

# LEGAL ALERT

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## **“Draft” Minutes of Public Bodies Remain Exempt from Disclosure under the Open Public Records Act**

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On January 26, 2018, the Appellate Division of the New Jersey Superior Court issued a published decision in *Libertarians for Transparent Government v. the Government Records Council*, Docket No. A-5563-15T4. In its opinion, the Court examined an Open Public Record Act (“OPRA”), request for draft meeting minutes of the Government Records Council (“GRC”) and affirmed the GRC’s refusal to disclose the minutes because they were not final documents.

In the case, the plaintiff submitted an OPRA request to the GRC for copies of its February 23, 2016 meeting minutes. However, because the next scheduled meeting of the GRC had been cancelled, the February 23<sup>rd</sup> minutes were not reviewed or voted on by the GRC, and the minutes remained in draft form at the time of plaintiff’s request. The GRC denied the request, informing the plaintiff that the records were exempt from disclosure pursuant to the advisory, consultative and deliberative (“ACD”) exception of OPRA because they had not been finalized by the agency.

Plaintiff filed suit against the GRC, alleging that the draft minutes must be provided pursuant to OPRA and the common law doctrine that government records are generally open to the public for inspection. The trial judge denied the plaintiff’s request, finding that the draft minutes were pre-decisional because they had not been finalized, and therefore could still be edited before the GRC voted on them. Thus, they were exempt under the ACD exception and not subject to disclosure under OPRA.

On appeal, the Appellate Division affirmed the trial judge’s decision. According to the Court, the determination of whether a document is “ACD” requires a two-prong analysis – (1) it must be pre-decisional, meaning it was generated before the agency’s adoption of the final decision or policy; and (2) it must be deliberative, in that it contains opinions, recommendations or advice about agency policies. The Court held that the draft minutes met this standard, because they were not finalized by the GRC, were subject to edits by the agency, and essentially constituted a

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“recommendation” on the form and content of the final minutes once approved by the agency. In short, the Court plainly stated that it is “not until an agency’s members approve the minutes that they become public record,” and that “draft minutes carry no import.”

In issuing its decision, the Appellate Court clarified the definition of ACD material and more importantly, reaffirmed the commonly-held belief that “draft” documents, prior to finalization, are not government records under OPRA. Rather, it is only the final document, once approved by the local entity, which becomes disclosable under the law. Because the Court’s decision is “published,” it is applicable to all public entities throughout New Jersey.

If you have any questions regarding the effect of this new decision, or would like assistance in determining whether certain documents constitute ACD material under OPRA, please do not hesitate to contact the school law attorneys at SPSK.

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