



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

November 19, 2013 Government Records Council Meeting

Nancy L. Held
Complainant

Complaint No. 2013-142

v.

NJ Department of Transportation
Custodian of Record

At the November 19, 2013 public meeting, the Government Records Council (“Council”) considered the November 12, 2013 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 responsive Evaluations contain recommendations about DOT policy and were generated before the DOT made a decision regarding the helistop, the responsive Evaluations are reflective of the deliberative process and are exempt from access as ACD material. *See* N.J.S.A. 47:1A-1.1; In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 84-85 (2000). *See also* Education Law Center v. New Jersey Department of Education, 198 N.J. 274, 304 (2009). Thus, the Custodian did not unlawfully deny access to the responsive records. *See* 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 19th Day of November, 2013

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: November 21, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 19, 2013 Council Meeting**

**Nancy L. Held¹
Complainant**

GRC Complaint No. 2013-142

v.

**New Jersey Department of Transportation²
Custodial Agency**

Records Relevant to Complaint: A copy of the completed Permanent Aeronautical Facility Application Evaluation Ranking form (an "Evaluation") used by the DOT's Aeronautics Division in evaluating the licensing criteria expressed in NJAC 16:54-2.5 for James L. Johnson's helistop application.

Custodian of Record: Maria C. Jacobi

Request Received by Custodian: March 25, 2013

Response Made by Custodian: March 25 and March 27, 2013

GRC Complaint Received: May 17, 2013

Background³

Request and Response:

On March 25, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned record. The Custodian responded in writing on that day seeking an extension of time until April 18, 2013. On March 27, 2013, two (2) business days later, the Custodian denied the request based on OPRA's exemption for records that contain advisory, consultative, or deliberative material ("ACD"). N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On May 17, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant states that on March 18, 2013 she received a copy of the completed Permanent Aeronautical Facility Application Evaluation Rankings (the "Evaluations") used by the New Jersey Department of Transportation ("DOT") to assess an application for a helistop at Trump National Golf Club Colts Neck ("Trump"). The

¹ No legal representation listed on record.

² The Custodian is represented by Deputy Attorney General Valentina M. DiPippo.

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.

Complainant asserts that she was denied access to the same Evaluations used to assess a helistop to be built in Tewksbury, New Jersey, because the DOT is “afraid to show how it made its assessment.”

Statement of Information:

On August 15, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s OPRA request on March 25, 2013 and responded that day with a request for an extension of time until April 18, 2013. The Custodian certifies that on March 27, 2013 she denied the Complainant’s request because the responsive records contained ACD material that is exempt from public access under N.J.S.A. 47:1A-1.1.

The Acting Manager for the DOT’s Division of Aeronautics (the “Manager”) certifies that the DOT supervises aeronautics within the State and processes applications for helistop facility licenses. The Manager further certifies that the DOT uses a matrix to evaluate the various licensing criteria set forth in N.J.A.C. 16:54-2.5, and that this matrix is included in the Evaluations completed by DOT Aeronautical Operations Specialists. The Manager also certifies that the matrixes are then tabulated by another DOT Aeronautical Operations Specialist, that the Evaluations reflect the personal opinions of these DOT employees, and that these documents are used as the basis for any licensing recommendation.

The Manager certifies that the DOT received an application for a helistop facility license from Trump and, based on the recommendations contained in the resulting completed Evaluations, the DOT stated that a license would be issued. The Manager further certifies that Colts Neck Township appealed the issuance of the license and, in its appellate brief, the DOT “included a chart setting forth the scores for each of the criteria contained on the [Evaluation] forms used” in assessing the Trump application.

Counsel for the Custodian (“Counsel”) asserts that the DOT provided the Trump Evaluation forms initially sought by the Complainant because the information contained in those Evaluations had been disclosed in the DOT’s appellate brief. Counsel contends that the disclosure of the Trump Evaluation forms in the appellate brief does not “waive the [DOT’s] deliberative process privilege with respect to any other [Evaluation] forms.”

Counsel further contends that OPRA’s intra-agency ACD materials exemption has been construed to encompass the deliberative process privilege. *See* N.J.S.A. 47:1A-1.1; Ciesla v. N.J. Dep’t of Health & Senior Servs., 429 N.J. Super. 127, 137 (App. Div. 2012) (citing Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 284 (2009)). Counsel states that in order to assert this privilege, “an agency must initially prove that a document is pre-decisional, i.e., generated before the adoption of an agency’s policy or decision, and also deliberative, in that it contain[s] opinions, recommendations or advice about agency policies.” Ciesla, 429 N.J. Super. at 138 (citation and quotations omitted).

Counsel contends that the Evaluation sought by the Complainant is pre-decisional in nature. Counsel states that the DOT’s granting of a helistop license is a policy decision based on the licensing criteria set forth in N.J.A.C. 16:54-2.5, and that the Evaluations are created prior to

that decision. Counsel notes that the Evaluations are used to advise DOT divisional directors and assist “in making a decision on an application for a license.” Counsel contends that the Evaluation is therefore deliberative and the disclosure of such forms “would stifle honest and frank communications within the agency and impede the agency’s decision-making.” *See Educ. Law Ctr.*, 198 N.J. at 304. Counsel asserts that the Evaluations, as such, are exempt from access for containing ACD material under N.J.S.A. 47:1A-1.1.

Analysis⁴

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. For example, government records “shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.” N.J.S.A. 47:1A-1.1. 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.

In O’Shea v. W. Milford Bd. of Educ., GRC Complaint No. 2004-93 (April 2006), the Council stated that:

[N]either the statute nor the courts have defined the terms . . . “advisory, consultative, or deliberative” 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 predecisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies.

Id. (citing 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)); *see also* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975) (stating that deliberative process privilege permits government agencies to withhold documents that reflect advisory opinions, recommendations, and deliberations submitted as part of processes by which governmental decisions and policies are formulated).

The New Jersey Supreme Court ruled that a record containing or involving factual components is entitled to deliberative process protection under OPRA’s ACD exemption when the document was used in the decision-making process and its disclosure would reveal deliberations that occurred during that process. *See Educ. Law Ctr.*, 198 N.J. at 280-81. In Integrity Ins. Co., the Court addressed the question of whether the Commissioner of Insurance could protect certain records from disclosure that she claimed contained opinions,

⁴ There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

recommendations, or advice regarding agency policy. Id. at 81. The Court adopted a qualified deliberative process privilege, noting that:

A document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. . . . Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies.

Id. at 84-85 (citations omitted).

The Court further set out procedural guidelines:

The initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.

Id. at 88 (citations omitted).

Here, the Complainant argued that she has received the Trump Evaluations and, therefore, should also be able to obtain access to the Evaluations at issue. For the Evaluations to be exempt as ACD material, they must have been “. . . generated before the adoption of an agency's policy or decision” and “. . . must be deliberative in nature, containing opinions, recommendations, or advice about agency policies.” Id. at 84-85. In the SOI, the Custodian argued that the Evaluations were created prior to, and to help make, the policy decision to grant or deny an application for a helistop license. The Custodian further contends that disclosure of the Evaluations “would stifle honest and frank communications within the agency and impede the agency’s decision-making.” See Educ. Law Ctr., 198 N.J. at 304.

Notwithstanding the fact that the DOT disclosed the Trump Evaluations, the exemption afforded under N.J.S.A. 47:1A-1.1 to material described as ACD cannot be waived through a voluntary disclosure to the public. See Eastwood v. Borough of Englewood Cliffs, GRC Complaint No. 2012-121 (June 2013). The inclusion of the Trump Evaluations in the DOT’s appellate brief does not render other Evaluations disclosable. Further, the Custodian adequately argued that the Evaluations meet both prongs of the Integrity Ins. Co. test: (1) the forms were generated before the DOT took any action on the helistop application; and (2) the forms’ matrixes were completed and tabulated by three (3) DOT Aeronautical Operations Specialists in order to provide an assessment of, and recommendation regarding, the licensing criteria listed in N.J.A.C. 16:54-2.5. While the Custodian has established the deliberative nature of the Evaluations, the Complainant has not demonstrated a compelling or substantial need for the

materials in light of the resulting presumption against disclosure. *See Integrity Ins. Co.*, 165 N.J. at 88.

Therefore, because the responsive Evaluations contain recommendations about DOT policy and were generated before the DOT made a decision regarding the helistop, the responsive Evaluations are reflective of the deliberative process and are exempt from access as ACD material. *See* N.J.S.A. 47:1A-1.1; *Integrity Ins. Co.*, 165 N.J. at 84-85. *See also Educ. Law Ctr.*, 198 N.J. at 304. Thus, the Custodian did not unlawfully deny access to the responsive records. *See* N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the responsive Evaluations contain recommendations about DOT policy and were generated before the DOT made a decision regarding the helistop, the responsive Evaluations are reflective of the deliberative process and are exempt from access as ACD material. *See* N.J.S.A. 47:1A-1.1; *In Re the Liquidation of Integrity Insurance Company*, 165 N.J. 75, 84-85 (2000). *See also Education Law Center v. New Jersey Department of Education*, 198 N.J. 274, 304 (2009). Thus, the Custodian did not unlawfully deny access to the responsive records. *See* N.J.S.A. 47:1A-6.

Prepared By: Robert T. Sharkey, Esq.
Staff Attorney

Approved By: Brandon D. Minde, Esq.
Executive Director

November 12, 2013