SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3289-21

FIRST MANAGED CARE OPTION, INC., and ALYSSA HRUBASH,

Plaintiffs-Appellants,

v.

NORTH HUDSON REGIONAL FIRE AND RESCUE,

Defendant-Respondent.

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Argued May 16, 2023 – Decided June 29, 2023

Before Judges Messano, Gummer and Perez-Friscia.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-1029-22.

Paul A. Alongi argued the cause for appellants (Alogi & Associates, LLC, attorneys; Paul A. Alongi, of counsel and on the briefs).

Philip W. Lamparello argued the cause for respondent (Chasan Lamparello Mallon & Cappuzzo, PC, attorneys; Philip W. Lamparello, of counsel and on the brief; Drew D. Krause, on the brief).

PER CURIAM

In December 2021, defendant North Hudson Regional Fire and Rescue issued a "Request for Qualifications" (RFQ) for twelve different services, including "Third Party Clams Administrator & Managed Care Services." The notice indicated the request was made "in accordance with the 'fair and open process' pursuant to N.J.S.A. 19:44A-20.5 et seq." The RFQ also included a separate "Criteria for Services," which described the "Evaluation Factors" defendant intended to use in reviewing responses, the "Scope of Services" to be provided by the successful applicant, and other relevant information and documentation that needed to be completed by the applicant.[1] Defendant received only one response to the RFQ, which was submitted by Claims Resolution Corporation, Inc.[2] Plaintiff First Managed Care Option, Inc. (FMC), did not respond to the RFQ.

[1] We assume the RFQ included separate "Criteria for Services" and "Scope of Services" for all twelve services that were subjects of the RFQ, but only the one for "Third Party Clams Administrator & Managed Care Services" is in the record.

[2] Defendant's January 24, 2022 resolution awarding the contract states there were two responses to the RFQ. However, at oral argument before us, defense counsel stated the resolution was incorrect in this regard, and defendant received only one response.

In February 2022, Alyssa Hrubash, one of plaintiff's employees, filed an email request with defendant pursuant to the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13. The request sought: 1) "cop[ies] of all bids or proposals received to the [RFQ] including . . . all documents submitted by any bidder"; 2) "documents regarding the scoring, ranking or selection of the winning bid or proposal for the [RFQ]"; 3) "[t]he resolution authorizing the award of a contract for the [RFQ]"; and 4) "[a] complete copy of the contract awarded for the [RFQ] including . . . all terms, conditions, specifications, schedules, and attachments thereto." Through its counsel, defendant furnished records in response to every category except the second.

Defense counsel's March 1, 2022 letter stated "[a]ll documents regarding the scoring, ranking or selection of the winning bid or proposal for the [RFQ]" were exempt from disclosure "pursuant to N.J.S.A. 47:1A-1.1 (advisory, consultative, and deliberative material) and N.J.S.A. 47:1A-9 (attorney-client privilege)." FMC's counsel's response cited provisions of the Local Public Contracts Law (LPCL), specifically N.J.S.A. 40A:11-4.5(d) and (f), and claimed "the requested documents are, by statute, public records." Defense counsel responded, noting those statutory citations were for "competitive contracting," a specific provision of the LPCL permitting procurement of a limited array of

goods and services. See N.J.S.A. 40A:11-4.1. He stated defendant had made the RFQ award "under the Local Unit Pay-to-Play Law" (the PPL).

FMC and Hrubash (collectively, plaintiffs) filed a verified complaint in the Law Division in support of an order to show cause seeking production of the records pursuant to OPRA and the common-law right-to-know, together with counsel fees and costs.[3] Defendant filed opposition.

The judge heard argument, and in an oral opinion that immediately followed, he concluded "the documents . . . regard[ing] the scoring[,] rank[ing] and selection of the winning . . . proposal" were "inherently deliberative in nature" and properly exempted from production under OPRA. The judge engaged in a balancing of interests in deciding whether plaintiffs were entitled to disclosure under the common law right of access to public records. See, e.g., Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 302-03 (2009) (explaining two-step inquiry and balancing of interests in considering whether to order disclosure). He concluded that "plaintiffs' interest in disclosure does not outweigh the governmental entity's interest in preventing disclosure." Lastly, the judge found that N.J.S.A. 19:44A-20.5, a provision of the PPL, did not

[3] Count three of the verified complaint sought damages pursuant to 42 U.S.C.A. §1983. Plaintiff subsequently voluntarily dismissed that count.

require defendant to provide the information plaintiffs sought. Accordingly, the judge dismissed plaintiffs' verified complaint with prejudice by order dated June 15, 2022, and this appeal followed.

Before us, plaintiffs limit their argument to a single substantive point. They contend the documents requested are government records under OPRA and must be produced. We disagree and affirm.

We need not restate in detail the public policy behind OPRA. See N.J.S.A. 47:1A-1 ("government records shall be readily accessible for inspection, copying, or examination by citizens of this State, with certain exceptions for the protection of the public interest"); Brennan v. Bergen Cnty. Prosecutor's Off., 233 N.J. 330, 333 (2018) (noting "OPRA favors broad public access to government records."). And although the definition of a " [g]overnment record" is very broad, the term "shall not include inter-agency or intra-agency advisory, consultative, or deliberative material." N.J.S.A. 47:1A-1.1.

"That exemption language . . . has, from its inception, been understood to encompass the common law deliberative process privilege." Educ. Law Ctr., 198 N.J. at 284. We have held "[t]he OPRA exemption, as it is set, expressed, and structured in the definitional section of the Act, is an unqualified one. As a matter of law, the countervailing claims of need raised by [an] appellant in

seeking access do not affect the OPRA analysis." Ciesla v. N.J. Dep't of Health & Senior Servs., 429 N.J. Super. 127, 144-45 (App. Div. 2012). "The deliberative process privilege 'permits the government to 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 (quoting In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 83 (2000)).

We view the Court's opinion in Education Law Center, a decision that plaintiffs do not cite in their brief or reply brief, as wholly dispositive of plaintiffs' argument. In that case, the plaintiff sought the disclosure of all records used by the Office of School Funding in developing a formula that the Department of Education (DOE) would recommend the Legislature utilize to fund the State's poorest school districts. Id. at 281. After numerous documents had been produced, and the trial court had conducted a massive in camera review and made various rulings, the dispute was reduced to the request for an unredacted version of a single memorandum. Ibid. As the Court explained:

> A redacted copy of that document had been released to [the plaintiff]. The document, twelve pages in length, outlines three school funding options. After describing the options in outline form, the memorandum details statistical data run through each of the formulas to determine what certain costs would be for each

> alternative. The redacted version of the document omits that statistical information for two of the three alternatives outlined and discussed in the memorandum.
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> [Id. at 282.]

When the trial court ordered production of an unredacted copy, DOE appealed. Ibid. We agreed with the trial court and concluded "the material at issue [wa]s numerical and statistical in nature," not deliberative material subject to OPRA's exemption. Ibid. (quoting Educ. Law Ctr. v. N.J. Dep't of Educ., 396 N.J. Super. 634, 641 (App. Div. 2007)).

Writing for the Court, Justice LaVecchia explained:

> [T]he question of what is protected under the deliberative process privilege, incorporated into OPRA as an exemption from the definition of a "government document," must depend, first, on whether the information sought is a part of the process leading to formulation of an agency's decision, (not on a simplistic label of "fact" or "opinion"), and, second, on the material's ability to reflect or to expose the deliberative aspects of that process. . . .
>
> The privilege is intended to protect the deliberative process. The privilege recognizes the importance of promoting government's full and frank discussion of ideas when developing new policies, or in examining existing policies and procedures, and further recognizes that such activities constitute a process of policy examination and evaluation. . . . The mere use of the word "process" in the name of the privilege suggests that the material can include factual

> components and still be protected from disclosure if it was used in the agency's efforts to reason through to an ultimate decision, including a decision to reject all options and not to act. So long as disclosure of such material would reveal the nature of the deliberations that occurred during the agency's processes, the material is entitled to the protection of the deliberative process privilege.
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> [Id. at 295-96 (citation omitted).]

The Court concluded "DOE was entitled to withhold the document under OPRA's provision that excludes from the definition of a 'government record' documents that constitute 'deliberative material.'" Id. at 302.

In this case, plaintiffs similarly sought all documents relating to the "scoring, ranking and selection" of the sole entity that responded to the RFQ. We have in other instances concluded pre-decisional data and internal communications were shielded from disclosure under OPRA. See, e.g., Libertarians for Transparent Gov't v. Gov't Recs. Council, 453 N.J. Super. 83, 91 (App. Div. 2018) (draft minutes of governmental body were not subject to production under OPRA); Larkins v. Solter, 450 N.J. Super. 519, 537-39 (App. Div. 2017) (concluding State Controller's Office "internal . . . audit proposal, planning memorandum and risk/priority evaluation" were not subject to disclosure under OPRA); Ciesla, 429 N.J. Super at 140 (draft reports prepared to aid in agency analysis of hospital's application for certificate of need was

"unquestionably pre-decisional" and not subject to disclosure under OPRA); McGee v. Twp. of E. Amwell, 416 N.J. Super. 602, 620-21 (App. Div. 2010) (concluding pre-meeting emails circulated among government officials were protected under the deliberative process exception and not subject to disclosure). We are firmly convinced that even without the benefit of an in camera review—which in most circumstances a trial judge should routinely conduct before ruling on such issues—the judge in this case correctly concluded responsive documents to plaintiffs' second category of requests were not "government records" as defined by OPRA.

Plaintiffs argue the requested documents are not covered by the deliberative process privilege because other statutes—the LPCL and the Pay-to-Play Law—require their disclosure. We disagree.

Local governmental entities like defendant must comply with the LPCL when procuring goods and services. See, e.g., Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 313-14 (1994) (explaining the LPCL's underlying public policy goals). Under the LPCL, a local government entity may award a contract for services, like those set forth in the RFQ, without public bidding. See N.J.S.A. 40A:11-5(1)(a)(ii) (excepting the procurement of "[e]xtraordinary unspecifiable services" (EUS) from public bidding

requirements); and N.J.S.A. 40A:11-5(1)(m) (excepting contracts for "[i]nsurance, including the purchase of insurance coverage and consultant services" from public bidding requirements "in accordance with the requirements for [EUS]"). The resolution awarding the contract in this case specifically cites this subsection of the LPCL as the basis for the award.[4]

Plaintiffs continue to cite provisions of the LPCL that permit a local governmental entity to procure certain "specialized goods and services" without public bidding through "competitive contracting." N.J.S.A. 40A:11-4.1. And plaintiff correctly asserts that when a governmental entity utilizes competitive contracting, generally it must cause a report to be made available to the public "at least [forty-eight] hours prior to the awarding of the contract." N.J.S.A. 40A:11-4.5(d). That report

> shall list the names of all potential vendors who submitted a proposal and shall summarize the proposals of each vendor. The report shall rank vendors in order of evaluation, shall recommend the selection of a vendor or vendors, as appropriate, for a contract, shall be clear in the reasons why the vendor or vendors have been selected among others considered, and shall detail

[4] In making an award for an EUS, the public governing body "shall in each instance state supporting reasons for its action in the resolution awarding each contract." N.J.S.A. 40A:11-5(1)(a)(ii). The resolution in this case fails to do so. However, the adequacy of the resolution is not before us because plaintiff is not challenging the award of the contract.

> the terms, conditions, scope of services, fees, and other matters to be incorporated into a contract.
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> [Ibid.]

The continuing fallacy in plaintiffs' argument is that defendant did not employ "competitive contracting" in making this award.

Plaintiffs similarly contend the PPL, N.J.S.A. 19:44A-20.3 to -20.15, requires disclosure of the information they sought, and, therefore, the records at issue are not covered by OPRA's statutory exemption for "intra-agency advisory, consultative, or deliberative material." N.J.S.A. 47:1A-1.1. We traced the evolution of the PPL in Communications Workers of America, AFL-CIO v. Christie, 413 N.J. Super. 229, 237-40 (App. Div. 2010). Pursuant to the PPL, instrumentalities of a municipality

> shall not enter into a contract having an anticipated value in excess of $17,500 . . . except a contract that is awarded pursuant to a fair and open process, if, during the preceding one-year period, that business entity has made a contribution . . . to any candidate committee of any person serving in an elective public office of that municipality when the contract is awarded.
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> [N.J.S.A. 19:44A-20.5 (emphasis added).]

The PPL defines the terms "fair and open process":

> [A] "fair and open process" means . . . that the contract shall be: publicly advertised in newspapers or on the Internet website maintained by the public entity in

> sufficient time to give notice in advance of the contract; awarded under a process that provides for public solicitation of proposals or qualifications and awarded and disclosed under criteria established in writing by the public entity prior to the solicitation of proposals or qualifications; and publicly opened and announced when awarded.
>
> [N.J.S.A. 19:44A-20.7.]

As we understand plaintiffs' argument, they contend that because the "fair and open process" requires a contract may only be "awarded and disclosed under criteria established in writing by the public entity prior to the solicitation of proposals or qualifications," the public entity must also disclose its internal evaluation of the proposal. Plaintiffs claim the "fair and open process" required by the PPL compels the conclusion that the disputed documents are not "intra-agency advisory, consultative, or deliberative material" but rather government records available under OPRA.

Plaintiffs misinterpret the plain language of N.J.S.A. 19:44A-20.7. The "fair and open process" mandated by the PPL requires only that the awarded contract was "publicly advertised; provided for public solicitations; [was] awarded according to set written criteria; and [was] publicly announced when awarded." Commc'ns Workers of Am., 413 N.J. Super. at 239 (citing N.J.S.A. 19:44A-20.7). Not only does it appear from the record that defendant complied

with these requirements, but we also again note that this appeal is not from a challenge to the award of the contract based on an alleged violation of the PPL. By its terms, the PPL does not require defendant to furnish "the advisory, consultative, or deliberative material" that led to the award, and the statute does not implicitly amend OPRA's exclusion of such material from the definition of a government record.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION