



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

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

March 28, 2023 Government Records Council Meeting

Paul Kovacsofsky
Complainant

Complaint No. 2021-356

v.

Borough of High Bridge (Hunterdon)
Custodian of Record

At the March 28, 2023 public meeting, the Government Records Council (“Council”) considered the March 21, 2023 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 cost analysis meets both prongs of the ACD test set forth in Educ. Law Ctr. v. Dep’t of Educ., 198 N.J. 274 (2009), and is exempt from disclosure on that basis. N.J.S.A. 47:1A-1.1. Thus, the Custodian lawfully denied access to the subject OPRA request. 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 28th Day of March 2023

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: April 3, 2023



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 28, 2023 Council Meeting**

**Paul Kovacsofsky¹
Complainant**

GRC Complaint No. 2021-356

v.

**Borough of High Bridge (Hunterdon)²
Custodial Agency**

Records Relevant to Complaint: Electronic copy of the “Chapter 48” cost analysis performed by Phoenix Advisors, LLC (“Phoenix”).

Custodian of Record: Adam Young

Request Received by Custodian: December 17, 2021

Response Made by Custodian: December 21, 2021

GRC Complaint Received: December 22, 2021

Background³

Request and Response:

On December 17, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 21, 2021, the Custodian responded in writing denying the subject OPRA request under the “inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material” exemption. N.J.S.A. 47:1A-1.1; Ciesla v. N.J. Dep’t of Health & Senior Servs., 429 N.J. Super. 127 (App. Div. 2012); Antonucci v. City of Hoboken (Hudson), GRC Complaint No. 2009-125 (February 2010); Steinhauer-Kula v. Twp. of Downe (Cumberland), GRC Complaint No. 2010-200 (July 2012).

Later on December 21, 2021, the Complainant e-mailed Custodian’s Counsel stating that he planned to file a complaint but wanted to attempt to avoid it if possible. The Complainant asked whether he completed his OPRA request form incorrectly or whether there was another way to request the cost analysis so that he could receive same. The Complainant noted that he believed he had a right to access the cost analysis but sought insight into the denial in the instance it was valid. On the same day, Custodian’s Counsel responded directing the Complainant back to the Borough of High Bridge (“Borough”) for a response: the Complainant acknowledged receipt of the e-mail.

¹ No legal representation listed on record.

² Represented by Barry S. Goldman, Esq. of Greenbaum, Rowe, Smith & Davis, LLP. (Iselin, 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.

Denial of Access Complaint:

On December 22, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that the Borough was contemplating a “Chapter 48” offering that would provide fully paid lifetime health benefits to retired Borough employees with 20 or more years of service. The Complainant stated that the Borough acknowledged the existence of the Phoenix cost analysis at a public meeting on December 16, 2021.

The Complainant contended that the public had a right to obtain the cost analysis, which was “presumably” paid for by taxpayer money. The Complainant asserted that the “Chapter 48” change carries a cost impact that would add to the already County-high tax burden of Borough residents. The Complainant asserted that he could not understand how the Borough was legally able to deny access to the cost analysis.

Supplemental Responses:

On December 25, 2021, the Complainant e-mailed the Custodian again asking him to reconsider the denial. The Complainant noted that the December 16, 2021 meeting, Council member Steve Strange stated that “[Phoenix] very expressly said they were analyzing but not providing a suggestion in either direction. [Phoenix] was just providing the information.” The Complainant asserted that the forgoing did not support that the cost analysis was ACD in nature.

On December 29, 2021, the Custodian e-mailed the Complainant stating that per Custodian’s Counsel, the cost analysis contained “alternate scenarios and therefore advice.” On the same day, the Complainant disputed that “alternate scenarios” meant advice; it contained options devoid of Phoenix’s suggestion on which would best serve the Borough. The Complainant asked that his response be forwarded to Custodian’s Counsel for consideration. Later the same day, the Custodian responded stating that he asked Counsel whether the record’s draft or deliberative status remained in effect. The Custodian included a quote from Counsel stating “[t]he answer is yes” and citing Educ. Law Ctr. v. Dep’t of Educ., 198 N.J. 274 (2009), Cielsa, 429 N.J. Super. 127, and Libertarians for Transparent Gov’t v. Gov’t Records Council, 453 N.J. Super. 83 (App. Div. 2018).

On December 30, 2021, the Complainant e-mailed the Custodian stating that he reviewed the cases cited in the prior e-mail and believes they do not apply to the cost analysis. The Complainant asserted that the analysis was devoid of opinions, recommendations, or advice and Phoenix was not acting in an advisory capacity. The Complainant argued that disclosure would not reveal any deliberations but could provide “much needed clarity to the public regarding the costs” of the Chapter 48 change. The Complainant again requested that the Custodian to revisit his denial. On January 4, 2022, the Complainant followed up seeking a response to his prior e-mail.

Statement of Information:

On January 25, 2022, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on December 17, 2021. The

Custodian affirmed that he contacted Custodian’s Counsel to discuss the disclosability of the cost analysis and appropriate denial response. The Custodian certified that he responded in writing on December 21, 2021 denying the responsive record under the ACD exemption.

The Custodian stated that on October 14, 2021, Borough Council proposed a Resolution to provide “Chapter 48” coverage for employees when they retire. The Custodian stated that because potential cost became an issue, the Resolution was tabled so that the Council could be provided with additional information to make a more informed decision. The Custodian stated that the Borough hired Phoenix to prepare a cost analysis for consideration; the analysis included assumptions they felt the Council “should be aware of in deciding whether or not to pass the Resolution . . .” The Custodian averred that the cost analysis included three (3) projections for costs and explained other financial issues the Council should consider; however, it did not make any recommendations in favor of allowing the Council to decide the issue. The Custodian stated that the cost analysis was discussed at the December 16, 2021 meeting as part of the deliberations on the Resolution, which was subsequently passed that evening. See “Regular Council Meeting Minutes” dated December 16, 2021 (stating that the Council “discussed the use of [Phoenix] for analysis, differing analyses, possible future costs and benefits of adopting this item, and options for amending the policy in the future.”).

The Custodian argued that the Complainant filed this complaint because of a “misunderstanding” of the ACD exemption and how it applied to the responsive cost analysis. The Custodian stated that in Educ. Law Ctr., 198 N.J. 274, the New Jersey Supreme Court held that the “Alternative Funding Formula Simulations” memorandum, containing factual data arranged into scenarios meant to assist the New Jersey Department of Education (“DOE”) in making a policy decision, was exempt under the ACD exemption. The Custodian argued that the cost analysis at issue here was analogous to the memorandum in Educ. Law Ctr. because it contained various “projections, assumptions, and other advice” and was used by the Council in deliberation of the Resolution. The Custodian thus argued that this complaint should be dismissed.

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 provides that the definition of a government record “shall not include . . . [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 v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). 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. 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. See Educ. Law Ctr., 198 N.J. at 286. 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 (adopting the federal standard for determining whether material is “deliberative” and 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.

In the instant complaint, the Complainant sought and was denied access to Phoenix's cost analysis under the ACD exemption. This complaint ensued, wherein the Complainant argued that the cost analysis should have been released because of the potential cost impact to taxpayers and the fact that public money was spent on it. In the SOI, the Custodian maintained that he lawfully denied access to the record. The Custodian argued that like the record in Educ. Law Ctr., the Borough Council utilized the cost analysis in deliberation over the potential approval of the “Chapter 48” Resolution.

For the cost analysis to be lawfully exempt under the ACD exemption, it must meet the two-prong test set forth in Educ. Law Ctr., 198 N.J. at 286. Further, the fact that a record may contain purely factual data or information does not negate the ACD exemption if that record meets the test. Id. at 280. Regarding the first prong, it is clear Phoenix's cost analysis predated the Borough's December 16, 2021 vote on the “Chapter 48” Resolution. This is proven in the statements of both parties, as well as the references to it in the December 16, 2021 minutes. Thus, the cost analysis satisfies the first prong of the ACD test.

Regarding the second prong, the Custodian described the record as “containing various projections, assumptions[,] and other advice” that was used by the Council as part of its deliberation on the “Chapter 48” Resolution vote. Thus, the description does not outwardly suggest that Phoenix made specific recommendations or included its opinions on the projections contained therein. However, as stated by the Educ. Law Ctr. Court, the GRC “must assess such fact-based documents against the backdrop of an agency's deliberative efforts” to determine if the ACD exemption applies. Educ. Law Ctr., 198 N.J. at 281. That Court found the memorandum “was created and used during the deliberative process employed by DOE.” Id. at 300. The GRC finds the cost analysis here to be like the memorandum reviewed in Educ. Law Ctr. Specifically, although it appeared to comprise of factual projections, the evidence of record here strongly supports that the Borough Council tabled a vote on the Resolution to seek out and obtain Phoenix's analysis to inform its deliberations. Phoenix's resulting cost analysis, as stated in the December 16, 2021 minutes, reflects that it was comprised of “analysis, differing analyses, possible future costs and benefits of adopting [the Resolution], and options for amending the policy in the future.”

Thus, and much like the memorandum, the cost analysis satisfies the second prong of the ACD test.

Based on the forgoing, the GRC is satisfied that the Custodian lawfully denied access to the requested cost analysis. That is, the cost analysis definitively meets the two-prong test set for by the Educ. Law Ctr. Court. Further, the evidence supports such a finding, as the creation and existence of the cost analysis is owed to the Council’s deliberation on the “Chapter 48” Resolution and the body relied upon it as part of those deliberations prior to voting on same at the December 16, 2021 meeting.

Accordingly, the requested cost analysis meets both prongs of the ACD test set forth in Educ. Law Ctr. and is exempt from disclosure on that basis. N.J.S.A. 47:1A-1.1. Thus, the Custodian lawfully denied access to the subject OPRA request. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the requested cost analysis meets both prongs of the ACD test set forth in Educ. Law Ctr. v. Dep’t of Educ., 198 N.J. 274 (2009), and is exempt from disclosure on that basis. N.J.S.A. 47:1A-1.1. Thus, the Custodian lawfully denied access to the subject OPRA request. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso
Executive Director

March 21, 2023