Government Records Council

2018 New Jersey League of Municipalities Conference

"Recent OPRA Decisions"
November 14, 2018
2:00 p.m. to 3:40 p.m.
Atlantic City Convention Center, Room 402

The Government Records Council ("GRC") has prepared the information contained herein for educational and informational purposes only. The information is not intended, and should not be construed, as legal advice. No reader should act or rely on the basis of the information contained herein without seeking appropriate legal counsel. Material herein does not constitute a decision of the GRC.

Libertarians for Transparent Gov't v. Government Records Council, 453 N.J. Super. 83 (App. Div. 2018):

This case was born from an apparent disagreement with the Council's decision on draft meeting minutes in Parave-Fogg v. Lower Alloways Creek Twp. GRC Complaint No. 2006-51 (August 2006) (holding that draft meeting minutes were 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). Based on this, plaintiffs waited for the appropriate time to request draft minutes from the GRC with some knowledge that the request would be denied. That window appeared in 2016: the Council cancelled its March meeting due to lack of quorum thus not allowing for the approval of February's minutes.

Shortly thereafter, plaintiffs filed an OPRA request seeking access to minutes from the February 2016 meeting. As plaintiffs likely expected, the GRC timely denied the request under OPRA and past case law. Plaintiffs subsequently filed in Superior Court, which upheld the GRC's denial of access. Plaintiffs appealed, and the Appellate Division affirmed.

The court held that the GRC properly denied plaintiff's request under the ACD exemption. The draft minutes were pre-decisional and deliberative; thus, satisfying the two-prong test for the ACD exemption. The court rejected plaintiffs' argument that the draft was merely a summary of what had occurred and could be redacted. Because the draft minutes were not yet a public record, the GRC was not required to produce them with redactions. The court finally rejected plaintiffs' previously unraised argument regarding potential violations of the Open Public Meetings Act.

Scheeler v. Atlantic Cnty. Mun. Joint Ins. Fund, 454 N.J. Super. 621 (App. Div. 2018):

The question of whether non-residents of New Jersey have standing to request records under OPRA was unsettled for several years until recently. In 2013, the United States Supreme Court in McBurney v. Young, 133 S.Ct. 1709, 1720 (2013) considered the issue in a suit brought to challenge Virginia's Freedom of Information Act ("the Act"). The Act permitted only state

residents to access government records. The Supreme Court determined that the Act did not violate the Privileges and Immunities Clause of the United States Constitution. As part of the rationale for the decision, the Court noted that several other States, including New Jersey, enacted freedom of information laws that were available only to their citizens.

After McBurney, New Jersey courts began addressing the issue of whether OPRA permitted non-citizens to submit OPRA requests in 2016. In Lawyers Committee v. Atlantic City Bd. of Educ., Docket No. ATL-L-832-15 (Law Div. Feb. 19, 2016), Scheeler v. City of Cape May, *et al*, Docket No. CPM-L-444-15 (Law Div. Feb. 19, 2016), and Twp. of Wantage, Docket No. SSX-C-21-15, the respective vicinages held that out-of-state requestors did not have standing to submit OPRA requests. However, in Scheeler v. Atlantic Cnty. Muni. Joint Ins. Fund, *et al*., Docket No. BUR-L-990-15 (Law Div. Oct. 2, 2015) and Scheeler v. Ocean Cnty. Prosecutor's Office, *et al*., Docket No. OCN-L-3295-15 (Law Div. Apr. 14, 2016), the respective vicinages held that out-of-state requestors did have standing to submit OPRA requests.

Following these decisions, plaintiffs in Docket No. BUR-L-990-15, ATL-L-832-15, and CPM-L-444-15 appealed. The appeals were consolidated under Scheeler v. Atl. Cty. Mun. Joint Ins. Fund. During the pendency of the appeal, the GRC issued a final decision in Scheeler, Jr. v. Burlington Twp. (Burlington), GRC Complaint No. 2015-93 (Final Decision dated September 27, 2016) wherein the Council determined that out-of-state requestors did not have standing to submit OPRA requests based on a plain reading of N.J.S.A. 47:1A-1.

The Appellate Division, Scheeler, 454 N.J. Super. 621, held that "the right to request records under OPRA is not limited to 'citizens' of New Jersey." Id. at 3. The court reasoned that "unlike the former Right to Know Law ("RTKL"), the absence of the term 'citizen' or a definitive definition in OPRA indicated the Legislature's 'intent to expand the public's right of access to public records, beyond that permitted by the RTKL.' Id. at 10. The court supported its conclusion by stating that "any doubts about the meaning of the phrase should be resolved in favor of public access, and hence in favor of construing the phrase as a generality rather than an intentional limit on standing. See Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 366 (App. Div. 2003) (ambiguities in OPRA are to be resolved in favor of public access)." Id. at 10-11.

Carter v. Franklin Fire Dist. No. 1 (Somerset), 2018 N.J. Super. Unpub. LEXIS 2189 (App. Div. Oct. 3, 2018) (on appeal from GRC Complaint No. 2011-318):

The Appellate Division affirmed an appeal from a GRC decision, which affirmed an administrative law judge's ("ALJ") initial decision holding that certain e-mails exchanged on a server maintained by the respondent were not "government records" subject to disclosure under OPRA.

The underlying request sought e-mail records between two (2) Franklin Fire District No. 1 Commissioners ("Commissioner's") and a former Commissioner pertaining to a Political-Action Committee ("PAC"). The GRC rejected the exceptions from the appellant in that they did not need to conduct their own *in camera* review, and that the ALJ addressed the concern that withholding disclosure would incentivize public officials to use public systems for political activity.

On appeal, appellant argued that the District's computer use policy at Resolution 07-13 did not convert every e-mail stored on the District's network in a "government record" as defined under OPRA. Ultimately, the court agreed with the GRC that a plain reading of OPRA did not support that not every e-mail created by a public official and stored or maintained on a public server is subject to disclosure under OPRA.

Dericks (O.B.O. TAPintoSparta.net) v. Sparta Twp. (Sussex), GRC Complaint No. 2016-227 (September 2017)

Here, the Council addressed body-worn camera ("BWC") footage and its disclosability for the first time. The records sought were BWC footage from officers responding to a request for medical assistance for a juvenile at a location on a specific date. The custodian denied the request under the criminal investigatory exemption, and this complaint ensued.

In addressing this issue, the Council first addressed whether BWC camera footage in general could be exempt under the "criminal investigatory" exemption. N.J.S.A. 47:1A-1.1. The Council applied standards set forth in N. Jersey Media Grp. v. Twp. of Lyndhurst, 229 N.J. 541 (2017) and O'Shea v. Twp. of West Milford, 410 N.J. Super. 371 (App. Div. 2009) to determine that BWC did not meet the two-prong test required to fall within the exemption. Specifically, the Council found that Attorney General Law Enforcement Directive No. 2015-1 contained minimum requirements for retention and storage. Based on this, the Council found that Directive 2015-1 "had the force of law" and thus BWC footage could not meet the "not required by law to be made, maintained or kept on file . . ." Id. at 6 (citing N.J.S.A. 47:1A-1.1).

Notwithstanding, the Council imposed its permitted right to assert additional defenses *sua sponte*. Id. (citing Paff v. Twp. of Plainsboro, Docket No. A-2122-05T2 (App. Div. 2007) (certif. denied Paff v. Twp. of Plainsboro, 193 N.J. 292 (2007)). To this end, the Council found that the footage was not disclosable under N.J.S.A. 47:1A-9(a) and N.J.S.A. 2A:4A-60, which exempts juvenile records maintained by law enforcement agencies when part of a juvenile-family crisis or juvenile delinquency issue. Id. at 7.

*****Based on Popular Inquiry Questions*****

Truland v. Borough of Madison, GRC Complaint No. 2006-88 (September 2007):

The Council held that "no redactions to the requested auto accident reports are warranted pursuant to N.J.S.A. 39:4-131." The New Jersey statute cited specifically states that "information contained [in the report] shall not be privileged or held confidential." The Council's holding in Truland, has been applied to another complaint in which accident reports were at issue. See also Selby v. Hazlet Twp. Police Dep't (Monmouth), GRC Complaint No. 2011-154 (Interim Order dated June 26, 2012). This is a departure from the normal OPRA procedures since driver's license numbers, social security numbers and unlisted telephone numbers are specifically exempt under OPRA and are routinely redacted from records.

The GRC understands that this provides a stark conflict with the personal information exemptions present in OPRA, which has led to some confusion. However, unless and until either the Legislature amends the statute and/or the courts/GRC decide otherwise, accident reports are required to be disclosed without redactions per N.J.S.A. 39:4-131.

Parreott, Sr. v. Asbury Park Sch. Dist. (Monmouth), GRC Complaint No. 2016-20, *et seq*. (September 2017).

The Council held that employment applications were not subject to access under OPRA. N.J.S.A. 47:1A-10; Executive Order No. 26 (Gov. McGreevey, 2002). In reaching this conclusion, the Council reasoned that:

> [E]mployment applications are not among the enumerated list of releasable records set forth at N.J.S.A. 47:1A-10 (allowing for limited disclosure of certain personnel information). Furthermore, EO 26 states that only *résumés* of successful candidates shall be disclosed once that candidate is hired. EO 26 makes no mention of employment applications being disclosed after the completion of the recruitment search. Moreover, the Council held in Toscano v. NJ Dep't of Human Serv., Div. of Health Serv., GRC Complaint No. 2010-147 (May 2011) that "the employment application sought by Complainant is not disclosable . . . because it is a personnel record which is exempt from disclosure pursuant to N.J.S.A. 47:1A-10, and [EO 26]. See N.J.S.A. 47:1A-9(a)." See also Deutsch v. NJ Civil Serv. Comm'n, GRC Complaint No. 2011-361 (March 2013).
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> [Id. at 7.]

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