



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

April 30, 2019 Government Records Council Meeting

Betsy Cross
Complainant

Complaint No. 2017-29

v.

Wall Township Board of Education (Monmouth)
Custodian of Record

At the April 30, 2019 public meeting, the Government Records Council (“Council”) considered the April 23, 2019 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 Custodian unlawfully denied access to the Complainant’s December 19, 2016 OPRA request. N.J.S.A. 47:1A-6. The requested record did not satisfy the elements required to qualify under the deliberative process privilege. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. N.J. Dep’t of Educ. 198 N.J. 274, 286 (2009). Additionally, the Custodian failed to show that release of the record would be “inimical to the public interest” under N.J.S.A. 47:1A-3(a). See North Jersey Media Group v. Twp. of Lyndhurst, 229 N.J. 541, 573-74 (2017). However, the GRC declines to order disclosure as the evidence in the record demonstrates that the Complainant has the requested letter in her possession.
2. The Custodian unlawfully denied access to the requested letter. N.J.S.A. 47:1A-6. However, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 2019

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 3, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
April 30, 2019 Council Meeting**

**Betsy Cross¹
Complainant**

GRC Complaint No. 2017-29

v.

**Wall Township Board of Education (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Copy of “the letter received from the Department of Agriculture [“DOA”] that was discussed at the [Finance and Facilities (“F&F”)] meeting on December 6, 2016 (see attached). This is the meeting that the F&F committee would not allow the public to attend.”

Custodian of Record: Brian J. Smyth

Request Received by Custodian: December 19, 2016

Response Made by Custodian: December 20, 2016

GRC Complaint Received: February 8, 2017

Background³

Request and Response:

On December 19, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 20, 2016, Custodian’s Counsel sent a response to the Complainant’s attorney,⁴ directing him to an earlier correspondence dated December 14, 2016. Within said correspondence, Custodian’s Counsel asserted that the record was part of an ongoing investigation and contained advisory, consultative, and/or deliberative (“ACD”) material. N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-3(a).

Denial of Access Complaint:

On February 8, 2017 the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that after she was denied access to the requested record, she received an unredacted copy from DOA in response to a subsequent OPRA request. The Complainant stated that the record was a letter dated November 23, 2016 from

¹ No legal representation listed on record.

² Represented by Michael J. Gross, Esq. of Kenney, Gross, Kovats & Parton (Red Bank, 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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

⁴ Although the Complainant was represented at the time of the OPRA request, she is not represented in this matter.

DOA to the Wall Township Board of Education (“Board”). The Complainant attached a copy of the letter, which she received in unredacted form, from DOA on January 31, 2017 via facsimile.

The Complainant stated that the Custodian’s reliance on N.J.S.A. 47:1A-3(a) was misplaced. The Complainant asserted that the letter did not pertain to an investigation but was notice of a final determination from DOA to the Board regarding an expenditures account. The Complainant also argued that even if the letter pertained to an ongoing investigation, the Custodian failed to show that release of the letter would be inimical to the public interest. As evidence, the Complainant attached two (2) newspaper articles dated February 1 and February 2, 2017 that discussed the letter at issue.

Next, the Complainant argued that the Custodian failed to show that the letter qualified as containing ACD material. The Complainant asserted that to qualify under the exemption, the Custodian must demonstrate that the record 1) was pre-decisional; and 2) reflected the deliberative process, in that it contained opinions, recommendations, or advice about agency policy. Educ. Law Ctr. v. N.J. Dep’t of Educ. 198 N.J. 274, 286 (2009); Hyland v. Twp. of Lebanon (Hunterdon) & Twp. of Tewksbury (Hunterdon), GRC Complaint No. 2012-227 and 2012-228 (Interim Order dated December 16, 2014).

The Complainant asserted that the letter was not pre-decisional, in that DOA expressly notified the Board of a final decision of its investigation. The Complainant also stated that the letter did not contain any opinions, recommendations, or advice about the Board’s policies, but directives for the Board to follow by a certain deadline. The Complainant also included a letter from a member of the Board’s firm to DOA dated December 20, 2016. Therein, the member stated that the letter was a follow-up from a telephone conversation held the day prior, in which the member informed DOA of the Board’s desire to contest the findings contained within the November 23, 2016 letter. The Complainant contended that the Board’s desire to dispute the results of the investigation did not make the letter pre-decisional, and to hold otherwise would allow agencies to withhold any final administrative ruling from access retroactively by filing an appeal or request for reconsideration.

Lastly, the Complainant attached a copy of correspondence from DOA to the Board dated November 30, 2016. Therein, it was requested that the Board consider DOA’s documents “exempt while [DOA continues] to deliberate this matter . . .” The Complainant asserted that a request from other agencies to withhold records is not a valid exemption under OPRA.

The Complainant requested that the GRC find that the Custodian violated OPRA by denying access to the letter in response to her December 19, 2016 request.

Statement of Information:

On February 24, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on December 19, 2016. The Custodian certified that Custodian’s Counsel sent a response to the Complainant’s Counsel on December 20, 2016.

The Custodian asserted that because the letter had yet to be reviewed by counsel and the Board, it was protected from disclosure under the deliberative process privilege. See NLRB v. Sears Roebuck & Co., 421 U.S. 132, 150, 95 S.Ct. 150, 156 (1975). The Custodian noted that the New Jersey Supreme Court ruled that records containing factual components and are used during the decision-making process and would disclose deliberations therein are protected from disclosure under OPRA pursuant to the deliberative process privilege. Educ. Law Ctr., 198 N.J. at 274. The Custodian argued that the conclusions within the letter were preliminary, and subject to further review by DOA. The Custodian also stated that the Board had yet to review the letter with counsel and provide direction thereafter, thus classifying the record as pre-decisional and an initial assessment in an investigation.

The Custodian thus asserted that the letter remained part of an ongoing investigation under N.J.S.A. 47:1A-3(a) and satisfied the two-prong test for the deliberative process privilege. The Custodian argued that release of the letter prior to a conclusion reached by DOA would erode the deliberative process privilege and invite public scrutiny in the middle of an investigation.

The Custodian asserted that the matter be dismissed based upon the Complainant's requested remedy. The Custodian argued that the GRC's jurisdiction is determining whether a record is subject to access under OPRA and does not have the authority to determine that a Custodian violated a Complainant's rights under the statute.

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 also states that the definition of a government record "shall not include . . . inter-agency or intra-agency advisory, consultative, or deliberative [("ACD")] material." When the exception is invoked, a governmental entity may "withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." Educ. Law Ctr., 198 N.J. at 285 (citing NLRB, 421 U.S. at 132). The New Jersey Supreme Court has also ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process and its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr., 198 N.J. at 274.

A custodian claiming an exception to the disclosure requirements under OPRA on that basis must initially satisfy two conditions: 1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity's policy or decision; and 2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. Id. at 286 (internal citations and

quotations omitted). The key factor in this determination is whether the contents of the document reflect “formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated.” Id. at 295 (quoting Mapother v. Dep’t of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies these two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government’s interest in confidentiality. Id. at 286-87.

Furthermore, OPRA provides that in order withhold access to records under N.J.S.A. 47:1A-3(a), the agency must show that the records “pertain to an investigation in progress by any public agency,” that disclosure will “be inimical to the public interest,” and also show that the records were not available to the public prior to the beginning of the investigation. See North Jersey Media Grp. v. Twp. of Lyndhurst, 229 N.J. 541, 573 (2017).

In North Jersey Media Grp., the Court noted that section 3(a) has seen little analysis in published decisions, stating:

In Serrano v. South Brunswick Township, 358 N.J. Super. 352, 367, 817 A.2d 1004 (App. Div. 2003), the Appellate Division rejected a claim that the release of a 9-1-1 tape could make it difficult to impanel a jury in a murder case and might call for a change of venue. Even if that were to happen, the panel observed, the “inconveniences to the prosecutor” did not make disclosure “inimical to the public interest.” Ibid. The panel also initially noted that the tape “was created hours before the police investigation began” and was “open for public inspection” at that time. Id. at 366, 817 A.2d 1004 (quoting N.J.S.A. 47:1A-3(a)). Section 3(a) expressly carves that type of record out of the ongoing investigations exception.

...

[I]n [Paff v. Ocean Cnty. Prosecutor’s Office, 446 N.J. Super. 163, 189-90 (App. Div. 2016)], the Appellate Division briefly addressed section 3(a). In light of the facts of the case, which are discussed above, a majority of the panel found that the MVR recordings preceded any investigation and that their release would not be inimical to the public interest.

[229 N.J. at 573-74.]

In summary, the Court found that the custodian must demonstrate that disclosure of the record will “be inimical to the public interest” under N.J.S.A. 47:1A-3(a).

In the instant matter, the Complainant sought access to a letter from DOA to the Board dated November 23, 2016, pertaining to a review of the Board’s non-profit food service account. The Custodian denied access under the ACD exemption, asserting that the letter was pre-decisional and used to determine the Board’s course of action considering the letter’s contents. N.J.S.A. 47:1A-1.1. The Custodian also asserted that the record was part of an ongoing investigation,

claiming that the findings within the letter were preliminary, and release of the record would have been inimical to the public interest. N.J.S.A. 47:1A-3(a).

The GRC first addresses whether the record is protected under the deliberative process privilege. Upon review, the evidence in the record suggests that the letter does not satisfy the two-pronged test. Within the letter, DOA informs the Board that “the [DOA] recently conducted a review . . .” and “has determined” that the Board expended funds from the account for certain improper expenditures. The letter does not contain advice, recommendations, or suggestions for the Board’s consideration. Additionally, the Custodian asserted that at the time of the request, neither the Board nor counsel had reviewed the letter and determined a course of action. However, counsel’s letter to DOA dated December 20, 2016 contradicts this assertion, indicating that the Board decided a course of action on or before December 19, 2016, the date of the OPRA request. Therefore, in accordance with Educ. Law Ctr., 198 N.J. at 274, the Custodian did not satisfy the two-prong test required for the letter to qualify under the deliberative process privilege.

Next, the GRC briefly addresses whether the record was part of an ongoing investigation. The GRC finds that the Custodian’s invocation of the exemption is inapplicable. Notwithstanding whether the findings within the requested letter were preliminary or final, the investigation was being conducted by DOA, not the Board. Therefore, the exemption lies with DOA as the investigating agency. Moreover, even if the Board could assert the exemption, the Custodian failed to show that release of the letter would be “inimical to the public interest” and hinder the course of the investigation. North Jersey Media Grp., 229 N.J. at 573-74.

Accordingly, the Custodian unlawfully denied access to the Complainant’s December 19, 2016 OPRA request. N.J.S.A. 47:1A-6. The requested record did not satisfy the elements required to qualify under the deliberative process privilege. N.J.S.A. 47:1A-1.1; Educ. Law Ctr., 198 N.J. at 274. Additionally, the Custodian failed to show that release of the record would be “inimical to the public interest” under N.J.S.A. 47:1A-3(a). See North Jersey Media Grp., 229 N.J. at 573-74. However, the GRC declines to order disclosure as the evidence in the record demonstrates that the Complainant has the requested letter in her possession.

Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically, OPRA states “. . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City

of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

In the matter before the Council, the Custodian unlawfully denied access to the requested letter. N.J.S.A. 47:1A-6. However, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that:

1. The Custodian unlawfully denied access to the Complainant's December 19, 2016 OPRA request. N.J.S.A. 47:1A-6. The requested record did not satisfy the elements required to qualify under the deliberative process privilege. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. N.J. Dep't of Educ. 198 N.J. 274, 286 (2009). Additionally, the Custodian failed to show that release of the record would be "inimical to the public interest" under N.J.S.A. 47:1A-3(a). See North Jersey Media Group v. Twp. of Lyndhurst, 229 N.J. 541, 573-74 (2017). However, the GRC declines to order disclosure as the evidence in the record demonstrates that the Complainant has the requested letter in her possession.
2. The Custodian unlawfully denied access to the requested letter. N.J.S.A. 47:1A-6. However, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Samuel A. Rosado
Staff Attorney

April 23, 2019