



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

February 27, 2008 Government Records Council Meeting

Jane Tousman
Complainant

Complaint No. 2007-115

v.

Township of Edison (Middlesex)
Custodian of Record

At the February 27, 2008 public meeting, the Government Records Council (“Council”) considered the February 20, 2008 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:

1. The draft of the Township of Edison 2008 budget and the pre-decisional worksheets for salaries and wages used to assist the township in its budgetary decision-making process are exempt from disclosure under N.J.S.A. 47:1A-1.1 because they constitute advisory, consultative and deliberative material.
2. The Custodian’s compilation, creation and release of information responsive to the Complainant’s request was not required under OPRA because a Custodian must only disclose clearly identifiable records under OPRA, pursuant to the Superior Court’s decision in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (March 2005).

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 27th Day of February, 2008

Robin Berg Tabakin, Vice Chairman
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records
Council.

Kathryn Forsyth
Government Records Council

Decision Distribution Date: February 29, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 27, 2008 Council Meeting**

**Jane Tousman¹
Complainant**

GRC Complaint No. 2007-269

v.

**Township of Edison (Middlesex)²
Custodian of Records**

Records Relevant to Complaint: Salaries and wages for the 2008 budget.³

Request Made: October 17, 2007

Response Made: October 25, 2007

Custodian: Reina A. Murphy

GRC Complaint Filed: October 31, 2007

Background

October 17, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

October 23, 2007

E-mail from the Custodian to the Edison Township Business Administrator. The Custodian's office requested the information responsive to the Complainant's request from the business administrator.

October 24, 2007

E-mail from the Custodian to the Edison Township Business Administrator. The Custodian informed the business administrator that the Complainant had requested the same information the previous year and the township had provided it to her.

October 25, 2007

Custodian's Response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that she needs a two week extension to compile the information responsive to the Complainant's request.

¹ No legal representation listed on record.

² Represented by Jeffrey Lehrer, Esq. (Warren, NJ).

³ The Complainant, in a narrative attached to her Denial of Access Complaint, further refines her request by stating that she needs the salaries broken down by position of the officer or employee receiving the salary and that such information is included on the budget worksheets.

October 31, 2007

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:

- Complainant’s OPRA request dated October 17, 2007
- GRC model OPRA request form with an attached two page narrative dated October 30, 2007⁴
- Letter from the Custodian to the Complainant dated October 25, 2007
- Letter from the Custodian to Frederick Wolke dated October 26, 2007⁵

The Complainant states that in late September or early October she visited the Custodian’s office and requested the 2008 township budget.⁶ The Complainant states the Custodian immediately provided the record, but the record had the salaries listed as a total amount. The Complainant states she needed a breakdown of salary by employee position, because that information is necessary in order for her to make cogent public remarks about the budget. The Complainant alleges the Edison Township Council has not yet voted on the budget and she is concerned the budget may be passed before she reviews the salary details.

The Complainant asserts that on October 17, 2007, she delivered an official OPRA request form to the Custodian wherein the Complainant states she asked for salaries and wages for the 2008 budget. The Complainant seeks the immediate disclosure of the budget worksheets for salary and wages because she asserts that the worksheets are an integral part of the budget and were therefore immediately disclosable along with the budget.⁷ The Complainant alleges she was told at that time by an employee in the Custodian’s office that the information she sought was not immediately available. The Complainant contends that the Custodian subsequently informed the Complainant in writing that the Custodian needed a two (2) week extension to obtain the records responsive to the Complainant’s request.

The Complainant filed her Denial of Access Complaint before the additional two (2) week time period requested by the Custodian had expired. The Complainant states that the budget worksheets contain the salary information in the format she desires. The Complainant contends that the Custodian should immediately disclose the budget worksheets to her because they are an integral part of the budget and N.J.S.A. 47: 1A-5.e.

⁴ The model OPRA request form appears to have been used by the Complainant as a cover sheet for the narrative pages attached to it.

⁵ This letter from the Custodian to a resident of Edison states there is no record responsive to his request. It is marked as “Exhibit #3,” but is not referenced elsewhere in the Complainant’s Denial of Access Complaint. When the Complainant was asked by the GRC to explain the purpose of the attachment, the Complainant said it was provided by a friend, Mrs. Wolke, to enhance the complaint and should remain with the complaint as an attachment. The Complainant acknowledged the fact that the letter is not referenced elsewhere in the complaint. Mrs. Wolke has not filed a Denial of Access Complaint with the GRC.

⁶ There is no evidence of record to indicate the Complainant made the request on an OPRA request form at that time.

⁷ The Complainant’s October 17, 2007 OPRA request neither requested a breakdown of salary by employee position nor worksheets.

requires immediate access to budgets and public employee salary and overtime information.

The Complainant also asserts in her complaint that the Custodian failed to comply with the provisions of N.J.S.A. 47: 1A-5.g. because the Custodian neither asserted that retrieval of the information the Complainant had requested would substantially disrupt agency operations nor attempted to reach a reasonable solution with the Complainant. The Complainant states that the main reason she is filing her complaint is to have the GRC declare in writing that salary worksheets should be made immediately available because they are an integral part of a municipal budget and that the Custodian's notification to the Complainant that the Custodian will need a two (2) week extension to respond to the Complainant's OPRA request is not an appropriate response under OPRA.

November 2, 2007

Offer of Mediation sent to both parties.

November 4, 2007

The Complainant declines mediation. The Custodian did not respond to the offer of mediation.

November 5, 2007

Letter from the Custodian to the Complainant. The Custodian states that she received from the township personnel office the information that the Complainant had requested and forwarded same to the Complainant as an enclosure.

November 5, 2007

Request for the Statement of Information sent to the Custodian.

November 5, 2007

Custodian's Statement of Information ("SOI"). The Custodian's SOI did not contain the records retention and disposition schedule for the records responsive to the Complainant's OPRA request included in the document index table required pursuant to John Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

November 8, 2007

Letter from the GRC to the Custodian. The Custodian's non-compliant SOI was returned to her with a request that the document index table be completed as described in the request for the SOI.

November 8, 2007

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated October 17, 2007
- E-mail from the Custodian to the Business Administrator dated October 23, 2007
- E-mail from the Custodian to the Business Administrator dated October 24, 2007

- Letter from the Custodian to the Complainant dated October 25, 2007
- Letter from the Custodian to the Complainant dated November 5, 2007

The Custodian certifies that her search for the requested records involved submitting a request to the Edison Township Administration and Finance Departments so that employees in these departments could obtain the information responsive to the Complainant's request.

The Custodian also certifies that the records responsive to the request must be retained by the agency for six (6) years and then may be destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM").

The Custodian certifies that on October 24, 2007, the Business Administrator informed her that in order to comply with the Complainant's request it would be necessary to compile information from their records and that doing so was not required by OPRA. The Custodian further certifies that she told the Business Administrator that the township had provided this service for the Complainant in past years, and the Business Administrator then agreed to provide the same service in response to the Complainant's present request. The Custodian states that the Business Administrator said he needed two (2) weeks to compile the information for the Complainant. On the following day, the Custodian sent a letter to the Complainant informing her that the township needed two (2) weeks in order to obtain the information responsive to the Complainant's request.

The Custodian certifies that on November 5, 2007, the information responsive to the Complainant's request was forwarded from the Administration and Finance Departments to her office, and that she then telephoned the Complainant to inform her that the information requested was available.

November 6, 2007

Facsimile transmission from the Complainant to the GRC. The Complainant informs the GRC that the Custodian notified her on November 5, 2007 that the records responsive to her request were ready to be picked up and that she retrieved them from the Custodian. She further informs the GRC, however, that notwithstanding the fact that she obtained the records she requested, she still expects the complaint to be adjudicated by the GRC.

November 14, 2007

Telephone call from the GRC to the Custodian. The GRC informs the Custodian that it will need a separate certification from the Business Administrator addressing the reason he does not believe the Complainant's request is valid under OPRA because the GRC cannot accept the Custodian's certification as evidence regarding statements allegedly made by the Business Administrator.

November 16, 2007

Facsimile transmission from the Custodian to the GRC. The Custodian forwards a certification from the Business Administrator wherein the Business Administrator avers that the record requested by the Complainant did not exist and would have to be created. The Business Administrator certifies that he needed an extension of time to create the

document, and although he believes creation of the document was not required under OPRA, he approved its creation because the township had provided this service for the Complainant in the past.

December 12, 2007

Telephone call from the GRC to the Custodian. The GRC informs the Custodian that it will need a certification from the Custodian specifying the date the 2008 budget was adopted.

December 13, 2007

Facsimile transmission from the Custodian to the GRC. The Custodian forwards a certification wherein the Custodian avers that the 2008 municipal budget has not been adopted by the Township Council to date.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

OPRA defines a government record as:

“ ... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file...or that has been received in the course of his or its official business ...” N.J.S.A. 47:1A-1.1.

OPRA also provides:

“...[t]he terms [government record or record] shall not include inter-agency or intra-agency *advisory, consultative, or deliberative material...*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA further provides:

“ The public agency shall have the burden of proving that the denial of access is authorized by law.” N.J.S.A. 47:1A-6.

The Complainant seeks immediate disclosure of salaries and wages for the 2008 budget which she asserts are contained in the worksheets that she contends are an integral part of the budget and should have been disclosed with the budget. Whether or not the worksheets are a part of the budget will depend upon whether those worksheets are

incorporated into the approved final budget; however, because the budget has not yet been adopted, it is presently a draft document.

As a general matter, draft documents are advisory, consultative and deliberative communications. Although OPRA broadly defines a “government record” as information either “made, maintained or kept on file in the course of [an agency’s] official business,” or “received” by an agency in the course of its official business, N.J.S.A. 47:1A-1.1, the statute also excludes from this definition a variety of documents and information. *Ibid.* See Bergen County Improvement Auth. v. North Jersey Media, 370 N.J. Super. 504, 516 (App. Div. 2004). The statute expressly provides that “inter-agency or intra-agency advisory, consultative, or deliberative material” is not included within the definition of a government record. N.J.S.A. 47: 1A-1 .1.

This exemption is equivalent to the deliberative process privilege, which protects from disclosure pre-decisional records that reflect an agency’s deliberations. In re Readoption of N.J.A.C. 10A:23, 367 N.J. Super. 61, 73-74 (App. Div. 2004), certif. den. 182 N.J. 149 (2004); see also In re Liq. Of Integrity Ins. Co., 165 N.J. 75 (2000). As a result, OPRA “shields from disclosure documents ‘deliberative in nature, containing opinions, recommendations, or advice about agency policies,’ and ‘generated before the adoption of an agency’s policy or decision.’” Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), quoting Gannet New Jersey Partners LP v. County of Middlesex, 379 N.J. Super. 205, 219 (App. Div. 2005).

The courts have consistently held that draft records of a public agency fall within the deliberative process privilege. See U.S. v. Farley, 11 F.3d 1385 (7th Cir. 1993); Pies v. U.S. Internal Rev. Serv., 668 F.2d 1350 (D.C. Cir. 1981); N.Y.C. Managerial Employee Ass’n v. Dinkins, 807 F.Supp. 955 (S.D.N.Y. 1992); Archer v. Cirrincione, 722 F.Supp. 1118 (S.D. N.Y. 1989); Coalition to Save Horsebarn Hill v. Freedom of Info. Comm., 73 Conn.App. 89, 806 A.2d 1130 (Conn. App. Ct. 2002); pet. for cert. den. 262 Conn. 932, 815 A.2d 132 (2003). As explained in Coalition, the entire draft document is deliberative because in draft form, it “‘reflect[s] that aspect of the agency’s function that precedes formal and informed decision making.’” *Id.* at 95, quoting Wilson v. Freedom of Info. Comm., 181 Conn. 324, 332-33, 435 A.2d 353 (1980).

The New Jersey Appellate Division has also reached this conclusion with regard to draft documents. In the unreported section of In re Readoption, *supra*, the court reviewed an OPRA request to the Department of Corrections (DOC) for draft regulations and draft statutory revisions. The court stated that these drafts were “all clearly pre-decisional and reflective of the deliberative process.” *Id.* at 18. It further held:

The trial judge ruled that while appellant had not overcome the presumption of non-disclosure as to the entire draft, it was nevertheless entitled to those portions which were eventually adopted. Appellant appeals from the portions withheld and DOC appeals from the portions required to be disclosed. *We think it plain that all these drafts, in their entirety, are reflective of the deliberative process.* On the other hand, appellant certainly has full access to all regulations and statutory revisions ultimately adopted. We see, therefore, no basis justifying a conclusion that

the presumption of nondisclosure has been overcome. *Id.* (Emphasis added.)

The court similarly held that memos containing draft procedures and protocols were entirely protected from disclosure. *Id.* at 19. See also Edwards v. City of Jersey City, GRC Complaint No. 2002-71 (February 27, 2004) (noting that in general, drafts are deliberative materials).

Once the township's budget is adopted, it will no longer be a draft, but rather a government record subject to immediate disclosure pursuant to N.J.S.A. 47:1A-5.e. The budget worksheets, however, because they are pre-decisional documents reflective of the township's deliberative process, are exempt from disclosure as advisory, consultative, or deliberative material pursuant to N.J.S.A. 47: 1A-1 .1.

Because it relates to the release of records in a fact pattern similar to the instant complaint, dicta in the pre-OPRA Superior Court case, Home News v. Board of Educ. of the Borough of Spotswood, 286 N.J. Super. 380 (App. Div. 1996) is instructional with respect to disclosure of material used to generate a budget.

In Home News, a reporter sought access to the Board's 1994 budget workbook. The court characterized the budget workbook as "...worksheets reflecting presentations and analyses of budgetary information, gathered by the business administrator and others..." *Id.* at 387. Of particular relevance to the instant complaint is that evidence considered by the trial court revealed that the workbook contained, *inter alia*, proposed salary information.

The court in Home News, affirming the trial court's holding that the newspaper was not entitled to disclosure of the workbook, noted "...[the workbook] was no more subject to disclosure than any other papers reflecting work in progress toward the goal of producing a document that will eventually become a public record." *Id.* at 387-88. Discussing the common law balancing test, the court stated "...[t]here is an important public interest in permitting public officials engaged in the budget planning process to...make tentative decisions about priorities and needs...before figures are bruited about in public discourse with the possibility that they will become prematurely fixed or will raise unfulfillable expectations." *Id.* at 388.

In a recent unpublished opinion, Jennifer Beck and Sean T. Kean v. Barbara O'Hare, Superior Court of New Jersey, Law Division – Mercer County, Docket No. MER-L-2411-07 (November 26, 2007), the court reviewed an action to challenge an OPRA request that was denied in part by the custodian because one of the records, a draft final report, was determined to be exempt from disclosure as inter-agency or intra-agency advisory, consultative or deliberative material ("ACD"). After finding that the withheld record was intra-agency, the court turned to the issue of whether the record fell within the ACD exemption. In considering this issue, the court found Home News, albeit a pre-OPRA decision, as being relevant. The court observed "... [w]hile [another decision] and Home News predate OPRA, both cases support the notion that preliminary or draft reports are exempt from disclosure." *Id.* at 21. The court noted the importance of the rationale that "...the premature release of information can mislead the public." *Id.* at 22.

In Martin O'Shea v. West Milford Board of Education, 391 N.J. Super. 534 (App. Div. 2007), the Complainant requested handwritten notes of an executive session meeting.⁸ The court agreed with the GRC that the handwritten notes might be considered "intra-agency consultative material" because they were informal notes taken preliminary to preparation of the formal minutes; however, the court went further and stated that "we also conclude that [the handwritten notes] are not 'government records' at all...the formal minutes themselves, not the Secretary's handwritten notes, are the public record." *Id.* at 538. In holding that the handwritten notes were not government records, the court stated:

"[w]e reject O'Shea's contention that the Secretary's handwritten notes, jotted down as a memory aid to assist in preparing the formal minutes, are public records merely because they were 'made' by a government official. Under that rationale any Board member's personal handwritten notes, taken during a meeting to assist the member to recall what occurred, would be a public record because the member might arguably refer to them later in reviewing the Secretary's draft of the formal minutes. Taken further, every yellow-sticky note penned by a government official to help him or her remember a work-related task would be a public record. Such absurd results were not contemplated or required by OPRA." *Id.* at 538-39.

Here, the Township of Edison 2008 budget has not yet been adopted by the Township Council; therefore it remains a draft document.⁹ The draft of the Township of Edison 2008 budget and the pre-decisional worksheets for salaries and wages used to assist the township in its budgetary decision-making process are exempt from disclosure under N.J.S.A. 47:1A-1.1 because they constitute advisory, consultative and deliberative material. Further, the worksheets may not be government records subject to disclosure at all, because analogous to the Superior Court's holding in Martin O'Shea, *supra*, the formal budget itself, not the preparers' worksheets, is the public record. Accordingly, the Custodian had no legal duty to disclose the records.

Further, the Custodian is not required under OPRA to compile information and create documents in response to a request. The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or examination."* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (March 2005). The Court further held that "[u]nder OPRA, *agencies are required to disclose only "identifiable" government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files.*" (Emphasis added.) *Id.* at 549.

⁸ This case is an appeal of the GRC's decision of Martin O'Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006).

⁹ N.J.A.C. 5:30-3 et seq. does provide, however, that prior to the public hearing, certain draft budget documents shall be made available for public inspection, these shall include schedules, estimates or lists of proposed revenues and appropriations used by the governing body in its budget deliberations.

Accordingly, the Custodian's compilation, creation and release of information responsive to the Complainant's request was not required under OPRA because a custodian must only disclose clearly identifiable records under OPRA, pursuant to the Superior Court's decision in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (March 2005).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The draft of the Township of Edison 2008 budget and the pre-decisional worksheets for salaries and wages used to assist the township in its budgetary decision-making process are exempt from disclosure under N.J.S.A. 47:1A-1.1 because they constitute advisory, consultative and deliberative material.
2. The Custodian's compilation, creation and release of information responsive to the Complainant's request was not required under OPRA because a Custodian must only disclose clearly identifiable records under OPRA, pursuant to the Superior Court's decision in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (March 2005).

Prepared By:

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Approved By:

Catherine Starghill, Esq.
Executive Director

February 20, 2008