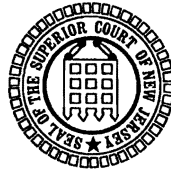


**SUPERIOR COURT OF NEW JERSEY  
MERCER VICINAGE**

LINDA R. FEINBERG  
ASSIGNMENT JUDGE



MERCER COUNTY COURTHOUSE  
P.O. BOX 8068  
TRENTON, NJ 08650  
609-571-4499

February 18, 2010

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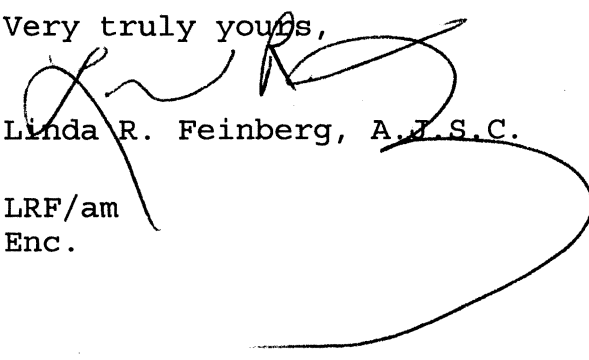
RE: Public Employees for Environmental Responsibility v.  
New Jersey Department of Environmental Protection  
Docket No.: MER-L-2501-09

Dear Counsel:

Enclosed herewith please find a copy of my opinion in reference to the above-captioned matter. The court requests that plaintiff's attorney, Michael L. Pisauro, Jr., prepare an order consistent with the enclosed opinion.

If you need any additional information, please feel free to contact my office.

Very truly yours,

  
Linda R. Feinberg, A.J.S.C.

LRF/am  
Enc.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE  
COMMITTEE ON OPINIONS

PUBLIC EMPLOYEES FOR  
ENVIRONMENTAL RESPONSIBILITY,

Plaintiff,

v.

NEW JERSEY DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,

Defendant.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION-MERCER COUNTY

DOCKET No.:MER-L-2501-09

CIVIL ACTION  
OPINION

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Decided: February 18, 2010

Michael L. Pisauero, Jr., for the plaintiff (Frascella & Pisauero,  
attorneys; Mr. Pisauero, on the brief).

Anne Milgram, Attorney General, for the defendant (Christine  
Piatek, Deputy Attorney General, on the brief).

FEINBERG, A.J.S.C.

FEINBERG, A.J.S.C.

On October 1, 2009, plaintiff, Public Employees for Environmental Responsibility ("PEER"), filed a one-count complaint alleging the failure by the Department of Environmental Protection (the "DEP") to comply with the Open Public Records Act, N.J.S.A. 47:1A-1, et seq. ("OPRA"). PEER, a non-profit organization with tax-exempt status, is dedicated to research and public education concerning the activities and operations of federal and state governments. The DEP, a public agency of the State of New Jersey and principal department of the Executive Branch of the State government, is charged with the duty to provide public access to documents in its possession consistent with OPRA requirements.

The background is straightforward. On August 8, 2009, PEER submitted an OPRA request (#88497) to the DEP to conduct a file review of records related to the nomination of board members to the agency's Science Advisory Board ("SAB"). The request sought:

- (1) any and all communication to the DEP from external third parties

regarding recommendations of candidates to serve on the SAB;

(2) any and all communication to the DEP regarding the SAB;

(3) any and all written materials regarding the review and selection of SAB members, including DEP's policies and procedures governing the SAB candidate selection criteria and review process;

(4) all e-mails, correspondences, meeting notes, etc. regarding items [2] and [3]; and

(5) an OPRA privilege log of any documents excluded from this request and the basis for exclusion.

On September 9, 2009, but for one document, DEP denied the request.<sup>1</sup> To support the denial, DEP relied on Executive Order 26 ("EO 26"), paragraph three, enacted on August 13, 2002.

PEER alleges that: (1) the DEP is required to provide the requested documents and records pursuant to OPRA; (2) all of the requested documents and records are subject to the disclosure requirements of OPRA; and (3) the refusal to make available for inspection and copying the requested documents and records constitutes a violation of OPRA.

---

<sup>1</sup> One document responsive to the request, the SAB's Administrative Order, was made available on the DEP website.

As such, PEER requests: (1) an order declaring that DEP has wrongfully withheld the requested agency records and directing the DEP to provide access to true and exact copies of all the requested documents and records to the plaintiffs; (2) reasonable attorney fees and costs incurred in this action, pursuant to N.J.S.A. 47:1A-6; (3) that the court maintain jurisdiction over this action until the DEP comes into compliance with OPRA and every order of this court; and (4) an order for the DEP to determine and implement standard guidelines for OPRA requests consistent with the findings of this court.

Following the submission of briefs, the court heard oral argument on January 22, 2010 and subsequently provided counsel the opportunity to submit supplemental briefs.

PEER argues in its brief that the DEP wrongfully withheld documents asked for under item one of its OPRA request. Specifically, PEER submits that EO 26 unambiguously applies solely to resumes, applications, and other employment-related information concerning "job applicants," and not those considered for non-employment.

Regarding item three of its OPRA request, PEER submits that the DEP pointed only to a single document available on its website; to wit, an Administrative Order pertaining to candidate selection criteria and the review process, and

failed to state that this was the only responsive document to the pertinent request. As to items two, four, and five, PEER represents that the DEP entirely disregarded these requests. That is, they failed to justify the denial of the requested items, or make responsive documents available for review by plaintiff.

On November 17, 2009, the DEP submitted opposition. The DEP asks that the court find its actions with respect to the portion of the request that it denied were authorized under OPRA, and that the rest of the complaint be dismissed as unripe for review.

The DEP submits that upon receiving the OPRA request, it determined that approximately 500 pages of records pertained to the request, including e-mails, paper files, and documents containing the identification of the nominees for the SAB. The DEP determined that the names, nomination submittals, and resumes could not be disclosed because the process for review, consideration, recommendation, and selection of candidates for the SAB was in progress and not complete.

Regarding the solicitation of candidates for the SAB, the DEP says that it posted nomination forms and information on the department website, and e-mailed a notice of the nomination process to individuals and

organizations on its regular interest constituency groups lists, and approximately 200 academic offices and departments in New Jersey institutions. The application form directed a nominator to submit a biographical sketch and curriculum vitae ("CV") or resume for the nominee, as well as work and home contact information. The nomination process closed on August 7, 2009. The DEP received 108 nominations. Currently, none of the candidates have been advised of their status in the ranking.

The DEP argues that OPRA puts an obligation on a public agency to safeguard a citizen's personal information from public access, when disclosure would violate the citizen's reasonable expectation of privacy, N.J.S.A. 47:1A-1, and that a record is public unless exempt by an Executive Order of the Governor.

The DEP also argues that EO 26 recognizes the sensitivity of an individual's search for public employment and the potential ramifications of disclosure of information related to that search. Specifically, an individual not selected for a position might suffer personal and professional embarrassment from the disclosure of her unsuccessful attempt at obtaining a position; someone searching for a job may not want a current employer to know of such efforts; and a resume or CV contains

personal information that the candidate may not wish to disclose widely to the public. As such, this information is protected under EO 26.

The DEP acknowledges that candidates for the SAB are volunteers and will not be employees of the DEP, but argues that aforementioned concerns for disclosure of information identifying the candidates before the DEP has had an opportunity to review, deliberate, and select the panel for the SAB, are the same as for candidates competing for employment positions. The DEP also argues that disclosure of information about the nominees at this time has the potential of placing pressure on the DEP to act a certain way in its deliberations and selection process.

The DEP asserts that courts have applied the concept of "similarity" of records in analyzing whether they're confidential or must be disclosed under OPRA and/or federal law, and cites North Jersey Media Group, Inc. v. Bergen County Prosecutor's Office, et al., 405 N.J. Super. 386 (App. Div. 2009), to support this argument. The DEP also cites the federal Freedom of Information Act, 5 USC 552(b)(6), which states that records that are "similar" to but not strictly personnel records but would constitute an invasion of personal privacy are exempt from disclosure.



The DEP also states that where privacy interests are at play, OPRA necessitates a balancing of the privacy interest against the right to public access. Under the factors listed in Doe v. Poritz, 142 N.J. 1 (1995), the DEP makes the following conclusions: (1) the records sought include information that will be used in a competitive selection process, and include personal information; (2) it is imperative that the review and selection process maintain a high level of integrity and noninterference in order to ensure the appointment of the most credentialed and experienced scientists and technicians; (3) publicizing the names of nominees and their nominators subjects the DEP to unwarranted pressure to select or not select specific candidates based on the goals and philosophies of constituent groups in possession of this information; (4) this pressure would cast a pall over the process, which is specifically designed to ensure independent scientific peer review; and (5) the end result would be less confidence by the public in the process and selections.

The DEP next argues that it only withheld records partially addressed by item one, and did not deny the entirety of the OPRA request. As such, PEER's claim with respect to items two, three, four, and five of the OPRA request is premature and not ripe for review by this court.

Lastly, the DEP argues that DEP advised PEER that responsive records were identified, and to contact the DEP for further details, which PEER failed to do. As such, the task of reviewing the documents has not been completed by the DEP. The DEP states that nonetheless, OPRA does not require the production of a privilege log in conjunction with a custodian's response to a request for government records.

With its opposition, the DEP submitted the certifications of Matthew J. Coefer ("Coefer"), Custodian of Records in the Office of Record Access in the DEP, and Jeanne Herb ("Herb"), Director of the Office of Policy, Planning and Science ("OPPS") in the DEP.

In Coefer's certification, he certified the following: (1) even though the request was overly broad in the scope and range of records sought, the DEP acknowledge that the subject would enable relatively easy identification and grouping of potentially responsive records; (2) he and staff of the various program areas discussed the records maintained in the context of the status of the process for selection of candidates for the SAB to determine whether the records were government records under OPRA or exempt from disclosure; (3) the DEP determined that approximately 500 pages of records pertained to the request, including e-

mails, paper files, and documents containing the identification of the nominees; (4) in consultation with counsel, the DEP determined that the names, nomination submittals, and resumes could not be disclosed because the process for review, consideration, recommendation and selection of candidates for the SAB was in progress and not complete; (5) the DEP advised the requestor that there were records and that some were exempt from access, and to contact the office to obtain further details; (6) PEER did not contact the DEP, and as a result, the privilege review of the records other than those identifying the names and nominations of candidates for the SAB has not been completed, as the requestor would have to agree to and pay a special service charge before the DEP is able to prepare the records with the appropriate notations of and redactions for privilege; (7) PEER has submitted 42 OPRA requests to the DEP over the years, and has knowledge of the DEP's policies governing the assessment of a special service charge for extraordinary time spent on responding to OPRA requests, copying, and record access procedures; and (9) the DEP is prepared to work with the requestor to provide records permitted to be disclosed under OPRA.

In Herb's certification, Herb certifies the following:

(1) the DEP received 108 nominations for seats on the SAB

and four standing committees in the areas of Ecological Processes, Public Health, Water Quality and Quantity, and Climate and Atmospheric Sciences; (2) the DEP has established two working groups to assess and select candidates based on criteria developed by the DEP; (3) the DEP is now in the process of reviewing the nominations, ranking them, and making preliminary selections for further consideration by a departmental working group, and ultimately, the Commissioner; (4) it is imperative that the review and selection process maintain a high level of integrity and noninterference in order to ensure the appointment of the most credentialed and experienced scientists and technicians; and (5) candidates were not advised that their names would be released publicly prior to selection.

On December 1, 2009, PEER submitted a letter to the court requesting an extension of time in which to file responsive papers to the DEP's response brief. This was granted. On January 4, 2010, PEER filed its reply brief.

PEER states that the DEP has essentially withheld the bulk of information requested by PEER by producing records of cover letters and e-mails suggesting various people for appointment but with the actual names redacted, and withholding most resumes, and biographical and background

information submitted by or on behalf of nominees. PEER further submits that it is not seeking information which OPRA protects from disclosure, including social security numbers, unlisted telephone numbers, or driver license numbers, and that it is not seeking "personnel records," which are not government records under OPRA, and are not made available with the exception of the employee's name, title, position, salary, etc. N.J.S.A. 47:1A-10.

PEER argues that the DEP has not alleged that the applications, biographical sketch, CVs or resumes contain confidential information that must be protected from disclosure. Instead, the DEP makes blanket assertions that the records should not be disclosed. The information submitted to the DEP provides no personal information that would subject the nominee to any invasion of privacy, as the nomination form only asks for the name, title, affiliation of the nominator, and e-mail of the nominator, as well as the person making the nomination.

PEER argues that the DEP does not cite to any case law that would support the proposition that nominees for a commission, board, or other group that are not employees of the governmental should be covered by EO 26. Because New Jersey has a long history of advisory boards and committees, if it wished to withhold resumes and other

nominee submissions from production under OPRA, the legislature or executive branch could have provided that these documents are not subject to disclosure.

PEER asserts that disclosure of the names of the applicants will allow citizens to review the candidates' qualifications to ensure that the DEP is selecting the most qualified members for the SAB. PEER also states that since a position on the SAB does not qualify as a job, the DEP's assertion that applicants might not want their current employers to know about their "job search" is not valid. PEER also states that none of the applicants were advised that their information would not be made public.

PEER submits that DEP cannot assert that revealing the names of nominees and nominators will reveal the deliberative process of the agency. First, the letters and documents recommending and nominating specific individuals for the SAB were sent to the DEP by third parties, and were therefore not created by the DEP. Secondly, the DEP has already released several of the documents currently being withheld pursuant to the deliberative process privilege.

Following oral argument, on January 25, 2010, the DEP submitted a supplemental brief. The DEP states that it finalized its recommendations of candidates for the SAB on January 15, 2010, and relayed these recommendations to

then-DEP Commissioner Mark Mauriello, but the appointments were held in abeyance, and the initiative is pending review by the new Commissioner.

The DEP reiterates what it stated during oral argument; to wit, PEER met with the OPRA custodian and counsel on December 21, 2009. At this time, the DEP provided PEER with responsive records as to the remainder of the OPRA request. Counsel was provided records in paper format and on CD-rom, containing the e-mails of the DEP staff member who was handling the formation of the SAB and working with an external study group whose task was to make recommendations to the Commissioner about the SAB, and 115 documents. Some records were redacted pursuant to claimed exemptions for advisory, consultative, and deliberative material. Specifically, the names, nominations, application forms, resumes, and CVs of the candidates were not provided.

On February 1, 2010, PEER submitted a response, stating that it understood the court to be inclined to release the names of the nominees for the SAB, their CVs/resumes, biographical information, and the names and nomination forms of those who nominated people for the DEP's consideration. As such, PEER is willing to waive its claim to the release of the records that were redacted

under the exemption for advisory consultant or deliberative exceptions.

### ANALYSIS

OPRA provides "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions . . . ."

N.J.S.A. 47:1A-1. Moreover, public policy requires courts to construe narrowly OPRA's exceptions to citizens' right of access to government records. Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005); Libertarian Party of Cent. New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006).

OPRA defines a government record as:

any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file . . . or that has been received in the course of his or its official business. . . . The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

[N.J.S.A. 47:1A-1.1.]

OPRA narrows this general definition by naming classes of records that do not qualify as government records under



OPRA. When an agency invokes exemptions and denies a citizen access to requested records, "the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor." N.J.S.A. 47:1A-5(g).

OPRA further provides that "[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may . . . institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . . ." N.J.S.A. 47:1A-6. During the proceeding, the records custodian bears the burden to show that OPRA authorizes nondisclosure of the requested records. Finally, if defendants fail to justify denying the record, the court shall order that plaintiff have access and award a reasonable attorney's fee. Ibid.

Based on the record, the information and documents currently being sought include the names of the nominees for the SAB, their CVs and/or resumes, biographical information provided by their nominators, and the names and documents of those who actually nominated individuals for consideration. PEER is not seeking the release of records that were redacted by the DEP under a claimed exemption for

advisory, consultant or deliberative exceptions.<sup>2</sup> Pl. Supp. Br. at 2.

For the following reasons, the court is satisfied that under OPRA, the DEP is obligated to provide to PEER the names of the nominees for the SAB, their CVs and/or resumes, any biographical information provided, and the names and documents of those who nominated them to the SAB.

First, the court rejects the notion that the denial of this information was justified because it was similar to the information intended to be protected through EO 26.<sup>3</sup> EO 26 provides, in pertinent part, that:

No public agency shall disclose the resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. The resumes of successful candidates shall be disclosed once the successful candidate is hired. The resumes of unsuccessful candidates may

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<sup>2</sup> Such documents presumably include letters, e-mails, and phone calls to the DEP from external third parties regarding recommendations of candidates to serve on the SAB; all letters, e-mails, and phone calls regarding the SAB; all written material regarding the review and selection of SAB members, including DEP policies and procedures governing the SAB candidate selection criteria and review process; all e-mail, correspondence and meeting notes regarding the SAB and selection process; and an OPRA privilege log of excluded documents. Def. Opp. at 2.

<sup>3</sup> One provision of OPRA provides that "all government records shall be subject to public access unless exempt from such access by . . . regulation promulgated under the authority of any . . . Executive Order of the Governor." N.J.S.A. 47:1A-1.

be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure.

[Ibid.]

The court finds that the DEP's reliance on this is misplaced. First, it is undisputed that the successful candidates for membership on the SAB will not qualify as employees of the DEP. Specifically, the DEP admits, ". . . the candidates for the SAB are volunteers and will not be employees of the Department and are not candidates for employment in the traditional sense . . ." Def. Br. at 14. Administrative Order No. 2009-05 (the "AO"), which created the SAB, also states that "[m]embers of the standing committees, ad hoc committees or subcommittees shall not be employed by the Department. . ." Def. Ex. (attached to Herb Cert.)

Secondly, the DEP has not offered any legal precedents indicating that EO 26 should be extended to apply to candidates for membership on public agency boards. Rather, the DEP relies on North Jersey Media Group, supra, 405 N.J. Super. 386. In that case, the Appellate Division affirmed a Law Division decision deny a newspaper's OPRA request for records of employees of the prosecutor's office who sought

approval for employment outside the office. Ibid. Without addressing EO 26, the court found the requested documents to be analogous to personnel records, see N.J.S.A. 47:1A-10 (personnel records possessed by public agencies are not considered government records and therefore are not available for public access), and exempted from OPRA because "[t]hey pertain to the general subject matter of one's employment, are proffered in furtherance thereof, and are made pursuant to the employee manual. . . ." North Jersey Media Group, 405 N.J. Super. at 389. This is clearly distinguishable from the current situation, which involves candidates for non-employment positions on the SAB and the voluntary submittal of the nominator's name, candidate's name, a biographical sketch, and a current CV or resume.

Most importantly, inasmuch as EO 26 is clear on its face, an interpretive analysis of the intent behind its promulgation is unnecessary. The Supreme Court in Twp. of Stafford v. Stafford Twp. Zoning Board, 154 N.J. 62 (1998), provided the following regarding statutory interpretation:

Generally, a court's duty in construing a statute is to determine the intent of the Legislature. To determine the legislative intent, courts turn first to the language of the statute. If the language is plain and clearly reveals the meaning of the statute, the court's

sole function is to enforce the statute in accordance with those terms.

However, this court has noted . . . where it is clear that the drafters of a statute did not consider or even contemplate a specific situation, this court has adopted as an established rule of statutory construction the policy of interpreting the statute 'consonant with the probable intent of the draftsman had he anticipated the situation at hand.'

[Id. at 71 (citations omitted).]

Paragraph 3 of EO 26 provides:

No public agency shall disclose the resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. The resumes of successful candidates shall be disclosed once the successful candidate is hired. The resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure.

[Ibid. (emphasis added).]

In fact, this paragraph is meant to serve as a clarification of certain regulations promulgated by Executive Order 21 ("EO 21"), see EO 26 ("WHEREAS, discussions following the issuance of [EO 21] have demonstrated the need to clarify certain provisions of that Executive Order . . . ), which states that:

In order to effectuate the legislative directive that a public governmental agency has the responsibility and the obligation to safeguard from public access a citizen's personal information with which it has been entrusted, an individual's home address and home telephone number, as well as his or her social security number, shall not be disclosed by a public agency at any level of government to anyone other than a person duly authorized by this State or the United States, except as otherwise provided by law, when essential to the performance of official duties, or when authorized by a person in interest. Moreover, no public agency shall disclose the resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing, and thereafter in the case of unsuccessful candidates.

[Id. at ¶ 3.]

The more in-depth explanation in EO 26 of what may or may not be released with regard to job applicants, paired with EO 21's discussion of the privacy interest of citizens generally, indicates that Governor McGreevey did contemplate the potential applicability of EOs 21 and 26 to an array of individuals, and created a final order to reflect this.

As PEER noted:

"[New Jersey] has a long history of advisory boards and committees . . . [i]f [it] wished to withhold resumes and other nominee submissions from

production under OPRA, the legislature or the executive branch could have provided that these documents are not subject to disclosure. DEP is asking the [c]ourt, in the absence of direct authority under the law or executive order, to apply an [e]xecutive order to a situation not explicitly provided . . . . Both [e]xecutive [o]rders issued by the Governor and relied on by DEP are silent as to their applicability to nominees of boards and councils similar to the SAB."

[Pl. Reply Br. at 6.]

As such, the court is satisfied that neither EO 21 nor EO 26 includes similar information provided by non-employee applicants to serve on the SAB.

Additionally, though defendants have listed concerns over protecting the privacy of those nominated to the SAB, the court is not persuaded that any such privacy rights are violated in this instance. Under OPRA, a public agency has the obligation to specifically protect against disclosure of personal information which runs contrary to an individual's reasonable privacy interests. Burnett v. County of Bergen and Bergen County Clerk's Office, 198 N.J. 408, 423 (2009), citing N.J.S.A. 47:1A-1, 5. In Burnett, this protected information included the social security numbers of individuals named on land title documents. It

did not include these individuals' names, addresses, signatures, or marital status. Id. at 437.

Here, what PEER seeks for review is the names of candidates for the SAB and their nominators, home contact information, the nominators' e-mail addresses, and the CVs and/or resumes of the candidates. None of this information is protected by statute or executive order. Release of this information does not present any security concerns, such as those at issue in Burnett. Further, the nominators were aware at the time they made their nominations that the information on their submissions would be viewed and made known to numerous individuals throughout the course of the review process. Accordingly, release of this information to PEER does not violate any of the involved individuals' privacy rights.

Beyond nomination forms and related documents, PEER also sought e-mails, correspondence, meeting notes, materials regarding review and selection policies and procedures and communications to the DEP from external third parties, relating to the nomination process. Based on representations during oral argument, at some point the DEP provided these materials, albeit in redacted form. The DEP claims the redactions were necessary to protect advisory, consultative, or deliberative material. N.J.S.A.



47:1A-1.1. During oral argument the court asked counsel whether Peer challenged the redactions. If so, the court would undertake an in camera review. In response, counsel for PEER provided a qualified "no" to permit counsel the opportunity to consult with his client.

On February 1, 2010, in writing, PEER waived its claim to the redacted portions of the documents provided. As a result, the court will not engage in a review of the advisory, consultative, or deliberative material privilege as it applies to those documents which were already disclosed to PEER in a redacted form, including e-mail communications. Rather, the court will address this privilege only as it applies to the nomination forms themselves, the accompanying CVs and/or resumes, and any biographical sketches of the nominees.

While OPRA provides access to a broad range of documents, it specifically provides that the term "government record" shall not include "inter-agency or intra-agency advisory, consultative, or deliberative material." Ibid. This exemption "shields from disclosure documents 'deliberative in nature, containing opinions, recommendations, or advice about agency policies,' and 'generated before the adoption of an agency's policy or decision.'" Bent v. Stafford Police Dep't, 38 N.J. Super.

30, 37 (App. Div. 2005) (quoting Gannett N.J. Partners, LP v. County of Middlesex, 379 N.J. Super. 205, 219 (App. Div. 2005)).

In order to fall under the deliberative process privilege, the documents at issue must be: (1) pre-decisional, meaning that they were "generated before the adoption of an agency's policy or decision; and (2) deliberative, or "contain opinions, recommendations, or advice about agency policies." In Re Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85 (2000). If these requirements are met, a presumption of confidentiality arises, and the requestor may only obtain the confidential materials upon a showing that the need for them overrides the government's interest in confidentiality. Education Law Center v. New Jersey Dept. of Educ., 198 N.J. 274 (2009) (citing Integrity, 165 N.J. at 85).

The DEP in this instance is currently undertaking the task of evaluating 108 candidate nominations in order to select twelve individuals to serve on the SAB. As such, it is clear that deliberative discussions are in the process of taking place. The court is aware that this may result in the production of documents or writings which may be protected by this deliberative privilege, and protected from disclosure by OPRA. However, the nomination forms

themselves, including the names of the nominators and candidates, the candidates' biographical information, and the candidates' CV and/or resume, do not qualify as deliberative material. Though clearly generated before the DEP's decision on who shall serve on the SAB, the DEP has not presented any evidence that there is information in the documents which contains the DEP's **own** opinions or recommendations, such as internal notes or markings anywhere on the nomination forms or their accompanying documents. Without this, the deliberative process privilege may not be invoked.

As the DEP has not submitted any applicable exceptions to its duty under OPRA to provide the documents at the heart of this matter, the DEP must provide PEER with the nomination forms, the candidates' biographical sketches, and their CVs and/or resumes, pursuant to OPRA.

Regarding attorneys fees, the court finds that PEER is a prevailing party. At this juncture, however, the court makes no specific findings as to the amount of fees pending receipt of a certification of services and accompanying brief. This certification shall include: (1) the necessary time and labor, the novelty and difficulty of the issues, and the legal skill required; (2) the likelihood, if apparent to the client, that the acceptance of the

particular employment will preclude the potential for any other employment taken by the lawyer; (3) the fee typically charged in the locality for similar legal services; (4) the fee amount and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent. See N.J.S.A. 47:1A-6; RPC 1.5(a).

Counsel for plaintiff shall prepare an order consistent with this opinion.