caruso
Executive Director

April 18, 2023