



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

November 9, 2022 Government Records Council Meeting

Marc Liebeskind
Complainant

Complaint No. 2021-186

v.

Borough of Highland Park (Middlesex)
Custodian of Record

At the November 9, 2022 public meeting, the Government Records Council (“Council”) considered the October 27, 2022 Supplemental 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 Complainant has failed to establish in his request for reconsideration of the Council’s August 30, 2022 Final Decision, *etc.*) that either 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on a “mistake.” The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. The Complainant’s arguments are contrary to precedential decisions on both draft documents and e-mail addresses. Thus, the Complainant’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 9th Day of November 2022

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 15, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
**Supplemental Findings and Recommendations of the Executive Director
November 9, 2022 Council Meeting**

**Marc Liebeskind¹
Complainant**

GRC Complaint No. 2021-186

v.

**Borough of Highland Park (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Copy of a draft Planning Board resolution regarding review of the Redevelopment Plan and e-mail containing the forgoing sent to Borough Administrator Teri Jover.

Custodian of Record: Joan Hullings

Request Received by Custodian: June 28, 2021; June 29, 2021

Response Made by Custodian: July 8, 2021

GRC Complaint Received: August 6, 2021

Background

August 30, 2022 Council Meeting:

At its August 30, 2022 public meeting, the Council considered the August 23, 2022 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, found that:

1. The requested draft resolutions because they are 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)); Daniel v. Twp. of West Orange, GRC Complaint No. 2017-163 (May 2019). Thus, the Custodian lawfully denied access to the resolution. N.J.S.A. 47:1A-6.
2. The Custodian did not unlawfully deny access to the redacted personal e-mail addresses of Planning Board members in the responsive e-mail. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6. Specifically, the Custodian’s redactions are consistent with the Council’s decision in Gettler v. Twp. of Wantage (Sussex), GRC Complaint No. 2009-73 *et seq.*

¹ No legal representation listed on record.

² Represented by Lucille E. Davy, Esq., of Mason, Griffin & Pierson, P.C. (Princeton, NJ).

(Interim Order dated June 25, 2013), and there is sufficient information in the e-mail to determine the identity of the senders and recipients.

Procedural History:

On September 1, 2022, the Council distributed its Final Decision to all parties.

On September 12, 2022, the Complainant filed a request for reconsideration of the Council's Final Decision based on a "mistake." The Complainant stated OPRA provides that limitations on access be "construed in favor of the public's right to access." N.J.S.A. 47:1A-1. The Complainant further noted that the Council "is required" to conduct *in camera* reviews and not to accept "an agency's word for the claimed exception." Rodriguez v. Kean Univ., GRC Complaint No. 2016-40 (Interim Order dated March 28, 2017) (citing Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005)). The Complainant argued that the Council's decision here is contrary to the forgoing.

The Complainant contended that the Council erred in finding that the responsive resolution satisfied both prongs of the "inter-agency or intra-agency advisory, consultative, or deliberative [("ACD")] material" exemption test set forth 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 Complainant contended that the resolution failed the first prong of the test because it was not "pre-decisional"; instead, it memorialized a vote taken at a June 10, 2021 meeting. The Complainant noted that the resolution was sent to Ms. Santiago on June 22, 2021; twelve (12) days after the vote and six (6) days before his OPRA request. The Complainant noted that the resolution was approved at the July 8, 2021 meeting.

The Complainant further argued that the resolution also failed the second prong because it was not related to any policy decision. The Complainant contended that the resolution memorialized a Planning Board vote and not a Borough of Highland Park ("Borough") policy. The Complainant asserted that this is significant because the Planning Board is separate from the Borough and acts in its own capacity. N.J.S.A. 40:55D-23; Geiger v. Levco Rt. 46 Assoc., Ltd., 181 N.J. Super. 278, 281 (October 5, 1981). The Complainant further argued that Daniel, GRC 2017-163 is distinguishable from this complaint for several reasons. The Complainant argued that the resolution there shared with third parties is not like that here, which simply memorialized a vote already taken, noting that he did not consider "Borough officials to be third parties." The Complainant further argued that Daniel was not instructive because that complaint addressed minutes, which have different "purpose and effect", and are not voted on until after finalization. The Complainant reiterated that the resolution memorialized a vote already taken.

The Complainant further argued that the Council erred by including e-mail addresses within the definition of "personal identifying information" where OPRA does not definitively provide for such. The Complainant argued that the Council admitted this fact in stating that "e-mail addresses are not specifically identified in [OPRA] as exempt from disclosure." Liebeskind, GRC 2021-186 (Final Decision dated August 30, 2022) at 6. The Complainant argued that the Legislature clearly intended that e-mail addresses are not exempt from disclosure except in the limited instance of hunting licenses. N.J.S.A. 47:1A-1.1. The Complainant noted that not even the

Identity Theft Protection Act includes e-mail addresses “standing alone as personal information.” N.J.S.A. 56:8-161. The Complainant argued that notwithstanding the forgoing, the Council relied on an inapplicable citation (Burnett v. Cnty. of Bergen, 198 N.J. 408, 422-23, 427 (2009)) to justify erroneously applying the privacy exemption. The Complainant also noted that the Council held that e-mail addresses were disclosable in Mayer v. Borough of Tinton Falls (Monmouth), GRC Complaint No. 2008-245 (2013). The Complainant contended that none of the Council’s online materials or publications indicate that e-mail addresses are exempt; thus, “a member of the public would conclude that an e-mail address is generally not protected, and therefore would have no expectation of privacy.” The Complainant argued that the Council nonetheless acted without legal authority to apply the privacy interest to e-mail addresses.³

On September 21, 2022, Custodian’s Counsel submitted objections to the request for reconsideration. Counsel argued that the Complainant’s request for reconsideration should be denied because it failed to prove that the Council made a “mistake.”

Counsel first argued that the resolution was clearly in draft form until voted on by the Planning Board on July 8, 2021. Counsel contended that only the approved resolution is a “government record” for purposes of OPRA. Educ. Law Ctr. v. Dep’t of Educ., 198 N.J. 274, 295 (2009). Counsel further argued that in In Re: Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85 (2000), which was cited in Educ. Law Ctr., specifically identified “draft documents” part of the deliberative process. Counsel noted that the resolution at issue here was the result of the Borough Council’s request to the Planning Board to review the redevelopment ordinance to ensure consistency with the Borough Master Plan. Counsel asserted that although the Planning Board took a verbal vote on June 10, 2021, said decision was not final until the Planning Board approved the resolution on July 8, 2021. Counsel thus argued that the draft resolution constituted the Planning Board attorney’s personal compilation of verbal discussions, conclusions, and motions, and was not finalized as the Planning Board’s policy until July 8, 2021.

Counsel next asserted that the Council’s decision regarding the redacted e-mail addresses is consistent with multiple prior GRC decisions on personal e-mail addresses. Counsel noted that although the Complainant cited Mayer, GRC 2008-245, same is inapposite to the instant complaint and does not support the Complainant’s position that the Council erred in its finding.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

³ The Complainant also addressed Planning Board Attorney Roger Thomas’s assertion that Municipal Land Use law allowed for redaction of the e-mail addresses. However, the GRC notes that it clearly indicated that it could not confirm the accuracy of Mr. Thomas’s statements and same did not factor into the analysis.

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's Final Decision on September 12, 2022, six (6) business days from the issuance of the Council's Order. Custodian's Counsel submitted objections on September 21, 2022, seven (7) business days after the Complainant filed the request for reconsideration.

Applicable case law holds that:

"A party should not seek reconsideration merely based upon dissatisfaction with a decision." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. "Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement." Ibid.

[In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).]

Upon reviewing the parties' filings, the GRC finds that the Council should deny the Complainant's request for reconsideration because it did not make a "mistake" in its Final Decision and adds the following. Regardless of the Complainant's attempts to distinguish the draft resolution from other draft documents in cited case law, longstanding precedential case law including those cited in the Council's Final Decision has found a lawful denial of access to draft documents under the ACD exemption. Additionally, the Complainant's assertion that personal e-mail addresses do not implicate privacy are contrary to precedential case law cited by the Council in its Final Decision. The Complainant also argued against this point while citing to Mayer, GRC 2008-245 in support of his position; there the Council similarly considered the disclosability of an e-mail address list as a privacy interest issue. The Complainant's position also fails to appreciate that New Jersey Courts have similarly placed e-mail addresses within the privacy information exemption found in N.J.S.A. 47:1A-1. See *e.g.* Wolosky v. Quick, 2017 N.J. Super. Unpub. LEXIS 781 (App. Div. 2017). Finally, whether the Council's posted website resources specifically identify e-mail addresses as falling within the privacy interest is of no moment; those materials are purely informational in nature and not exhaustive of every intricacy requestors or custodians may encounter in the OPRA process.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. See Cummings, 295 N.J. Super. at 384. The Complainant failed to establish that the complaint should be reconsidered based on a "mistake." The Complainant has also failed

to show that the Council acted arbitrarily, capriciously or unreasonably. See D'Atria, 242 N.J. Super. at 401. The Complainant's arguments are contrary to precedential decisions on both draft documents and e-mail addresses. Thus, the Complainant's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant has failed to establish in his request for reconsideration of the Council's August 30, 2022 Final Decision, *etc.*) that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on a "mistake." The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. The Complainant's arguments are contrary to precedential decisions on both draft documents and e-mail addresses. Thus, the Complainant's request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Frank F. Caruso
Executive Director

October 27, 2022



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
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LT. GOVERNOR SHEILA Y. OLIVER
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FINAL DECISION

August 30, 2022 Government Records Council Meeting

Marc Liebeskind
Complainant

Complaint No. 2021-186

v.

Borough of Highland Park (Middlesex)
Custodian of Record

At the August 30, 2022 public meeting, the Government Records Council (“Council”) considered the August 23, 2022 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 requested draft resolution 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)); Daniel v. Twp. of West Orange, GRC Complaint No. 2017-163 (May 2019). Thus, the Custodian lawfully denied access to the resolution. N.J.S.A. 47:1A-6.
2. The Custodian did not unlawfully deny access to the redacted personal e-mail addresses of Planning Board members in the responsive e-mail. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6. Specifically, the Custodian’s redactions are consistent with the Council’s decision in Gettler v. Twp. of Wantage (Sussex), GRC Complaint No. 2009-73 *et seq.* (Interim Order dated June 25, 2013), and there is sufficient information in the e-mail to determine the identity of the senders and recipients.

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 August 2022

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: September 1, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 30, 2022 Council Meeting**

**Marc Liebeskind¹
Complainant**

GRC Complaint No. 2021-186

v.

**Borough of Highland Park (Middlesex)²
Custodial Agency**

Records Relevant to Complaint: Copy of a draft Planning Board resolution regarding review of the Redevelopment Plan and e-mail containing the forgoing sent to Borough Administrator Teri Jover.

Custodian of Record: Joan Hullings

Request Received by Custodian: June 28, 2021; June 29, 2021

Response Made by Custodian: July 8, 2021

GRC Complaint Received: August 6, 2021

Background³

Request and Response:

On June 28, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the resolution. On June 29, 2021, the Complainant e-mailed the Custodian amending his OPRA request to include the e-mail containing the resolution.

On July 8, 2021 the Deputy Clerk Jennifer Santiago responded in writing on behalf of the Custodian acknowledging receipt of the Complainant’s original and amended OPRA request. Ms. Santiago stated that she was disclosing the e-mail sought with redactions for personal e-mail addresses under the privacy interest exemption. N.J.S.A. 47:1A-1; Doe v. Poritz, 142 N.J. 1 (1995). Ms. Santiago also denied access to the responsive resolution as a draft document exempt from disclosure under the “inter-agency, or intra-agency advisory, consultative or deliberative [“ACD”] material” exemption. N.J.S.A. 47:1A-1.1; Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274 (2009); Shea v. Village of Ridgewood (Bergen), GRC Complaint No. 2010-79 (February 2011). Ms. Santiago noted that the resolution was on the agenda for consideration at the Planning Board’s meeting on that night and she would disclose it if adopted. On the same day, the

¹ No legal representation listed on record.

² Represented by Lucille E. Davy, Esq., of Mason, Griffin & Pierson, P.C. (Princeton, 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.

Complainant e-mailed Ms. Santiago disputing the denial because Ms. Jover and others copied are “not part of the Planning Board and is not included in the deliberative process . . .” The Complainant also disputed the redacted e-mail addresses of public officials and questioned why the Custodian would disclose e-mail addresses for members of the public but not public officials. Later that day, the Complainant e-mailed Ms. Santiago contending that Doe did not apply to OPRA and that no exemption for e-mail addresses exists therein. The Complainant also reiterated that the resolution was shared with non-members of the Planning Board. The Complainant asserted that the redactions and denial were “willful,” and he would be filing a complaint.

Denial of Access Complaint:

On August 6, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant first asserted that the Borough of Highland Park (“Borough”) unlawfully denied access to the draft resolution because Ms. Jover and others who were not members of the Planning Board possessed it. The Complainant contended that because Ms. Jover was not a member and not part of the deliberative or decision-making process, “she has no greater right to access than any other member of the public, and she cannot claim an exception to disclosure.” The Complainant also argued that the resolution was publicly discussed at a meeting and thus there is no basis to claim it is exempt from disclosure.

The Complainant next disputed the redacted e-mail addresses contained in the disclosed e-mail. The Complainant noted that Planning Board members’ e-mail addresses were redacted but others were left unredacted. The Complainant argued that N.J.S.A. 47:1A-1.1 did not include e-mail addresses as part of the exempt personal information. The Complainant also argued that the e-mail in question contains a disclaimer warning that “[e]-mails received by or sent to Borough officials and employees” were subject to OPRA and that “[t]his means absent some specific privilege, all such communications are considered a public record and are subject to” disclosure upon request. The Complainant contended that no basis existed to redact personal e-mail addresses where Planning Board members used them to conduct Borough business.

Statement of Information:

On September 2, 2021, the Custodian filed a Statement of Information (“SOI”) attaching legal certifications from Ms. Santiago, Ms. Jover, and Planning Board Attorney Roger Thomas. The Custodian certified that she received the Complainant’s OPRA request on June 28, 2021 and amendment on June 29, 2021. The Custodian certified that Ms. Santiago responded in writing on her behalf on July 8, 2021 disclosing the responsive e-mail with redactions for personal addresses and denying access to the draft resolution. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1. See Santiago Cert. ¶ 8-9. The Custodian averred that “it is important to note that the draft resolution . . . was revised and redrafted multiple times” prior to approval. See Santiago Cert. ¶ 12. The Custodian certified that Ms. Santiago ultimately disclosed the approved resolution to the Complainant on July 26, 2021.

Regarding the resolution, the Custodian noted that in 2018 the Borough dissolved the Highland Park Redevelopment Agency in favor of the Borough assuming those duties. See Jover Cert. ¶ 4. The Custodian certified that based on this, the draft resolution was sent as a courtesy to

Ms. Jover, who also serves as Redevelopment Director, and others in their capacity as Borough staff members. See Jover Cert. ¶ 4-5. The Custodian argued that her denial was lawful because at the time of the OPRA request, the draft resolution prepared by Mr. Thomas was not reviewed or considered by the Planning Board. Educ. Law Ctr., 198 N.J. 274; Eastwood v. Borough of Englewood Cliffs (Bergen), GRC Complaint No. 2012-121 (June 2013). The Custodian noted that the draft nature of the resolution is particularly acute here: it contained a summary narrative of Mr. Thomas’ “observations, reasoning, and conclusions” as opposed to a verbatim transcript. The Custodian argued that, as indicated earlier, the draft resolution incurred changes and was substantially different in approved form. The Custodian thus argued that her denial was proper and consistent with precedential case law. See also Parave-Fogg v. Lower Alloways Creek Twp., GRC Complaint No. 2006-51 (August 2006).

Regarding the e-mail address redactions, the Custodian argued that her denial was also lawful under OPRA. N.J.S.A. 47:1A-1. The Custodian noted that prior to making the redactions, Ms. Santiago received advice from Mr. Thomas that redacting the e-mail addresses would foster the impermissibility of *ex parte* communications directly to Planning Board members set forth in N.J.S.A. 40:55D-1, *et seq.* See Santiago Cert. ¶ 9; Thomas Cert. ¶ 5-8. The Custodian noted that Mr. Thomas prepared a memorandum on this point and same is posted on the Borough’s website. Thomas Cert. ¶ 6. The Custodian further noted that personal e-mail addresses of board, commission, and committee members are routinely redacted for privacy reasons. N.J.S.A. 47:1A-1.

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.

Draft Resolution

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. 274, 276 (2009) (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.]

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.

Further, the GRC has previously held that draft resolutions are exempt from disclosure under the ACD exemption. In Daniel v. Twp. of West Orange, GRC Complaint No. 2017-163 (May 2019), the complainant expressly sought access to draft Planning Board resolutions. The custodian denied access under the ACD exemption and that complaint ensued. Therein, the complainant argued that the ACD exemption did not apply because the resolutions were shared with a third party; however, the custodian maintained her denial in the SOI. The Council held that a lawful denial of access occurred based on precedential case law and noted that third party possession did not negate the exempt status of draft documents (citing Eastwood, GRC 2012-121). See also Chang v. Town of West New York (Hudson), GRC Complaint No. 2014-213 (Interim Order dated February 24, 2015) (holding that draft resolution language contained in an e-mail was exempt as ACD material).

Here, like in Daniel, the Complainant sought access to a draft resolution and was denied under the ACD exemption. In the Denial of Access Complaint, the Complainant contended that

the ACD exemption did not apply because: 1) the resolution was shared with non-members of the Planning Board; and 2) the resolution was publicly discussed at a meeting. The Complainant also contended that Ms. Jover had “no greater right to access” than anyone else. In the SOI, the Custodian maintained that her denial was proper. N.J.S.A. 47:1A-1.1; Educ. Law Ctr., 198 N.J. 274; Eastwood, GRC 2012-121.

The GRC is persuaded by OPRA and well-settled case law that the Custodian lawfully denied access to the draft resolution. That is, the Council has already addressed this exact issue in Daniel, GRC 2017-163 and the Complainant has not presented any facts or legal arguments that would disturb said holding. Additionally, as in Daniel, the Complainant’s arguments are misplaced for the following reasons. Initially, both Daniel and Eastwood, 2012-121 provide that the ACD exemption is not waivable based on dissemination to other individuals or through public discussion. Notwithstanding, even if that were the case, the Complainant’s “third party” argument fail on two (2) additional points. First, Ms. Jover is clearly an employee of the Borough and thus falls within the confines of “inter-agency.” Second, whether an agency is sharing draft documents with other parties is of no moment: agencies may choose to share any records with their own employees and OPRA does not govern such actions. That is, in the absence of an OPRA request, the statute and its provisions do no apply.

Accordingly, the requested draft resolution is exempt from disclosure under the ACD exemption. N.J.S.A. 47:1A-1.1; Libertarians, 453 N.J. Super. 83; Daniel, GRC 2017-163. Thus, the Custodian lawfully denied access to the resolution. N.J.S.A. 47:1A-6.

Personal E-mail Addresses

OPRA provides that “a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy . . .” N.J.S.A. 47:1A-1.

The Supreme Court has explained that OPRA’s safeguard against disclosure of personal information is substantive and requires “a balancing test that weighs both the public’s strong interest in disclosure with the need to safeguard from public access personal information that would violate a reasonable expectation of privacy.” Burnett v. Cnty. of Bergen, 198 N.J. 408, 422-23, 427 (2009) (citing Doe, 142 N.J. 1).

In Gettler v. Twp. of Wantage (Sussex), GRC Complaint No. 2009-73 *et seq.* (Interim Order dated June 25, 2013), the Council was tasked with determining whether the custodian lawfully denied access to redacted personal e-mail addresses. After determining that additional development of the record was necessary, the Council referred the complaint to the Office of Administrative Law (“OAL”). As part of that referral, the Council asked the OAL to determine whether personal e-mail addresses were disclosable, both in the instance when a name is displayed or not displayed within the address.

The OAL obtained balancing test responses from the parties and conducted the test based on the Burnett factors. Based on its application of the test, the OAL determined that the factors

weighed in favor of redaction of personal e-mail addresses. In reaching its conclusion, the OAL reasoned that the potential for harm in subsequent nonconsensual disclosure and the lack of any adequate safeguards preventing unauthorized disclosure of the email addresses outweighed the complainant's degree of need for access to the email addresses. The OAL applied that reasoning to all e-mails where names accompanied the personal e-mail addresses but did require the disclosure of those e-mail addresses not accompanied by a name. The Council accepted the OAL's Initial Decision without modification.

In Gettler, the development of the record required the Council to refer the complaint to OAL, which employed a balancing test to determine whether a private e-mail address was disclosable. However, the facts and reasoning of Gettler are clearly applicable here. Specifically, the Custodian certified in the SOI that the redacted e-mail addresses were personal addresses of Planning Board members. The Custodian, Ms. Santiago, and Mr. Thomas also certified that the addresses were also redacted due to a statutory prohibition against communicating with planning board members *ex parte* regarding official business. The GRC notes that specific statutory citation was not included in the SOI; thus, the GRC is unable to confirm the accuracy of this argument. Notwithstanding, the GRC is compelled to follow Gettler here, noting that the redacted e-mail addresses are accompanied by corresponding names, thus clarifying to whom the e-mail addresses belonged. The Custodian's redactions are consistent with those the OAL determined to be lawful in Gettler.

Further, the GRC is not persuaded by the Complainant's arguments against redaction of the e-mail addresses. First, while e-mail addresses are not specifically identified in N.J.S.A. 47:1A-1.1 as exempt from disclosure, the GRC has routinely applied the privacy interest analysis to them through N.J.S.A. 47:1A-1. See *e.g.* Smith v. N.J. Dep't of Banking & Ins., GRC Complaint No. 2014-301. Further, that test was derived from Doe, 142 N.J. 1 and later adopted by the Burnett Court. Second, the presence of a disclaimer in an e-mail does not supersede OPRA; thus, alerting recipients that an e-mail may be subject to disclosure does not abrogate potential exemptions thereto. By the Complainant's asserted standard, agencies could apply disclaimers with language exempting e-mails from OPRA and the GRC would be required to adhere accordingly. Such a standard would result in an absurd outcome. Third, whether the Custodian chose to redact other e-mail addresses, which ranged from Borough-issued addresses to business addresses, is of no moment. Instead, only the redacted addresses issue is properly before the Council.

Therefore, the Custodian did not unlawfully deny access to the redacted personal e-mail addresses of Planning Board members in the responsive e-mail. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6. Specifically, the Custodian's redactions are consistent with the Council's decision in Gettler, GRC 2009-73 *et seq.*, and there is sufficient information in the e-mail to determine the identity of the senders and recipients.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The requested draft resolution 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)); Daniel v. Twp. of West Orange, GRC Complaint No. 2017-163 (May 2019). Thus, the Custodian lawfully denied access to the resolution. N.J.S.A. 47:1A-6.

2. The Custodian did not unlawfully deny access to the redacted personal e-mail addresses of Planning Board members in the responsive e-mail. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-6. Specifically, the Custodian's redactions are consistent with the Council's decision in Gettler v. Twp. of Wantage (Sussex), GRC Complaint No. 2009-73 *et seq.* (Interim Order dated June 25, 2013), and there is sufficient information in the e-mail to determine the identity of the senders and recipients.

Prepared By: Frank F. Caruso
Executive Director

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