



State of New Jersey

DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lieutenant Governor

JACQUELYN A. SUÁREZ
Acting Commissioner

FINAL DECISION

April 30, 2024 Government Records Council Meeting

Gerlando Termini
Complainant

v.

Randolph Township School District (Morris)
Custodian of Record

Complaint No. 2022-37

At the April 30, 2024 public meeting, the Government Records Council (“Council”) considered the April 23, 2024 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 the requested calendar proposals under the “inter-agency or intra-agency advisory, consultative or deliberative material” exemption. N.J.S.A. 47:1A-6. Specifically, the evidence of record supports that the Complainant sought the draft versions of the proposals, which are exempt from disclosure under OPRA. 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. 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 30th Day of April 2024

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 2, 2024



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 30, 2022 Council Meeting**

**Gerlando Termini¹
Complainant**

GRC Complaint No. 2022-37

v.

**Randolph Township School District (Morris)²
Custodial Agency**

Records Relevant to Complaint: “[C]opy of all draft 2022-23 school calendar options provided to the Randolph Board of [E]ducation [(“Board”)] for consideration by the Superintendent, Ms. Fano, between August 1, 2021 and November 30, 2021.”

Custodian of Record: Stephen Frost

Request Received by Custodian: February 22, 2022

Response Made by Custodian: February 22, 2022

GRC Complaint Received: February 24, 2022

Background³

Request and Response:

On February 19, 2022, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 22, 2022, the Custodian responded in writing denying access to the records as they constituted inter-agency or intra-agency advisory, consultative, or deliberative (“ACD”) material.

Denial of Access Complaint:

On February 24, 2022, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian’s basis for denial was not applicable for his request. The Complainant stated that the requested calendar options produced by employees were not considered “policy” and that Randolph Township School District (“District”) employees were not considered part of the Board. The Complainant also stated that the ACD exemption did not apply since a decision had already been made.

¹ No legal representation listed on record.

² Represented by Marc Zitomer, Esq., of Schenck, Price, Smith & King, LLP (Florham Park, 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.

Statement of Information:

On April 7, 2022, the Custodian filed a Statement of Information (“SOF”). The Custodian certified that he received the Complainant’s OPRA request on February 22, 2022. The Custodian certified that he responded in writing that same day, denying access.

The Custodian argued that he lawfully denied access to the requested records because they were still in draft form at the time of the OPRA request. The Custodian noted 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. The Custodian further argued that the Council consistently held that requests for draft documents as a general matter fall within the ACD exemption, citing Nee v. Brick Twp. Bd. of Educ. (Ocean), GRC Complaint No. 2016-209.

The Custodian asserted that the request explicitly sought draft calendar proposals for the Board’s 2022-2023 school year calendar. The Custodian asserted the proposals were drafted by the Superintendent and provided to the Board’s Education Committee for review at a November 15, 2021 meeting. The Custodian asserted that approval of the drafts took place the next day, November 16, 2021, but with the Board allowed to make revisions and suggestions to the proposals beforehand. The Custodian therefore argued that the requested proposals were pre-decisional and contained recommendations pertaining to the District’s policy determination in adopting a 2022-2023 school calendar.

The Custodian further argued that the Custodian properly denied access to the request pursuant to established law and public policy. The Custodian therefore argued there was no violation of OPRA, and thus no knowing or willful violation.

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 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 draft calendar proposals submitted by the Superintendent to Board for approval of the District's 2022-2023 school calendar. The Custodian denied access by virtue of the Complainant's request explicitly seeking draft documents intended for review and approval by the Board. The Complainant argued the records did not fall within the exemption because "calendar options" were not considered policy and was submitted by a District employee rather than a member of the Board. The Complainant also argued that the exemption would not apply since a decision has already been made on the proposals. The Custodian

maintained that the proposals were lawfully denied since they were pre-decisional documents provided to the Board prior to approving the District’s 2022-2023 calendar. N.J.S.A. 47:1A-1.1; Libertarians for Transparent Gov’t, 453 N.J. Super. 83.

Applying all relevant case law to the issue before the Council, the GRC is satisfied that the Custodian lawfully denied access to the draft proposals as they meet the two-prong ACD test. First, by seeking “draft” versions, the proposals are pre-decisional documents, as by their very nature, draft documents are subject to revision and eventual approval. See Libertarians for Transparent Gov’t, 453 N.J. Super. at 90-91. Next, the proposals were calendars containing the Superintendent’s recommendations on what the 2022-2023 school calendar should be. The Board thereafter reviewed the proposals, provided feedback, and voted to approve the revised version. Notwithstanding the Complainant’s policy claims, the Board’s reliance on the draft documents to decide the District’s school calendar satisfies the second prong of the test.

Moreover, the Complainant failed to present evidence demonstrating that the ACD privilege only protects draft documents furnished by the decision-making body. Lastly, draft documents do not lose its protections from disclosure even when a final decision has since been made. See Ciesla, 429 N.J. Super. at 140-41.

Accordingly, the Custodian lawfully denied access to the requested calendar proposals under the ACD exemption. N.J.S.A. 47:1A-6. Specifically, the evidence of record supports that the Complainant sought the draft versions of the proposals, which are exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Libertarians for Transparent Gov’t, 453 N.J. Super. 83.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian lawfully denied access to the requested calendar proposals under the “inter-agency or intra-agency advisory, consultative or deliberative material” exemption. N.J.S.A. 47:1A-6. Specifically, the evidence of record supports that the Complainant sought the draft versions of the proposals, which are exempt from disclosure under OPRA. 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. 2018).

Prepared By: Samuel A. Rosado
Staff Attorney

April 23, 2024