



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Acting Commissioner

**FINAL DECISION**

**May 29, 2012 Government Records Council Meeting**

Eugene E. Sarafin  
Complainant

Complaint No. 2011-122

v.

Borough of Hightstown (Mercer)  
Custodian of Record

At the May 29, 2012 public meeting, the Government Records Council (“Council”) considered the May 22, 2012 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 because the Custodian certified that the requested subcommittee police report was used as the basis for deliberations which resulted in the negotiation, preparation, and execution of a Retirement and Separation Agreement with the Borough’s former Police Chief, such report is therefore a predecisional record the disclosure of which would reveal the nature of the deliberations that occurred during that process. The requested subcommittee policy report, as well as the factual components thereof, is therefore exempt from disclosure under OPRA as advisory, consultative and deliberative material. N.J.S.A. 47:1A-1.1; Education Law Center v. New Jersey Department of Education, 198 N.J. 274 (2009); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004). *See also* Bergen County Improvement Auth. v. North Jersey Media, 370 N.J. Super. 504, 516 (App. Div. 2004). Accordingly, the Custodian has not unlawfully denied the Complainant access to the requested record. N.J.S.A. 47:1A-6.

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 May, 2012

Robin Berg Tabakin, Chair  
Government Records Council



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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: June 4, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
May 29, 2012 Council Meeting**

**Eugene E. Sarafin<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-122**

v.

**Borough of Hightstown (Mercer)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** A copy of the “subcommittee police report.”

**Request Made:** March 29, 2011

**Response Made:** March 31, 2011

**Custodian:** Debra Sopronyi

**GRC Complaint Filed:** April 13, 2011<sup>3</sup>

**Background**

**March 29, 2011**

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.

**March 31, 2011**

Custodian’s response to the OPRA request. The Custodian responds in writing via letter to the Complainant’s OPRA request on the second (2<sup>nd</sup>) business day following receipt of such request. The Custodian states that access to the requested record is denied because the requested record consists of interagency advisory, consultative, and deliberative (“ACD”) material that is exempt from disclosure under OPRA. The Custodian maintains that the report of the Police Committee (“Committee”) is advisory and consultative in nature because the Committee makes recommendations to the rest of the Borough’s governing body. The Custodian asserts that the requested subcommittee police report is not a government record.

**April 13, 2011**

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

- Complainant’s OPRA request dated March 29, 2011
- Letter from the Custodian to the Complainant dated March 31, 2011

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

<sup>2</sup> Represented by Jessica T. Zolotorofe, Esq., of Ansell Grimm & Aaron (Ocean, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

The Complainant states that the Committee began a study to determine the reasons for excessive police overtime. The Complainant asserts that the Committee came to its conclusions using various records that contained information about how the police officers were paid. The Complainant states that a subcommittee formed the requested report using this information. The Complainant claims that the Custodian's denial of access is based on the Custodian's belief that the Complainant is seeking the Committee's conclusions and recommendations instead of the subcommittee report used to make the conclusions and recommendations. The Complainant argues that there is no legitimate reason to deny access to the requested subcommittee report.

The Complainant contends that he has been denied access to the requested records because of personnel actions that resulted from the report. The Complainant maintains that the elected officials of the Borough are trying to hide the findings because they concern payroll information. The Complainant further argues that although the requested report may contain opinions, he is at least entitled to the factual portions of the report.

The Complainant does not agree to mediate this complaint.

#### **April 29, 2011**

Request for the Statement of Information ("SOI") sent to the Custodian.

#### **May 3, 2011**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated March 29, 2011
- Letter from the Custodian to the Complainant dated March 31, 2011

The Custodian certifies that a search for the requested record yielded the February 20, 2011 "Report and Recommendations of Hightstown Borough Council Police Committee on Issues of Police Staffing, Overtime, and Oversight." The Custodian certifies that this record has a permanent retention schedule. The Custodian further certifies that the Borough Council created a subcommittee to provide recommendations to the governing body concerning police staffing, overtime, and oversight issues.

The Custodian argues that the ACD privilege permits the government to withhold documents or correspondence that reflect deliberations which are part of the process that leads to a governmental decision or the formation of a policy, and cites Education Law Center v. New Jersey Department of Education, 198 N.J. 274 (2009), in support of this proposition. The Custodian asserts that in Education Law Center, the New Jersey Supreme Court held that a report used by the New Jersey Department of Education was exempt from disclosure under OPRA as ACD material because the report was used during deliberations and in the Department's decision-making process. The Custodian contends that the Court's decision in Education Law Center applies in the instant matter as well because the subcommittee's report is consultative and pre-decisional.

The Custodian further argues that in Paff v. Office of Attorney Ethics, 399 N.J. Super. 632 (Law Div. 2007), the Court held that a party seeking disclosure of a

government record under OPRA must show a particularized need that outweighs the public interest in confidentiality of the investigative proceeding, even when the person seeking disclosure is a citizen seeking to further the public good.

The Custodian contends that in the instant matter, the Complainant will suffer no compelling particularized harm if the information is not released to the public. The Custodian maintains that the disclosure of the requested subcommittee report would be a substantial detriment to the Borough's investigation and decision making process. The Custodian maintains that the usage of the subcommittee report during Borough deliberations qualifies the report as ACD material that is exempt from disclosure under OPRA and that the Complainant's request was not unlawfully denied.

#### **April 30, 2012**

Letter from the GRC to the Custodian. The GRC requests additional information from the Custodian to assist with the adjudication of this complaint. The GRC requests that the Custodian respond to the following:

1. Did the subcommittee police report lead to a final report issued by the governing body?
2. If so, please provide the GRC with a copy and provide a certified statement indicating that the subcommittee report was used to make the final report and any other pertinent details.

#### **May 1, 2012**

Letter from the Custodian to the GRC. The Custodian responds to the GRC's April 30, 2012 request for additional information. The Custodian certifies that the subcommittee police report was not used to write a final report by the governing body, but instead was used as the basis for deliberations which resulted in the negotiation, preparation, and execution of a Retirement and Separation Agreement with the Borough's former Police Chief, James Eufemia.

### **Analysis**

#### **Whether the Custodian unlawfully denied access to the requested record?**

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.

Additionally, 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 ... The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

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

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.

As a general matter, draft documents are ACD communications. Although OPRA broadly defines a “government record” as records 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. *Id.*, See also 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.

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 (7<sup>th</sup> 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 also has reached this conclusion with regard to draft documents. In the unreported section of In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004), 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:

“[t]he 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. *Ibid.* (Emphasis added.)”

In the instant matter, the Complainant is requesting a copy of the Borough’s “subcommittee police report.” The Custodian denied the Complainant’s request on the grounds that the requested subcommittee police report qualified as ACD material that is exempt from disclosure under OPRA. The Custodian certified to the GRC on May 1, 2012 that the subcommittee police report was used as the basis for deliberations that resulted in the negotiation, preparation, and execution of a Retirement and Separation Agreement for former Borough Police Chief, James Eufemia.

In Education Law Center v. New Jersey Department of Education, 198 N.J. 274 (2009), the New Jersey Supreme Court held that a report used by the New Jersey Department of Education was exempt from disclosure under OPRA as ACD material because the report was used during deliberations and in the Department’s decision-making process.

In doing so, the Court stated:

“it is not the existence of a "fact" that should strip a document used in governmental deliberation from the protection of the privilege. Rather, a court must recognize the difference between factual material that is part of the formulation, or exercise, of policy-oriented judgment from factual material that is not. Because of "the need for deliberation to inform discretion and for confidentiality to protect deliberation," (*citations omitted*) ... we are convinced that the key to identifying deliberative material must be how closely the material (including the selection of "factual" or "informational" material) relates to the "formulation or exercise of ... policy-oriented judgment or [to] the process by which policy is formulated," (*internal quotation marks and emphasis omitted*). Deliberative material need not, in all instances, expressly reflect an overt opinion, recommendation, or advice when a discretionary decision is in development. And, pre-decisional documents do not lose their protection from unwarranted public scrutiny merely because they may contain numerical or statistical data or information used in the development of, or deliberation on, a possible governmental course of action. ... So long as disclosure of such material would reveal the nature of the deliberations that occurred during the agency's processes, the material is entitled to the protection of the deliberative process privilege.”(*Citations omitted*). *Id.* at 295-96.

Thus, the Court held that a record, which contains or involves factual components, is subject to the deliberative process privilege when it was used in the

decision-making process and its disclosure would reveal the nature of the deliberations that occurred during that process. *Id.* at 300.

In the matter before the Council, the Custodian certified to the GRC on May 1, 2012 that the requested subcommittee police report was used as the basis for deliberations which resulted in the negotiation, preparation, and execution of a Retirement and Separation Agreement with the Borough's former Police Chief, James Eufemia.

Therefore, because the Custodian certified that the requested subcommittee police report was used as the basis for deliberations which resulted in the negotiation, preparation, and execution of a Retirement and Separation Agreement with the Borough's former Police Chief, such report is therefore a predecisional record the disclosure of which would reveal the nature of the deliberations that occurred during that process. The requested subcommittee policy report, as well as the factual components thereof, is therefore exempt from disclosure under OPRA as advisory, consultative and deliberative material. N.J.S.A. 47:1A-1.1; Education Law Center v. New Jersey Department of Education, 198 N.J. 274 (2009); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004). *See also* Bergen County Improvement Auth. v. North Jersey Media, 370 N.J. Super. 504, 516 (App. Div. 2004). Accordingly, the Custodian has not unlawfully denied the Complainant access to the requested record. N.J.S.A. 47:1A-6.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that because the Custodian certified that the requested subcommittee police report was used as the basis for deliberations which resulted in the negotiation, preparation, and execution of a Retirement and Separation Agreement with the Borough's former Police Chief, such report is therefore a predecisional record the disclosure of which would reveal the nature of the deliberations that occurred during that process. The requested subcommittee policy report, as well as the factual components thereof, is therefore exempt from disclosure under OPRA as advisory, consultative and deliberative material. N.J.S.A. 47:1A-1.1; Education Law Center v. New Jersey Department of Education, 198 N.J. 274 (2009); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004). *See also* Bergen County Improvement Auth. v. North Jersey Media, 370 N.J. Super. 504, 516 (App. Div. 2004). Accordingly, the Custodian has not unlawfully denied the Complainant access to the requested record. N.J.S.A. 47:1A-6.

Prepared By: Darryl C. Rhone  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

May 22, 2012