



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

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COMMISSIONER JOSEPH V. DORIA, JR.  
COMMISSIONER LUCILLE DAVY  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

**FINAL DECISION**

**November 19, 2008 Government Records Council Meeting**

John Paff  
Complainant

Complaint No. 2007-271

v.

Township of Berkeley Heights (Union)  
Custodian of Record

At the November 19, 2008 public meeting, the Government Records Council (“Council”) considered the November 12, 2008 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:

1. The Custodian’s failure to respond in writing within seven (7) business days of receipt of the Complainant’s September 10, 2007 OPRA request, specifically granting access, denying access for a lawful reason, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the complainant’s OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Although the Custodian did respond in writing to the Complainant’s OPRA request stating that the records responsive to Items No. 2, No. 3 and No. 4 were not available, and to request Item No. 5 directing the Complainant to see exhibits, the Custodian’s response to the Complainant’s OPRA request is insufficient because the Custodian failed to cite a specific basis for her denial, as required by N.J.S.A. 47:1A-5.g. See Paff v. City of Plainfield, GRC Complaint No. 2006-103 (February 2007).
3. The Custodian provided all records responsive to request Items No. 1 and No. 6 on October 5, 2007 at a cost of \$12.50. The Custodian’s Counsel also states in the Statement of Information that there were no executive meetings held on May 8, 2007 or July 24, 2007. Although the Custodian’s failure to respond in writing within the statutorily mandated time frame resulted in a deemed denial



of access, no further action is required because the records responsive to request Items No. 1 and No. 6 were made available to the Complainant.

4. The Custodian's response to the Complainant's OPRA request Item No. 2 was insufficient because she failed to specifically state that the requested executive session minutes were not yet approved by the governing body at the time of the Complainant's request pursuant to N.J.S.A. 47:1A-5.g. and Paff v. City of Plainfield, GRC Complaint No. 2006-103 (February 2007). However, although the Custodian failed to respond to the Complainant's OPRA request specifically stating that the requested executive session meeting minutes responsive to Item No. 2 were not yet approved by the governing body at the time of the Complainant's September 10, 2007 OPRA request, the requested unapproved, draft executive minutes constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant to the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006).
5. The Custodian's response to the Complainant's request is insufficient because she failed to timely respond in writing to the Complainant's OPRA request and failed to specifically state that no records responsive to Items No. 3 and No. 4 exist, as required by N.J.S.A. 47:1A-5.g. and Paff v. City of Plainfield, GRC Complaint No. 2006-103 (February 2007). Nevertheless, the Custodian did not unlawfully deny access to the requested records because the Custodian certified that records responsive to request Items No. 3 and No. 4 did not exist. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
6. The types of records requested by the Complainant in Items No. 3, No. 4 and No. 5 are not explicitly stated as those which may be disclosed under N.J.S.A. 47:1A-10. Therefore, the requested records in Items No. 3, No. 4 and No. 5 relating to police disciplinary actions are exempt from disclosure pursuant to N.J.S.A. 47:1A-10 and Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004).
7. Because the Custodian had a duty to forward Items No. 3, No. 4 and No. 5 to the proper custodian of record or direct the Complainant to the proper custodian of record and failed to do so, the Custodian has violated N.J.S.A. 47:1A-5.h.
8. The Custodian failed to respond in writing to the Complainant's OPRA request within the statutorily mandated seven (7) business days, resulting in a deemed denial of the Complainant's September 10, 2007 OPRA request. Also, the Custodian's response to Items No. 2, No. 3, No. 4 and No. 5 was insufficient and the Custodian violated N.J.S.A. 47:1A-5.h. by failing to forward Items No. 3 No. 4 and No. 5 to the proper custodian of record.

However, the Custodian did provide access to request Items No. 1 and No. 6 on October 5, 2007 pending payment of copying fees and the Custodian's denial of access to request Items No. 2, No. 3, No. 4 and No. 5 was supported by law. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's deemed denial, insufficient response and failure to forward part of the request to the proper custodian appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

9. Because the Complainant failed to achieve the desired result of disclosure of the requested records because the records responsive to Item No. 2 are exempt from disclosure as advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), the Custodian certified that records responsive to Items No. 3 and No. 4 do not exist and that the records responsive to Item No. 5 are exempt from disclosure pursuant to N.J.S.A. 47:1A-10 and Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004), the Complainant is not entitled to prevailing party attorney's fees. See Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and NJ Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166, 175 (App. Div. 2007).

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 19<sup>th</sup> Day of November, 2008

Robin Berg Tabakin, Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

David Fleisher, Secretary  
Government Records Council

**Decision Distribution Date: November 20, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 19, 2008 Council Meeting**

**John Paff<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-271**

v.

**Township of Berkeley Heights (Union)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. The resolution which, in accordance with N.J.S.A. 10:4-13, authorized any Township Committee closed sessions held on March 13, March 27, April 10, April 24, May 29, June 11, June 26 and July 10, 2007.
2. The minutes, redacted as narrowly as possible, if at all, for the closed sessions responsive to request Item No. 1.
3. The January 24, 2006 closed session minutes stated that the police asked the Committee to set a date for a disciplinary hearing against one of its officers who is facing fifteen (15) charges. The Complainant requests a copy of any letter or document, redacted as narrowly as possible, that indicates the dates that any hearings related to this matter were held.
4. If the officer who is subject of the disciplinary matters referenced in request Item No. 3 above appealed any disposition of this matter to the Merit System Board or filed a complaint with the Superior Court, the Complainant requests a copy of any appeal or complaint filed.
5. Any records similar to a "Charging Form," "Appendix to Charging Form," "Preliminary Notice of Disciplinary Action," and "Schedules A & B."<sup>3</sup>
6. An Internal Affairs Summary Report form filed by the Berkeley Heights Police for years 2004, 2005 and 2006.<sup>4</sup>

**Request Made:** September 10, 2007<sup>5</sup>

**Response Made:** October 5, 2007

**Custodian:** Linda Santillo

**GRC Complaint Filed:** October 31, 2007

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<sup>1</sup> Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

<sup>2</sup> Represented by Thomas P. Scrivo, Esq., of McElroy, Deutsch, Mulvaney & Carpenter, LLP (Newark, NJ).

<sup>3</sup> The function and format of the requested forms are set forth in the Internal Affairs Policy and Procedures Manual revised in November, 2000. The Complainant attaches examples of these types of records to his OPRA request.

<sup>4</sup> The Complainant attaches an example of this type of record to his OPRA request.

<sup>5</sup> The Custodian certifies in the Statement of Information that the Complainant's OPRA request was received by the Custodian on September 12, 2007.

## **Background**

### **September 10, 2007**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form and attaches examples of requested records for Items No. 5 and No. 6. The Complainant requests that these records be provided in the least costly of the following three forms: a) by e-mail attachment, b) by fax or c) by regular mail. The Complainant further advises that should two (2) or more methods cost the same, he would prefer to receive the records according to the order of preference above.

### **October 5, 2007**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the seventeenth (17<sup>th</sup>) business day following receipt of such request. The Custodian states the following:

#### **Request Item No. 1**

Resolutions by Township Council authorizing executive sessions for the meetings of March 12, March 27, April 10, April 24, May 29, June 11, June 26 and July 10, 2007, or a total of eight (8) pages, are available to the Complainant.<sup>6</sup>

#### **Request Item No. 2**

The minutes for the executive sessions listed in request Item No. 1 have not been resolved and are not available.

#### **Request Item No. 3**

These records are not available.

#### **Request Item No. 4**

These records are not available.

#### **Request Item No. 5**

See the Complainant's exhibits.

#### **Request Item No. 6**

Internal Affairs Summary Report for 2004, 2005 and 2006, a total of twelve (12) pages are available to the Complainant.

The Custodian states that the Complainant must submit a check in the amount of \$12.50 for copying costs of twenty (20) pages of records. The Custodian further states that upon receipt of the Complainant's payment, the records responsive will be forwarded to the Complainant's home address.

### **October 5, 2007**

E-mail from the Complainant to the Custodian. The Complainant requests clarification on two (2) issues. The Complainant asks whether the Custodian's statement

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<sup>6</sup>The Custodian provided resolutions dated on or about the dates specifically requested by the Complainant in request Item No. 1.

in the response that records responsive to request Items No. 3 and No. 4 are “not available” means that there are no records responsive or that the Custodian does possess records but will not disclose the records. The Complainant asserts that he needs some clarification as to whether the records exist and if so, the exact reason why the Custodian will not disclose them to the Complainant.

The Complainant also questions the Custodian’s response to request Item No. 5 that specifically states “your exhibits.” The Complainant asks if the Custodian possesses records and believes such records are exempt from access or if there are no records responsive.

### **October 5, 2007**

E-mail from the Custodian to the Complainant. The Custodian states that with regard to request Items No. 3 and No. 4, the Custodian provides the Police Chief’s e-mail address and requests that the Complainant contact the Police Chief to obtain a reason for the non-availability of the records responsive.

The Custodian states that she misunderstood request Item No. 5 and apologizes for her response. The Custodian further states that the Complainant will need to contact the Police Chief in regards to request Item No. 5 to find out why the requested records are not available.

### **October 31, 2007**

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:

- Complainant’s OPRA request, attaching examples of requested records for Items No. 5 and No. 6, dated September 10, 2007.
- E-mail from the Custodian to the Complainant dated October 5, 2007.
- E-mail from the Complainant to the Custodian dated October 5, 2007.
- E-mail from the Custodian to the Complainant dated October 5, 2007.

The Complainant’s Counsel states that the Complainant mailed his request to the Custodian on September 10, 2007. The Complainant’s Counsel states that, assuming the request was received by the Custodian on September 13, 2007, the Custodian was statutorily required to respond by September 24, 2007, yet failed to respond until October 5, 2007.

The Complainant’s Counsel asserts that the Custodian denied a large portion of the Complainant’s OPRA request. The Complainant’s Counsel states that the Custodian gave short responses with an unspecified explanation to request Items No. 2 through No. 5. The Complainant’s Counsel further states that the Custodian requested payment of \$12.50 for twenty (20) pages of records. The Complainant’s Counsel contends that the Complainant e-mailed the Custodian to obtain clarification of the Custodian’s response, but was told to contact the Police Chief for an explanation as to why the requested records were not available.

The Complainant's Counsel contends that the Custodian violated OPRA in three (3) ways.

The Complainant's Counsel asserts that the Custodian failed to respond to the Complainant's September 10, 2007 OPRA request within the statutorily mandated seven (7) business days pursuant to N.J.S.A. 47:1A-5.i.

The Complainant's Counsel further contends that the Custodian's denial of access to request Item No. 2 fails to identify a specific citation of law or authority supporting the Custodian's denial of access. The Complainant's Counsel further asserts that OPRA does not allow for a denial simply because meeting minutes have not been "resolved." The Complainant's Counsel contends that none of the twenty-four (24) exemptions from disclosure set forth in OPRA refer to meeting minutes being unavailable because the minutes have not been resolved, nor does the Township of Berkeley Heights provide any other legal explanation as to why the meeting minutes are exempt from disclosure. The Complainant's Counsel asserts that the Custodian failed to bear her burden of proving that this denial of access to request Item No. 2 was authorized by law.<sup>7</sup>

The Complainant's Counsel finally contends that the Custodian's denial of access to request Items No. 3, No. 4 and No. 5 also fails to identify a specific citation of law or authority supporting the Custodian's denial of access. The Complainant's Counsel states that the Custodian only directed the Complainant to the Police Chief, who would provide the reasons that the records could not be disclosed. The Complainant's Counsel contends that the Custodian did not assert that the Police Chief was the actual Custodian of Record for the requested records; therefore, there is no valid reason to compel an individual making an OPRA request to submit the request to the police, which action appears meant to intimidate the Complainant.<sup>8</sup>

The Complainant's Counsel declines mediation.

**November 26, 2007**

Request for the Statement of Information sent to the Custodian.

**November 27, 2007**

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel requests an extension of the deadline to submit the Statement of Information.

**November 28, 2007**

E-mail from the GRC to the Custodian's Counsel. The GRC grants the Custodian an extension until December 10, 2007 to file the Statement of Information.

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<sup>7</sup> The Complainant's Counsel also notes that meeting minutes for March 13, March 27, April 10, April 24, May 29, June 11, June 26 and July 10, 2007 should be available and "resolved" by September 10, 2007 because the Open Public Meetings Act ("OPMA") requires meeting minutes to be made promptly available. N.J.S.A. 10:4-14.

<sup>8</sup> The Complainant's Counsel does not challenge the Custodian's lack of a response regarding the manner in which the Complainant receives the requested records.

**December 7, 2007**

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request, attaching examples of requested records for Items No. 5 and No. 6, dated September 10, 2007.
- E-mail from the Custodian to the Complainant dated October 5, 2007.
- E-mail from the Complainant to the Custodian dated October 5, 2007.
- E-mail from the Custodian to the Complainant dated October 5, 2007.
- Township of Berkeley Heights Police Department Policy and Procedure: Records Management.
- Memo from Captain Andrew F. Moran, Berkeley Heights Police Department to the Public dated July 8, 2002.<sup>9</sup>

The Custodian certifies that her search for the requested records involved first determining which department maintained the requested records. The Custodian certifies that she located and reviewed the records responsive. The Custodian certifies that she contacted the Police Department to obtain the remaining records responsive, at which time records responsive to request Item No. 6 were provided but access to the remaining records was denied.

The Custodian's Counsel states that the Custodian granted access to all OPRA-accessible records in her custody in response to request Item No. 1. The Custodian's Counsel further states that the records responsive to request Item No. 2 have not been approved and are therefore exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. The Custodian's Counsel further states that all existing records relating to police disciplinary matters are in the possession of the Police Department. The Custodian's Counsel states that the disciplinary hearing referenced in request Item No. 3 never took place because the matter was resolved. The Custodian's Counsel states that the Custodian did provide the records responsive to request Item No. 6 but that the other requested records are personnel records and are exempt from OPRA pursuant to N.J.S.A. 47:1A-10.

The Custodian's Counsel states that the Custodian received the Complainant's OPRA request on September 12, 2007. The Custodian's Counsel states that the Custodian responded to the Complainant via e-mail on October 5, 2007 with the following:

1. Approved access to resolutions authorizing executive sessions on March 12, March 27, April 10, April 24, May 29, June 11, June 26 and July 10, 2007 upon payment of copy fees.
2. Could not grant access to minutes for the above executive sessions because the draft minutes were not yet available.
3. Could not grant access to any letter or other document indicating date of police disciplinary hearings because no such document was available through an OPRA request.
4. Could not grant access to any appeal or complaint from the disciplinary hearings because such was not available through an OPRA request.

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<sup>9</sup>This memo identifies personnel as custodians of record for the Berkeley Heights Police Department.  
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5. Could not grant access to forms, notices, schedules or other disciplinary documents, because such documents are not available through an OPRA request.
6. Approved access to Internal Affairs Reports for 2004 through 2006 upon payment of copy fees.

The Custodian's Counsel states that the Complainant responded via e-mail on October 5, 2007 requesting clarification of the Custodian's response to Items No. 3, No. 4 and No. 5. The Custodian's Counsel states that the Custodian responded via e-mail on the same day stating that her response to request Item No. 5 was a misunderstanding and referred the Complainant to the Police Department because the requested records were not available through the Custodian. The Custodian's Counsel states that the Complainant subsequently filed a Denial of Access Complaint with the GRC asserting that the Custodian did not respond in a timely manner and failed to provide a valid OPRA exemption for withholding executive session minutes and police disciplinary records.

#### Unapproved Executive Session Minutes are Exempt Under OPRA

The Custodian's Counsel states that the Custodian provided all resolutions responsive to request Item No. 1 to the Complainant, but advised that the minutes had not been resolved and are not available."<sup>10</sup> The Custodian's Counsel asserts that contrary to the allegation of the Complainant, draft minutes are "advisory, consultative and deliberative" ("ACD") communications that are excluded from the definition of OPRA pursuant to N.J.S.A. 47:1A-1.1. and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). The Custodian's Counsel states that in Parave-Fogg, supra, the GRC applied the deliberative process privilege, which exempts pre-decisional records that reflect an agency's deliberations. The Custodian's Counsel further contends that minutes are prepared as part of the public body's decision-making, including specific language and information that goes into creating meeting minutes, pursuant to the public body's OPMA obligation to "keep reasonably comprehensive minutes." N.J.S.A. 10:4-14.

#### Police Disciplinary Records are Personnel Files Exempt Under OPRA

The Custodian's Counsel states that N.J.S.A. 47:1A-10 exempts disciplinary records from disclosure. The Custodian's Counsel further asserts that even if the Custodian was in possession of the requested records, the records would still be exempt from disclosure. The Custodian's Counsel further contends that the Custodian's response that Items No. 3, No. 4 and No. 5 were not available satisfies the Custodian's responsibility under N.J.S.A. 47:1A-5.g. The Custodian's Counsel asserts that the Custodian's response was correct because the records were exempt. The Custodian's Counsel finally asserts that the Custodian's referral of the Complainant to the Police Chief was an offer for further explanation of Police Department policies and why the records were not available rather than an improper delegation of the Custodian's duties to cite a specific basis for denial, as asserted by the Complainant's Counsel.

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<sup>10</sup> The Custodian's Counsel further states that when the Complainant requested minutes and resolutions for the wrong date, the Custodian provided resolutions for the nearest actual date of such meeting.  
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**June 9, 2008**

E-mail from the GRC to the Custodian. The GRC requests that the Custodian certify to the following: Whether any records responsive to request Items No. 3 and No. 4 (pertaining to a disciplinary hearing) exist? The GRC requests that the Custodian provide the requested certification by close of business on June 12, 2008.

**June 12, 2008**

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel requests an extension of time to submit the requested certification. The Custodian's Counsel states that the Custodian is having some difficulty determining whether the records exist because she is unable to personally access Police Department files and personnel with the authority to review the files are not available.

**June 12, 2008**

E-mail from the GRC to the Custodian's Counsel. The GRC grants the Custodian an extension until June 17, 2008 to file the requested certification.

**June 16, 2008**

Legal Certification from the Custodian to the GRC. The Custodian certifies that no records responsive to request Items No. 3 and No. 4 exist.

**Analysis**

**Whether the Custodian responded in a timely manner to the Complainant's September 10, 2007 OPRA request?**

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, 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 ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

"[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ..." N.J.S.A. 47:1A-5.g.

OPRA further provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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 mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, the custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.<sup>11</sup> A custodian’s failure to respond in writing to a complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the complainant’s OPRA request. Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In this complaint, the Custodian received the Complainant’s September 10, 2007 OPRA request on September 12, 2007, but did not respond in writing until October 5, 2007, seventeen (17) business days after receipt of the Complainant’s September 10, 2007 OPRA request.

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<sup>11</sup> It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

The Custodian's failure to respond in writing within seven (7) business days of receipt of the Complainant's September 10, 2007 OPRA request, specifically granting access, denying access for a lawful reason, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a "deemed" denial of the Complainant's OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Additionally, although the Custodian did respond in writing to the Complainant's OPRA request stating that the records responsive to Items No. 2, No. 3 and No. 4 were not available, and to request Item No. 5 directing the Complainant to see exhibits, the Custodian's response to the Complainant's OPRA request is insufficient because the Custodian failed to cite a specific basis for her denial, as required by N.J.S.A. 47:1A-5.g. See Paff v. City of Plainfield, GRC Complaint No. 2006-103 (February 2007)(holding that because the Custodian provided an incomplete basis for the denial of access to the requested records, the Custodian failed to bear her burden of proving that a denial of access was authorized by law at the time of the denial.)

### **Whether the Custodian unlawfully denied access to the requested records?**

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 ... [t]he terms shall not include *inter-agency or intra-agency advisory, consultative, or deliberative* material." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA provides that:

"[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ..." N.J.S.A. 47:1A-5.g.

OPRA also provides that:

"[a]ny officer or employee of a public agency who *receives a request* for access to a government record *shall forward* the request to the custodian of the record or *direct* the requestor to the *custodian of the record.*" (Emphasis added.) N.J.S.A. 47:1A-5.h.

Further, OPRA provides that:

“Notwithstanding the provisions of [OPRA] or any other law to the contrary, the personnel ... *records* of any *individual* in the possession of a public agency, ... *shall not be considered a government record and shall not be made available for public access, except ... an individual’s name, title, salary, payroll record, length of service, date of separation and the reason therefore ... personnel or pension records of any individual ... when required to be disclosed by another law ... data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment ... shall be a government record.*” (Emphasis added.)  
N.J.S.A. 47:1A-10.

#### Request Items No. 1 and No. 6

The Custodian provided all records responsive to request Items No. 1 and No. 6 on October 5, 2007 at a cost of \$12.50. Although the Custodian’s failure to respond in writing within the statutorily mandated time frame resulted in a deemed denial of access, no further action is required because the records responsive to request Items No. 1 and No. 6 were made available to the Complainant.<sup>12</sup>

#### Request Item No. 2

The Custodian responded on October 5, 2007 stating that the minutes responsive had not been resolved and were not available. The Custodian’s Counsel states in the SOI that the minutes responsive to this request item were not yet approved at the time of the Complainant’s OPRA request and therefore were not subject to disclosure pursuant to N.J.S.A. 47:1A-1.1. and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006).

As a general matter, draft documents are advisory, consultative and deliberative communications. Although OPRA broadly defines a “government record” as records either “made, maintained or kept on file in the course of [an agency’s] official business,” or “received” by an agency in the course of its official business, N.J.S.A. 47:1A-1.1, the statute also excludes from this definition a variety of documents and information. *Ibid.* See Bergen County Improvement Auth. v. North Jersey Media, 370 N.J. Super. 504, 516 (App. Div. 2004). The statute expressly provides that “inter-agency or intra-agency advisory, consultative, or deliberative material” is not included within the definition of a government record. N.J.S.A. 47: 1A-1 .1.

The courts have consistently held that draft records of a public agency fall within the deliberative process privilege. See U.S. v. Farley, 11 F.3d 1385 (7<sup>th</sup> Cir. 1993); Pies v. U.S. Internal Rev. Serv., 668 F.2d 1350 (D.C. Cir. 1981); N.Y.C. Managerial Employee Ass’n, v. Dinkins, 807 F.Supp., 955 (S.D.N.Y. 1992); Archer v. Cirrincione, 722 F. Supp. 1118 (S.D. N.Y. 1989); Coalition to Save Horsebarn Hill v. Freedom of

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<sup>12</sup> The Complainant’s Counsel does not challenge the Custodian’s lack of a response regarding the manner in which the Complainant receives the requested records.

Info. Comm., 73 Conn.App. 89, 806 A.2d 1130 (Conn. App. Ct. 2002); pet. for cert. den. 262 Conn. 932, 815 A.2d 132 (2003). As explained in Coalition, the entire draft document is deliberative because in draft form, it “reflect[s] that aspect of the agency’s function that precedes formal and informed decision making.” *Id.* at 95, quoting Wilson v. Freedom of Info. Comm., 181 Conn. 324, 332-33, 435 A.2d 353 (1980).

The New Jersey Appellate Division also has reached this conclusion with regard to draft documents. In the unreported section of In re: Readoption, *supra*, the court reviewed an OPRA request to the Department of Corrections (“DOC”) for draft regulations and draft statutory revisions. The court stated that these drafts were “all clearly pre-decisional and reflective of the deliberative process.” *Id.* at 18. It further held:

“[t]he trial judge ruled that while appellant had not overcome the presumption of non-disclosure as to the entire draft, it was nevertheless entitled to those portions which were eventually adopted. Appellant appeals from the portions withheld and DOC appeals from the portions required to be disclosed. We think it plain that all these drafts, in their entirety, are reflective of the deliberative process. On the other hand, appellant certainly has full access to all regulations and statutory revisions ultimately adopted. We see, therefore, no basis justifying a conclusion that the presumption of nondisclosure has been overcome. *Ibid.* (Emphasis added.)”

Additionally, the GRC has previously ruled on the issue of whether draft meeting minutes are exempt from disclosure pursuant to OPRA. In Parave-Fogg, *supra*, the Council held that “...the Custodian has not unlawfully denied access to the requested meeting minutes as the Custodian certifies that at the time of the request said minutes had not been approved by the governing body and as such, they constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.”

Thus, in accordance with the foregoing case law and the prior GRC decision in Parave-Fogg, *supra*, all draft minutes of a meeting held by a public body, are entitled to the protection of the deliberative process privilege. Draft minutes are pre-decisional. In addition, they reflect the deliberative process in that they are prepared as part of the public body’s decision making concerning the specific language and information that should be contained in the minutes to be adopted by that public body, pursuant to its obligation, under the Open Public Meetings Act, to “keep reasonably comprehensible minutes.” N.J.S.A. 10:4-14.

The Custodian’s response to the Complainant’s OPRA request Item No. 2 was insufficient because she failed to specifically state that the requested executive session minutes were not yet approved by the governing body at the time of the Complainant’s request pursuant to N.J.S.A. 47:1A-5.g. and Paff, *supra*. However, although the Custodian failed to respond to the Complainant’s OPRA request specifically stating that the requested executive session meeting minutes responsive to Item No. 2 were not yet approved by the governing body at the time of the Complainant’s September 10, 2007 OPRA request, the requested unapproved, draft executive minutes constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not

government records pursuant to the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg, supra.

Request Item No. 3, No. 4 and No. 5

The Custodian stated on October 5, 2007 that the records responsive to Items No. 3 and No. 4 were not available. The Custodian's October 5, 2007 response stated that the Complainant should see his own exhibits for records responsive to request Item No. 5. The Custodian later clarified her response by requesting that the Complainant contact the Police Chief for a proper denial of access. The Custodian certified on June 16, 2008 that these records do not exist.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The GRC determined that although the Custodian failed to respond to the OPRA request in a timely manner, the Custodian did not unlawfully deny access to the requested records because the Custodian certified that no records responsive to the request existed.

In the instant matter, the Custodian's response to the Complainant's request is insufficient because she failed to timely respond in writing to the Complainant's OPRA request **and** failed to specifically state that no records responsive to Items No. 3 and No. 4 exist, as required by N.J.S.A. 47:1A-5.g. and Paff, supra. Nevertheless, the Custodian did not unlawfully deny access to the requested records because the Custodian certified that records responsive to request Items No. 3 and No. 4 did not exist. See Pusterhofer, supra.

The Custodian's Counsel also asserted in the SOI that the records responsive to Items No. 3 and No. 4 regarding pending disciplinary action against a Berkeley Heights police officer, even if they existed, are exempt from disclosure as personnel or pension records pursuant to N.J.S.A. 47:1A-10. Additionally, the Complainant's request Item No. 5 seeks certain forms which are required to initiate a complaint against a law enforcement officer.<sup>13</sup> The Custodian's Counsel avers that the records responsive to Item No. 5 are exempt from disclosure pursuant to N.J.S.A. 47:1A-10.

In Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004), the Complainant requested complaints filed against Officer Michael Tuttle. The GRC held that "[t]he Complainant's request to review the records of complaints filed against Officer Tuttle were properly denied by the Custodian pursuant to N.J.S.A. 47:1A-10."

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<sup>13</sup> These forms are required to be completed according to the Internal Affairs Policy and Procedures Manual revised in November 2000.  
John Paff v. Township of Berkeley Heights (Union), 2007-271 – Findings and Recommendations of the Executive Director

The types of records requested by the Complainant in Items No. 3, No. 4 and No. 5 are not explicitly stated as those which may be disclosed under N.J.S.A. 47:1A-10.<sup>14</sup> Therefore, the requested records in Items No. 3, No. 4 and No. 5 relating to police disciplinary actions are exempt from disclosure pursuant to N.J.S.A. 47:1A-10 and Merino, supra.

The Custodian's Counsel averred in the SOI that all existing records relating to police disciplinary matters were in the possession of the Police Department. N.J.S.A. 47:1A-5.h. states that an officer or employee of a public agency must either forward the request or direct the requestor to the custodian of record. In her initial response to the Complainant on October 5, 2007, the Custodian did not direct the Complainant to the Police Department even though the Township of Berkeley Heights Police Department's website, [www.bhpolice.org](http://www.bhpolice.org), identifies Captain Andrew F. Moran, Detective Sergeant Stephen G. Stampler and Barbara Healy as the Berkeley Heights Police Department Custodians of Record and provides a downloadable version of the Police Department's official OPRA request form. Following the Complainant's inquiry as to the meaning of the Custodian's response to the Complainant's OPRA request, the Custodian merely stated that the Complainant should contact the Police Chief for a proper denial of access.

Therefore, because the Custodian had a duty to forward the Complainant's request for Items No. 3, No. 4 and No. 5 to the proper custodian of record or direct the Complainant to the proper custodian of record and failed to do so, the Custodian has violated N.J.S.A. 47:1A-5.h.

**Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ..." N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically, OPRA states:

"... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]..." N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian

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<sup>14</sup> OPRA permits disclosure of certain limited personnel information, including "an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received." N.J.S.A. 47:1A-10.

“knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86 (App. Div. 1996) at 107).

The Custodian failed to respond in writing to the Complainant’s OPRA request within the statutorily mandated seven (7) business days, resulting in a deemed denial of the Complainant’s September 10, 2007 OPRA request. Also, the Custodian’s response to Items No. 2, No. 3, No. 4 and No. 5 was insufficient and the Custodian violated N.J.S.A. 47:1A-5.h. by failing to forward Items No. 3 No. 4 and No. 5 to the proper custodian of record. However, the Custodian did provide access to request Items No. 1 and No. 6 on October 5, 2007 pending payment of copying fees and the Custodian’s denial of access to request Items No. 2, No. 3, No. 4 and No. 5 was supported by law. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s deemed denial, insufficient response and failure to forward part of the request to the proper custodian appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

**Whether the Complainant is a “prevailing party” entitled to attorney’s fees pursuant to N.J.S.A. 47:1A-6?**

OPRA provides that:

“... [i]f it is determined that access has been improperly denied, the court or agency [GRC] head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.”  
N.J.S.A. 47:1A-6.

Attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). A complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. *Id.*

In the matter before the Council, the Custodian did provide access to request Items No. 1 and No. 6 pending payment of copying fees. Further, although the Custodian’s response to Item No. 2 was not timely and was insufficient, the requested records are exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg, supra. Additionally, while the Custodian’s response to Items No. 3 and

No. 4 was insufficient, the Custodian certified that records responsive to these request items do not exist because no disciplinary hearing was ever held. Finally, the records requested in Item No. 5 are exempt from disclosure pursuant to N.J.S.A. 47:1A-10 and Merino, supra.

Because the Complainant failed to achieve the desired result of disclosure of the requested records because the records responsive to Item No. 2 are exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg, supra, the Custodian certified that records responsive to Items No. 3 and No. 4 do not exist and that the records responsive to Item No. 5 are exempt from disclosure pursuant to N.J.S.A. 47:1A-10 and Merino, supra, the Complainant is not entitled to prevailing party attorney's fees. See Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and NJ Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166, 175 (App. Div. 2007).

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing within seven (7) business days of receipt of the Complainant's September 10, 2007 OPRA request, specifically granting access, denying access for a lawful reason, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a "deemed" denial of the complainant's OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Although the Custodian did respond in writing to the Complainant's OPRA request stating that the records responsive to Items No. 2, No. 3 and No. 4 were not available, and to request Item No. 5 directing the Complainant to see exhibits, the Custodian's response to the Complainant's OPRA request is insufficient because the Custodian failed to cite a specific basis for her denial, as required by N.J.S.A. 47:1A-5.g. See Paff v. City of Plainfield, GRC Complaint No. 2006-103 (February 2007).
3. The Custodian provided all records responsive to request Items No. 1 and No. 6 on October 5, 2007 at a cost of \$12.50. The Custodian's Counsel also states in the SOI that there were no executive meetings held on May 8, 2007 or July 24, 2007. Although the Custodian's failure to respond in writing within the statutorily mandated time frame resulted in a deemed denial of access, no further action is required because the records responsive to request Items No. 1 and No. 6 were made available to the Complainant.
4. The Custodian's response to the Complainant's OPRA request Item No. 2 was insufficient because she failed to specifically state that the requested executive session minutes were not yet approved by the governing body at the time of the Complainant's request pursuant to N.J.S.A. 47:1A-5.g. and Paff v. City of

Plainfield, GRC Complaint No. 2006-103 (February 2007). However, although the Custodian failed to respond to the Complainant's OPRA request specifically stating that the requested executive session meeting minutes responsive to Item No. 2 were not yet approved by the governing body at the time of the Complainant's September 10, 2007 OPRA request, the requested unapproved, draft executive minutes constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant to the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006).

5. The Custodian's response to the Complainant's request is insufficient because she failed to timely respond in writing to the Complainant's OPRA request and failed to specifically state that no records responsive to Items No. 3 and No. 4 exist, as required by N.J.S.A. 47:1A-5.g. and Paff v. City of Plainfield, GRC Complaint No. 2006-103 (February 2007). Nevertheless, the Custodian did not unlawfully deny access to the requested records because the Custodian certified that records responsive to request Items No. 3 and No. 4 did not exist. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
6. The types of records requested by the Complainant in Items No. 3, No. 4 and No. 5 are not explicitly stated as those which may be disclosed under N.J.S.A. 47:1A-10. Therefore, the requested records in Items No. 3, No. 4 and No. 5 relating to police disciplinary actions are exempt from disclosure pursuant to N.J.S.A. 47:1A-10 and Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004).
7. Because the Custodian had a duty to forward Items No. 3, No. 4 and No. 5 to the proper custodian of record or direct the Complainant to the proper custodian of record and failed to do so, the Custodian has violated N.J.S.A. 47:1A-5.h.
8. The Custodian failed to respond in writing to the Complainant's OPRA request within the statutorily mandated seven (7) business days, resulting in a deemed denial of the Complainant's September 10, 2007 OPRA request. Also, the Custodian's response to Items No. 2, No. 3, No. 4 and No. 5 was insufficient and the Custodian violated N.J.S.A. 47:1A-5.h. by failing to forward Items No. 3 No. 4 and No. 5 to the proper custodian of record. However, the Custodian did provide access to request Items No. 1 and No. 6 on October 5, 2007 pending payment of copying fees and the Custodian's denial of access to request Items No. 2, No. 3, No. 4 and No. 5 was supported by law. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's deemed denial, insufficient response and failure to forward part of the request to the proper custodian appears negligent and heedless since she is vested with

the legal responsibility of granting and denying access in accordance with the law.

9. Because the Complainant failed to achieve the desired result of disclosure of the requested records because the records responsive to Item No. 2 are exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), the Custodian certified that records responsive to Items No. 3 and No. 4 do not exist and that the records responsive to Item No. 5 are exempt from disclosure pursuant to N.J.S.A. 47:1A-10 and Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004), the Complainant is not entitled to prevailing party attorney's fees. See Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and NJ Builders Association v. NJ Council on Affordable Housing, 390 N.J. Super. 166, 175 (App. Div. 2007).

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November 12, 2008