



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

August 27, 2019 Government Records Council Meeting

Elinor Comlay
Complainant

Complaint No. 2018-167

v.

Stockton Affiliated Services, Inc.
Custodian of Record

At the August 27, 2019 public meeting, the Government Records Council (“Council”) considered the August 20, 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 the requested SASI’s unapproved, draft minutes constituted “inter-agency or intra-agency advisory, consultative or deliberative material” were 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) (certif. denied, 233 N.J. 484 (2018)); Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006). Therefore, the Custodian did not unlawfully deny access to these records. 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 27th Day of August 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: August 29, 2019

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**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 27, 2019 Council Meeting**

**Elinor Comlay¹
Complainant**

GRC Complaint No. 2018-167

v.

**Stockton Affiliated Services, Inc.²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via email of the “preliminary minutes” from the Stockton Affiliated Services, Incorporated (“SASI”) Board meeting of May 2018, as recorded, prior to their approval at the September 2018 SASI meeting date.

Custodian of Record: E. Michael Angulo, Esq.
Request Received by Custodian: July 25, 2018
Response Made by Custodian: August 2, 2018
GRC Complaint Received: August 6, 2018

Background³

Request and Response:

On July 23, 2018, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 2, 2018, the Custodian responded in writing denying the request asserting that the requested records were “consultative or deliberative material exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.”

Denial of Access Complaint:

On August 6, 2018, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant requested review of the Custodian’s reason for denial of above-mentioned records. The Complainant asserted that the requested records should be disclosed under “N.J. Sunshine Law,” which provided that minutes should be “promptly made public”.

¹ No legal representation listed on record.

² Represented by Colin G. Bell, Esq. of Hankin, Sandman, Palladino & Weintrob, P.C. (Atlantic City, 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 August 28, 2018, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on July 25, 2018. The Custodian certified that he responded in writing on August 2, 2018 denying the requested documents as exempt from disclosure under the “inter-agency or intra-agency advisory, deliberative or consultative [“ACD”] material” N.J.S.A. 47:1A-1. The Custodian certified that requested records were draft, unapproved minutes of SASI May 2018 meeting. The Custodian cited to Libertarians for Transparent Gov’t v. Gov’t Records Council, 453 N.J. Super. 83 (App. Div. 2018); and Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006) in support of his denial.

Additional Submissions:

On September 28, 2018, Custodian’s Counsel e-mailed the Complainant advising that the SASI approved its May Board minutes at a meeting on this day. Counsel stated that he attached a copy of the approved minutes in hopes of resolving this complaint. The Complainant subsequently confirmed receipt of the approved minutes via e-mail.

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 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 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, (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (2004).

Regarding draft meeting minutes, the Council has previously determined same are exempt from disclosure pursuant to OPRA. In Parave-Fogg, GRC 2006-51, the Council held that “. . . the Custodian has not unlawfully denied access to the requested meeting minutes as the Custodian certifies that at the time of the request said minutes had not been approved by the governing body and as such, they constitute [ACD] material and are exempt from disclosure. . . ” citing N.J.S.A. 47:1A-1.1. See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-106 (February 2009); Wolosky v. Stillwater Twp. (Sussex), GRC Complaint No. 2009-30 (January 2010).

In Libertarians, 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 policy 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 Integrity, 165 N.J. at 83)]. If a document stratifies both prongs, it is exempt from disclosure under OPRA pursuant to the deliberative process privilege.

[Id. at 89-90.]

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.

As a general matter, draft documents are advisory, consultative and deliberative 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. Ibid. See Bergen Cnty. Improvement Auth. v. North Jersey Media Grp., Inc., 370 N.J. Super. 504, 516 (App. Div. 2004). The statute expressly provides that [ACD] material is not included within the definition of a government record. N.J.S.A. 47:1A-1.1.

In the matter before the Council, the Complainant specifically sought “preliminary” minutes in her OPRA request. The Custodian denied access to the OPRA request as the requested

records were ACD material. The Custodian subsequently certified in the SOI that the requested records were “draft, unapproved minutes of the SASI meeting of May 2018.” Precedential case law supports the non-disclosure of draft minutes as decided in Libertarians as well as Parave-Fogg.

Accordingly, the requested SASI’s unapproved, draft minutes constituted ACD material and were exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Libertarians, 453 N.J. Super. 83; Parave-Fogg, GRC 2006-51. Therefore, the Custodian did not unlawfully deny access to these records N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the requested SASI’s unapproved, draft minutes constituted “inter-agency or intra-agency advisory, consultative or deliberative material” were 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) (certif. denied, 233 N.J. 484 (2018)); Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006). Therefore, the Custodian did not unlawfully deny access to these records. N.J.S.A. 47:1A-6.

Prepared By: Brandon Garcia
Case Manager

August 20, 2019