



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

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**December 15, 2020 Government Records Council Meeting**

Andrew Kelsey  
Complainant

Complaint No. 2019-244

v.

Borough of Keyport (Monmouth)  
Custodian of Record

At the December 15, 2020 public meeting, the Government Records Council (“Council”) considered the December 8, 2020 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 draft ordinance is exempt from disclosure under the “inter-agency or intra agency advisory, consultative, or deliberative material” exemption. 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.) (certif. denied, 233 N.J. 484 (2018)); Eastwood v. Borough of Englewood Cliffs (Bergen), GRC Complaint No. 2012-121 (June 2013); Chang v. Town of West New York (Hudson), GRC Complaint No. 2014-213 (Interim Order dated February 24, 2015). Thus, the Custodian lawfully denied access to said 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 15<sup>th</sup> Day of December 2020

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: December 17, 2020**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 15, 2020 Council Meeting**

**Andrew Kelsey<sup>1</sup>  
Complainant**

**GRC Complaint No. 2019-244**

v.

**Borough of Keyport (Monmouth)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copy via e-mail of the draft ordinance created by Council Matthew Goode that amends Chapter 2 of the Borough of Keyport’s (“Borough”) Code and was discussed at the November 12, 2019 Council meeting.

**Custodian of Record:** Michele Clark

**Request Received by Custodian:** November 13, 2019

**Response Made by Custodian:** November 21, 2019

**GRC Complaint Received:** December 9, 2019

**Background<sup>3</sup>**

**Request and Response:**

On November 12, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On November 13, 2019, the Custodian responded acknowledging receipt of the subject OPRA request. On November 21, 2019, the Custodian responded in writing denying access to the responsive record as a draft that is both pre-decisional and deliberative. The Custodian thus stated that the requested record was exempt under the “inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material” exemption. N.J.S.A. 47:1A-1.1.

On the same day, the Complainant e-mailed the Custodian disputing her denial of access. The Complainant stated that the deliberative process exemption allowed government to withhold records reflecting opinions, recommendations, or deliberations during the formulation of agency policy. In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 83 (2000). The Complainant stated that the exemption was intended to ensure “free and uninhibited communication within governmental agencies so that the best possible decisions can be reached.” Educ. Law Ctr. v. N.J. Dep’t of Educ.,

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

<sup>2</sup> Represented by William P. Opel, Esq., of McManimon, Scotland & Baumann, LLC (Roseland, NJ).

<sup>3</sup> 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.

198 N.J. 274, 286 (App. Div. 2009). The Complainant contended that the ordinance did not meet the ACD definition because it was placed on the agenda for introduction. The Complainant contended that disclosure would not affect “free and uninhibited communications” as the ordinance was discussed at length during the Council meeting.<sup>4</sup>

On November 22, 2019, the Custodian responded via e-mail stating that although she believed her denial was lawful, she would review and consider the Complainant’s rebuttal.

#### Denial of Access Complaint:

On December 9, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant contended that the Custodian unlawfully denied him access to the responsive records for the reasons stated in his November 21, 2020 e-mail.

#### Statement of Information:

On December 19, 2019, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on November 13, 2019. The Custodian certified that she responded in writing on November 21, 2019 denying the subject OPRA request under the ACD exemption.

The Custodian stated that the ACD exemption is applied through a two-prong test set forth in Educ. Law Ctr., 198 N.J. at 286. The Complainant contended that if the record satisfied both prongs, then it was exempt from disclosure under OPRA. The Custodian also noted that in Ciesla v. N.J. Dep’t of Health & Senior Serv., 429 N.J. Super. 127 (App. Div. 2012); the court held that the privilege is meant to “avoid[] the confusion that could result from the release of information concerning matters that do not bear on the agency’s chosen course.” Id. at 138. The Custodian contended that here, the draft ordinance was: 1) generated before adoption of any Borough decision; and 2) reflected the recommendations of future Borough policy that had not yet be fully vetted and was under review. The Custodian thus asserted that the draft ordinance met both prongs of the test and she lawfully denied access to it.

### 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.

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<sup>4</sup> The Complainant also asserted a common law right of access to the requested ordinance. However, the GRC does not have any authority to address an individual’s common law right of access. Rosenblum v. Borough of Closter, 2006 N.J. Super. Unpub. LEXIS 1444 (App. Div. 2006); Rowan Jr. v. Warren Hills Reg’l Sch. Dist. (Warren), GRC Complaint No. 2011-347 (January 2013).

OPRA excludes from the definition of a government record ACD 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 . . . [ACD] 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, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004).

In Libertarians for Transparent Gov’t v. Gov’t Records Council, 453 N.J. Super. 83 (App. Div.) (certif. denied, 233 N.J. 484 (2018)), 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 police 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.

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, 429 N.J. Super. at 138 (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.

Further, the GRC has previously held that text of a draft resolution contained within an e-mail was exempt from disclosure under the ACD exemption. In Chang v. Town of West New York (Hudson), GRC Complaint No. 2014-213 (Interim Order dated February 24, 2015), the Council reviewed an e-mail *in camera* to determine whether the custodian lawfully denied access to it. The

e-mail comprised of two (2) parts, with the second being the text of a draft resolution. The Council held that this portion of the e-mail should not be disclosed because the “resolution contained in the body of the [e]-mail is in draft form.” Citing Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006) Cielsa v. N.J. Dep’t of Health & Senior Serv., Div. of Health Care Quality & Oversight, GRC Complaint No. 2010-38 (Final Decision dated May 24, 2011); Wolosky v. Sparta Bd. of Educ. (Sussex), GRC Complaint No. 2010193 (November 2011); Hyland v. Twp. of Lebanon, et al, GRC Complaint Nos. 2012-227 and 2012-228 (Interim Order dated June 24, 2014).

Finally, in Eastwood v. Borough of Englewood Cliffs (Bergen), GRC Complaint No. 2012-121 (June 2013), the Mayor, during a Township special meeting, showed members of the public the conceptual drawings of a redevelopment plan on a tablet device. Notwithstanding, the custodian later denied a copy of the drawings, arguing that they constituted ACD material and were therefore exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1. The GRC held that:

[T]he ACD exemption is not akin to a privilege that can be waived through voluntary disclosure to the public similar to the attorney-client privilege exemption. ACD material is a description, not a privilege. Therefore, ACD material does not lose its character as ACD merely because it was shown in public. The ACD exemption is always held in light of the Integrity test.

[Id. at 4.]

Thus, despite the Mayor’s decision to show the ACD material at a public meeting, the Council held that OPRA intended that the ACD privilege be preserved in the public interest. That interest protects a privilege that “bars the ‘disclosure of proposed policies before they have been fully vetted and adopted by a government agency,’ thereby ensuring that an agency is not judged by a policy that was merely considered.” Ibid. (citing Ciesla, 429 N.J. Super. 127).

Here, the Complainant’s OPRA request sought a draft ordinance discussed at a November 12, 2019 Council meeting. The Custodian denied access to the Complainant’s OPRA request stating that said record was exempt from disclosure under the ACD exemption. This complaint followed, wherein the Complainant argued that the ACD exemption did not apply because disclosure would not affect the Borough’s ability to engage in “free and uninhibited communications.” The Complainant also argued that the ACD exemption could not apply because the ordinance was placed on the agenda and discussed during the Council meeting. In the SOI, the Custodian maintained that she denied access to the responsive records as draft ordinance in accordance with Educ. Law Ctr. and Ciesla.

Applying all relevant case law to the issue before the Council, the GRC is satisfied that the Custodian lawfully denied access to the draft ordinance under OPRA as ACD material. Initially, neither party disputes the draft nature of the ordinance at issue here. Further, the GRC has provided a long history of case law above confirming that draft documents are exempt from disclosure under OPRA. Thus, the requested ordinance is exempt from disclosure under the ACD exemption. Further, the Complainant’s argument that the ordinance was no longer ACD material because it was placed on the November 12, 2019 agenda and discussed at length during that meeting is

incorrect. As stated in Eastwood, GRC 2012-121, the ACD exemption cannot be waived simply because it was discussed in a public meeting. Thus, whether the ordinance was placed on an agenda or discussed during a public session is of no moment.

Accordingly, the requested draft ordinance is exempt from disclosure under the ACD exemption. N.J.S.A. 47:1A-1.1; Libertarians, 453 N.J. Super. 83; Eastwood, GRC 2012-121; Chang, GRC 2014-213. Thus, the Custodian lawfully denied access to said record. N.J.S.A. 47:1A-6.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the requested draft ordinance is exempt from disclosure under the “inter-agency or intra agency advisory, consultative, or deliberative material” exemption. 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.) (certif. denied, 233 N.J. 484 (2018)); Eastwood v. Borough of Englewood Cliffs (Bergen), GRC Complaint No. 2012-121 (June 2013); Chang v. Town of West New York (Hudson), GRC Complaint No. 2014-213 (Interim Order dated February 24, 2015). Thus, the Custodian lawfully denied access to said record. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso  
Executive Director

December 8, 2020