



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

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VINCENT P. MALTESE, Chair  
COMMISSIONER SUSAN BASS LEVIN  
ACTING COMMISSIONER LUCILLE DAVY  
ROBIN BERG TABAKIN  
DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

**FINAL DECISION**

**March 28, 2007 Government Records Council Meeting**

Vincent Donato  
Complainant

Complaint No. 2005-125

v.

Borough of Emerson  
Custodian of Record

At the March 28, 2007 public meeting, the Government Records Council ("Council") considered the March 21, 2007 Supplemental 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 based on the Custodian's certification dated March 5, 2007, the Custodian has complied with the Council's February 28, 2007 Interim Order.

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 28<sup>th</sup> Day of March, 2007

Vincent P. Maltese, Chairman  
Government Records Council



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

Government Records Council

**Decision Distribution Date: April 2, 2007**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
March 28, 2007 Council Meeting**

**Vincent Donato<sup>1</sup>  
Complainant**

**GRC Complaint No. 2005-125**

**v.**

**Borough of Emerson<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

- **May 4, 2005 Request:**
  1. All regular and special Council meeting agendas for the years 2003, 2004, and 2005;
  2. All approved minutes of regular and special open Council meetings for the years 2003, 2004, and 2005;
  3. All draft minutes of regular and special open Council meetings for the year 2003, 2004, and 2005;
  4. All resolutions authorizing the Council to go into closed session for the years 2003, 2004, and 2005;
  5. All approved closed session minutes for the years 2003, 2004, and 2005.
- **May 17, 2005 Request:** All meeting minutes for the following dates:
  1. January 21, 2003
  2. March 18, 2003
  3. April 1, 2003
  4. May 6, 2003
  5. June 10, 2003
  6. June 24, 2003
  7. August 19, 2003
  8. September 29, 2003
  9. October 7, 2003
  10. October 21, 2003
  11. all regular and special meetings in November 2003
  12. January 24, 2004
  13. February 7, 2004
  14. April 27, 2004
  15. July 13, 2004
  16. August 3, 2004
  17. September 20, 2004 both open and closed sessions
  18. September 21, 2004
  19. October 5, 2004

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<sup>1</sup> Represented by Gina A. Calogero, Esq. (Oradell, NJ).

<sup>2</sup> Represented by William T. Smith of Hook, Smith & Meyer (Franklin Lakes, NJ).

20. October 19, 2004
21. November 9, 2004
22. December 14, 2004
23. December 28, 2004.

**Request Made:** May 4, 2005 and May 17, 2005

**Response Made:** May 4, 2005, May 17, 2005, May 25, 2005, and June 6, 2005

**Custodian:** Carol Dray

**GRC Complaint Filed:** June 11, 2005

### **Background**

#### **February 28, 2007**

Government Records Council's ("Council") Interim Order. At its February 28, 2007 public meeting, the Council considered the February 21, 2007 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, found that:

1. In response to the Complainant's May 4, 2005 OPRA request, the Custodian has not unlawfully denied access to the requested records as the Custodian certifies that she provided the Complainant with all responsive records as maintained on file with the Borough.
2. Regarding the Complainant's May 17, 2005 request, the Custodian did provide a written response within the statutorily mandated seven (7) business days required to respond to requests. However, the Custodian's initial response was not appropriate pursuant to OPRA as the Custodian never explicitly granted or denied access to the specific requested records. As such, the Custodian violated N.J.S.A. 47:1A-5.i.
3. The Custodian has unlawfully denied access to the requested July 13, 2004 and August 3, 2004 meeting minutes as the Complainant contends he never received such records and it appears the Custodian did not state a lawful basis for such denial pursuant to N.J.S.A. 47:1-6. As such, the Custodian shall release said records to the Complainant with appropriate redactions, if any, and a legal justification for any redacted part thereof.
4. **The Custodian shall comply with # 3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, pursuant to *N.J. Court Rules, 1969 R. 1:4-4* (2005), to the Executive Director.**
5. Based on the decision in Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super 534 (March 2005) and James Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007), the Custodian was obligated to fulfill the records request which requires that she search her files for the requested identifiable government records.
6. As the Complainant requested the estimated cost for specific meeting minutes, pursuant to N.J.S.A. 47:1A-5.b., the Custodian should have provided the exact copying costs for the actual amount of pages and not her best guess estimate.

7. The Custodian's \$40.00 an hour charge for labor is not likely warranted pursuant to the GRC's decision in James Donato v. Jersey City Police Department, GRC Complaint No. 2005-251 (December 2006).
8. Although the Custodian certifies that several of the requested meeting minutes did not exist at the time of the Complainant's request, the Custodian also certifies in the Borough's Statement of Information that the Borough maintained the same meeting minutes on audio tape. The Custodian's failure to offer the requested meeting minutes in another meaningful medium (audio tape) at the time of the request, is a violation of N.J.S.A. 47:1A-5.d.
9. At the time of the Complainant's May 17, 2005 request, the requested meeting minutes did not exist. The Custodian is not obligated any further than to either grant or deny access at the time of the request. The Custodian denied the Complainant's request on the basis that the meeting minutes did not exist. If the Complainant wants to receive a copy of said meeting minutes once they become available as approved, he must submit a new OPRA request pursuant to Robert Blau v. Union County, GRC Complaint No. 2003-75 (January 2005).
10. Because the unapproved, draft meeting minutes of the Borough Council's meetings constitutes inter-agency or intra-agency advisory, consultative, or deliberative material, they are not government records pursuant to the definition of same in N.J.S.A. 47:1A-1.1 and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Dina Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). As such, the Custodian has borne her burden of proving a lawful denial of access to the draft minutes pursuant to N.J.S.A. 47:1A-6 as she certifies that the requested draft minutes which had not been provided to the Complainant had not been approved at the time of the request.
11. The matter of whether the meeting minutes should have been prepared and maintained in the Borough's official minute books does not fall under the authority of the Government Records Council and is not governed by OPRA pursuant to N.J.S.A. 47:1A-7.b and Thomas Allegretta v. Borough of Fairview, GRC Complaint No. 2005-132 (December 2006).
12. Although the Custodian eventually waived the deposit in favor of a complete payment, the deposit was indeed warranted as the total charge did exceed \$25 with a total of \$32.25, pursuant to the Handbook for Records Custodians, Santos v. New Jersey State Parole Board, GRC Complaint No. 2004-74 (August, 2004), and Cuba v. Northern State Prison, GRC Complaint No. 2004-146 (February, 2005).
13. While the Custodian did fail to offer the existing audio tapes for the dates in which the meeting minutes did not exist at the time of the request, such failure appears merely negligent, heedless, or unintentional. Nevertheless, the Custodian did release the records responsive to the request that existed at the time of the request, except for the July 13, 2004 and August 3, 2004 meeting minutes. Therefore, 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.

**March 2, 2007**

Council's Interim Order distributed to the parties.

**March 5, 2007**

Custodian's response to the Council's Interim Order. The Custodian certifies that on March 5, 2007, she provided the Complainant with copies of the Borough Council's meeting minutes dated July 13, 2004 and August 3, 2004 via regular and certified mail.

**Analysis****Whether the Custodian complied with the Council's February 28, 2007 Interim Order?**

In a letter to the GRC dated March 5, 2007, the Custodian certifies that on March 5, 2007, she provided the Complainant with copies of the Borough Council's meeting minutes dated July 13, 2004 and August 3, 2004 via regular and certified mail.

Based on the Custodian's certification dated March 5, 2007, the Custodian has complied with the Council's February 28, 2007 Interim Order.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that based on the Custodian's certification dated March 5, 2007, the Custodian has complied with the Council's February 28, 2007 Interim Order.

Prepared By:

Dara Lownie  
Senior Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

March 21, 2007



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

VINCENT P. MALTESE, Chair  
COMMISSIONER SUSAN BASS LEVIN  
ACTING COMMISSIONER LUCILLE DAVY  
ROBIN BERG TABAKIN  
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**INTERIM ORDER**

**February 28, 2007 Government Records Council Meeting**

Vincent Donato  
Complainant

Complaint No. 2005-125

v.

Borough of Emerson  
Custodian of Record

At the February 28, 2007 public meeting, the Government Records Council ("Council") considered the February 21, 2007 Supplemental 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:

1. In response to the Complainant's May 4, 2005 OPRA request, the Custodian has not unlawfully denied access to the requested records as the Custodian certifies that she provided the Complainant with all responsive records as maintained on file with the Borough.
2. Regarding the Complainant's May 17, 2005 request, the Custodian did provide a written response within the statutorily mandated seven (7) business days required to respond to requests. However, the Custodian's initial response was not appropriate pursuant to OPRA as the Custodian never explicitly granted or denied access to the specific requested records. As such, the Custodian violated N.J.S.A. 47:1A-5.i.
3. The Custodian has unlawfully denied access to the requested July 13, 2004 and August 3, 2004 meeting minutes as the Complainant contends he never received such records and it appears the Custodian did not state a lawful basis for such denial pursuant to N.J.S.A. 47:1-6. As such, the Custodian shall release said records to the Complainant with appropriate redactions, if any, and a legal justification for any redacted part thereof.
4. **The Custodian shall comply with # 3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, pursuant to *N.J. Court Rules, 1969 R. 1:4-4 (2005)*, to the Executive Director.**
5. Based on the decision in Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super 534 (March 2005) and James Donato v. Township of Union, GRC Complaint No. 2005-182 (January



2007), the Custodian was obligated to fulfill the records request which requires that she search her files for the requested identifiable government records.

6. As the Complainant requested the estimated cost for specific meeting minutes, pursuant to N.J.S.A. 47:1A-5.b., the Custodian should have provided the exact copying costs for the actual amount of pages and not her best guess estimate.
7. The Custodian's \$40.00 an hour charge for labor is not likely warranted pursuant to the GRC's decision in James Donato v. Jersey City Police Department, GRC Complaint No. 2005-251 (December 2006).
8. Although the Custodian certifies that several of the requested meeting minutes did not exist at the time of the Complainant's request, the Custodian also certifies in the Borough's Statement of Information that the Borough maintained the same meeting minutes on audio tape. The Custodian's failure to offer the requested meeting minutes in another meaningful medium (audio tape) at the time of the request, is a violation of N.J.S.A. 47:1A-5.d.
9. At the time of the Complainant's May 17, 2005 request, the requested meeting minutes did not exist. The Custodian is not obligated any further than to either grant or deny access at the time of the request. The Custodian denied the Complainant's request on the basis that the meeting minutes did not exist. If the Complainant wants to receive a copy of said meeting minutes once they become available as approved, he must submit a new OPRA request pursuant to Robert Blau v. Union County, GRC Complaint No. 2003-75 (January 2005).
10. Because the unapproved, draft meeting minutes of the Borough Council's meetings constitutes inter-agency or intra-agency advisory, consultative, or deliberative material, they are not government records pursuant to the definition of same in N.J.S.A. 47:1A-1.1 and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Dina Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). As such, the Custodian has borne her burden of proving a lawful denial of access to the draft minutes pursuant to N.J.S.A. 47:1A-6 as she certifies that the requested draft minutes which had not been provided to the Complainant had not been approved at the time of the request.
11. The matter of whether the meeting minutes should have been prepared and maintained in the Borough's official minute books does not fall under the authority of the Government Records Council and is not governed by OPRA pursuant to N.J.S.A. 47:1A-7.b. and Thomas Allegretta v. Borough of Fairview, GRC Complaint No. 2005-132 (December 2006).
12. Although the Custodian eventually waived the deposit in favor of a complete payment, the deposit was indeed warranted as the total charge did exceed \$25 with a total of \$32.25, pursuant to the Handbook for Records Custodians, Santos v. New Jersey State Parole Board, GRC Complaint No. 2004-74 (August, 2004), and Cuba v. Northern State Prison, GRC Complaint No. 2004-146 (February, 2005).



13. While the Custodian did fail to offer the existing audio tapes for the dates in which the meeting minutes did not exist at the time of the request, such failure appears merely negligent, heedless, or unintentional. Nevertheless, the Custodian did release the records responsive to the request that existed at the time of the request, except for the July 13, 2004 and August 3, 2004 meeting minutes. Therefore, 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.

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of February 2007

Vincent Maltese, Chairman  
Government Records Council

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

Robin Berg Tabakin, Vice Chairman & Secretary  
Government Records Council

**Decision Distribution Date: March 2, 2007**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 28, 2007 Council Meeting**

**Vincent Donato<sup>1</sup>  
Complainant**

**GRC Complaint No. 2005-125**

**v.**

**Borough of Emerson<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

- **May 4, 2005 Request:**
  1. All regular and special Council meeting agendas for the years 2003, 2004, and 2005;
  2. All approved minutes of regular and special open Council meetings for the years 2003, 2004, and 2005;
  3. All draft minutes of regular and special open Council meetings for the year 2003, 2004, and 2005;
  4. All resolutions authorizing the Council to go into closed session for the years 2003, 2004, and 2005;
  5. All approved closed session minutes for the years 2003, 2004, and 2005.
- **May 17, 2005 Request:** All meeting minutes for the following dates:
  1. January 21, 2003
  2. March 18, 2003
  3. April 1, 2003
  4. May 6, 2003
  5. June 10, 2003
  6. June 24, 2003
  7. August 19, 2003
  8. September 29, 2003
  9. October 7, 2003
  10. October 21, 2003
  11. all regular and special meetings in November 2003
  12. January 24, 2004
  13. February 7, 2004
  14. April 27, 2004
  15. July 13, 2004
  16. August 3, 2004
  17. September 20, 2004 both open and closed sessions
  18. September 21, 2004
  19. October 5, 2004

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<sup>1</sup> Represented by Gina A. Calogero, Esq. (Oradell, NJ).

<sup>2</sup> Represented by William T. Smith, Esq. of Hook, Smith & Meyer (Franklin Lakes, NJ).  
Vincent Donato v. Borough of Emerson, 2005-125 – Findings and Recommendations of the Executive Director

- 20. October 19, 2004
- 21. November 9, 2004
- 22. December 14, 2004
- 23. December 28, 2004.

**Request Made:** May 4, 2005 and May 17, 2005

**Response Made:** May 4, 2005, May 17, 2005, May 25, 2005, and June 6, 2005

**Custodian:** Carol Dray

**GRC Complaint Filed:** June 11, 2005

### **Background**

#### **May 4, 2005**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above.

#### **May 4, 2005**

Custodian's response to the OPRA request. The Custodian responded to the Complainant's OPRA request on the date of receipt of such request. The Custodian states that the Complainant may make an appointment at his earliest convenience to inspect the records that he has requested.

#### **May 17, 2005**

Letter from Complainant to Custodian (Complainant's second OPRA request.) The Complainant requests an estimate of the cost for photocopies of all minutes, whether approved or in draft form, for the dates listed above. The Complainant states that he wishes to be advised of the cost so that he may decide whether to obtain the copies or just inspect the records.

#### **May 18, 2005**

Custodian's response to the Complainant's second OPRA request. The Custodian responded to the request one (1) day following receipt of such request. The Custodian states that the following is her best guess estimate of the copying cost for the records requested based on the average of two (2) regular meetings a month, three (3) special meetings a year, and twelve (12) pages of typed meeting minutes per meeting:

- Year 2003 – 324 pages
- Year 2004 – 144 pages (the Custodian notes that there are fewer pages for the meeting minutes in 2004 because the Borough Attorney has not yet approved any closed session minutes)
- Total pages – 468

The Custodian asserts that pursuant to Ordinance No. 1238-03, this request would be considered extraordinary due to the volume of pages and therefore the Complainant would be charged \$40.00 an hour for reproduction. The Custodian states that this charge may not apply for inspection of the records. The Custodian calculates that the estimated total charge for this request is \$164.50 and that a deposit of \$83.00 is required should the Complainant wish to pursue his request for copies. Additionally, the Custodian states that the estimated charge is subject to change.

#### **May 23, 2005**

Letter from Complainant to Custodian. The Complainant claims that the Custodian's letter dated May 18, 2005 was not responsive to his request. The Complainant states that the Custodian provided a best guess estimate of the reproduction costs of the requested records based on the assumption that the records even exist. The Complainant states that the Custodian failed to indicate whether the specific records identified in the Complainant's May 17, 2006 letter to the Custodian (the Complainant's second OPRA request) definitively exist.

The Complainant states that he submitted a request for all minutes for the years 2003, 2004, and 2005, both final and draft on May 4, 2005. He claims that the Custodian contacted him by phone that same day and indicated that he could come to Borough Hall to review the minute book. The Complainant states that on May 11, 2005, he went to Borough Hall to inspect the requested records. He asserts that the minutes were put together with agendas and supporting documents and claims that he did not have the chance to read the minutes as the book was very user unfriendly.

Additionally, the Complainant claims that the Borough's website, which includes meeting minutes, is unhelpful. The Complainant claims that some meeting minutes are missing from the website and that the schedule of meetings listed on the Borough's website is incomplete. The Complainant further states that in his May 17, 2005 letter to the Custodian (the Complainant's second OPRA request), he specifically requested copies of the twenty seven (27) Council meeting minutes which he asserts are not only missing from the minute book, but also the Borough's website as of May 11, 2005.

Further, the Complainant disagrees with the idea that his request is extraordinary requiring a \$40.00 an hour charge, as he claims the Custodian indicated that it would be easy for her to locate the records.

### **May 25, 2005**

Letter from Custodian to Complainant. The Custodian states that the following minutes do not exist and therefore cannot be produced at this time:

- March 18, 2003
- May 6, 2003
- June 10, 2003
- June 24, 2003
- September 23, 2003
- October 7, 2003
- October 21, 2003
- November 11, 2003 (the only meeting held in November 2003)
- January 24, 2004
- February 7, 2004
- September 20, 2004

The Custodian further states that the remaining thirteen (13) documents do exist and can be produced at an estimated cost of \$46.50, based on an average of twelve (12) typed pages per meeting. The Custodian requests that the Complainant indicate whether he would like to purchase these copies or just inspect them. Should the Complainant wish to obtain the copies, the Custodian states that the Complainant must submit a \$5.00

deposit. The Custodian states that she would then pull the requested documents and calculate the actual cost of duplication for approval by the Complainant. Additionally, the Custodian encloses a copy of OPRA.

### **June 3, 2005**

Letter from Complainant to Custodian. The Complainant indicates that he would like the Custodian to photocopy the requested meeting minutes that do exist. The Complainant states that he will pick up the documents in person and therefore a \$5.00 deposit is not required. He claims that the Custodian can instruct the dispatcher at the police desk to only give the Complainant his documents once the Complainant pays for the copies in full.

### **June 6, 2005**

Letter from Custodian to Complainant. The Custodian states that the meeting minutes from May 2, 2003 and August 19, 2003 also do not exist and the Custodian apologizes for the inconvenience. The Custodian further states that the total fee for copies of the eleven (11) available documents is \$32.25 and that upon receipt of payment, she will leave the photocopies at the police desk for pickup.

### **June 11, 2005**

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

- Letter from Complainant to Custodian (Complainant's second OPRA request) dated May 17, 2005
- Letter from Custodian to Complainant dated May 18, 2005
- Letter from Complainant to Custodian dated May 21, 2005
- Letter from Custodian to Complainant dated May 25, 2005
- Letter from Custodian to Complainant dated June 6, 2005
- Letter of Representation from Complainant's Counsel dated June 13, 2005
- Letter from Complainant's Counsel to Custodian dated June 15, 2005

The Complainant states that he submitted his OPRA request on May 4, 2005. The same day, the Complainant states that the Custodian contacted him by phone and indicated that the requested records were immediately available for inspection. The Complainant states that he viewed the Borough's minute book and website on May 11, 2005 and alleges that as many as twenty four (24) meeting minutes were missing. The Complainant further asserts that he was denied access to unapproved and draft minutes of approximately twenty four (24) meetings, but that the Custodian failed to put the denial in writing. Additionally, the Complainant claims that he was not provided with all the requested executive session minutes for inspection. The Complainant states that in a letter dated May 18, 2005, the Custodian indicated that the Borough Attorney had not yet approved any of the 2004 closed session minutes.

Further, the Complainant states that on May 17, 2005, he requested an estimate of the cost of photocopying the draft and approved meeting minutes which were allegedly missing from the minute binder, as well as the Borough's website. The Complainant states that on May 18, 2005, the Custodian provided him with an estimated charge for copies including a \$40.00 an hour extraordinary handling fee. The Complainant asserts

that he was effectively denied access to records due to the Custodian's insistence on a handling charge and the Custodian's refusal to indicate in writing that specific meeting minutes were missing.

In another letter to the Custodian dated May 23, 2005, the Complainant states that he requested copies of specific dates of meeting minutes, both approved and draft. The Complainant asserts that via a letter dated May 25, 2005, the Custodian stated that she would produce the existing minutes, but that the following minutes did not exist on file:

- March 18, 2003
- May 6, 2003
- June 10, 2003
- June 24, 2003
- September 23, 2003
- October 7, 2003
- October 21, 2003
- November 11, 2003
- January 24, 2004
- February 7, 2004
- September 20, 2004

The Complainant contends that the Custodian's statement that these minutes do not exist is not valid since the meeting minutes are required to be maintained pursuant to the Open Public Meetings Act ("OPMA").

The Complainant also states that via letter dated June 6, 2005, the Custodian informed him that the minutes for May 20, 2003 and August 19, 2003 also do not exist. He asserts that the Custodian did provide him with draft minutes from the following meetings:

- July 27, 2004
- October 5, 2004
- October 19, 2004
- November 9, 2004
- December 14, 2004
- December 28, 2004

The Complainant claims that the Custodian has yet to produce either draft or approved minutes for any date in 2005, as well as from July 13, 2004 and August 3, 2004. He also claims that in terms of any meeting minutes that had not yet been approved at the time of the initial inspection, the Custodian had an obligation to advise when said minutes would become available. The Complainant contends that the Custodian violated OPRA by demanding a \$5.00 deposit when such deposit is unnecessary, and that causing the Complainant to make two separate trips to Borough Hall to pay for and then pickup the requested documents, discourages the Complainant from making future OPRA requests.

#### **June 24, 2005**

Offer of Mediation sent to both parties.

#### **June 24, 2005**

Custodian's signed Agreement to Mediate. The Complainant did not agree to mediate this complaint.

**July 20, 2005**

Request for Statement of Information sent to the Custodian.

**July 26, 2005**

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

- Complainant's OPRA request dated May 4, 2005
- Custodian's response to Complainant's OPRA request dated May 4, 2005
- Letter from Complainant to Custodian dated May 17, 2005 (Complainant's second OPRA request)
- Letter from Custodian to Complainant dated May 18, 2005
- Letter from Complainant to Custodian dated May 23, 2005
- Letter from Custodian to Complainant dated May 25, 2005
- Letter from Complainant to Custodian dated June 3, 2005
- Letter from Custodian to Complainant dated June 6, 2005
- Complainant's Denial of Access Complaint dated June 11, 2006 (with attachments)

The Custodian certifies that she received the Complainant's OPRA request on May 4, 2005 and that she responded via facsimile on the same day indicating that the Complainant could make an appointment to view the requested records. The Custodian certifies that the Complainant then called her to set up an appointment in which the Custodian advised the Complainant that all the requested documents could be located for the Complainant's viewing if the meeting minutes had been created and maintained on file with the Borough.

The Custodian certifies that the Complainant came into Borough Hall to view the requested records on May 11, 2005. The Custodian certifies that the typist/stenographer in the Clerk's Office had prepared for the Complainant's inspection eleven (11) official minute books for the years 2003-2005. Additionally, the Custodian certifies that the typist made available nine (9) binders which serve as the office copies of the official minute books. The Custodian certifies that these books contain the original agendas, unapproved meeting minute drafts, certified resolutions, ordinances, as well as other items which are separated by tabs. The Custodian certifies that with the exception of the draft meeting minutes, these binders contain the same information as the official minute books. In addition to these binders, the Custodian certifies that she also made available a binder of closed session minutes that had been approved for release. The Custodian certifies that on May 11, 2005, she provided the Complainant with all the records that had been created and maintained in accordance with the definition of a government record in OPRA.

Additionally, the Custodian certifies that she received a new records request from the Complainant on May 18, 2005 requesting the estimated cost for copies of several volumes of meeting minutes. The Custodian certifies that she immediately responded to the Complainant's request in writing. The Complainant's response would have then determined the Custodian's next move. The Custodian certifies that if the Complainant

had provided a monetary deposit for the requested copies, she would have pulled the minute books and calculated the exact cost of the copies. At that time, the Custodian certifies that she would have notified the Complainant if any of the requested minutes had not yet been created. The Custodian certifies that she does not maintain a list of the meeting minutes that are on file as approved or in draft form. The Custodian certifies that she has to research the minute books the same way the Complainant did when he originally inspected said books on May 11, 2005. The Custodian certifies that the Complainant requested an estimate of the cost of photocopies of the requested records and that's what the Custodian provided.

Further, the Custodian certifies that despite the Complainant's objection to the required deposit, the Custodian would only fulfill the request for records upon complete payment of the copying cost. The Custodian certifies that all the records that had been created or maintained as of May 23, 2005 were provided to the Complainant on June 8, 2005.

The Custodian asserts that the Complainant's May 4, 2005 OPRA request was an extraordinary request as it involved numerous years worth of records. She also certifies that there are no missing records, only records that currently do not exist. With regard to the dates in which no written minutes exist, the Custodian certifies that the audio tapes of said meetings are maintained on file with the Borough.

With regard to the issue of a deposit, the Custodian refers to the Handbook for Records Custodians (on the GRC website) which reads, "OPRA permits the custodian to require a deposit or pre-payment of fees for any request received." In addition, the Custodian draws attention to the back of the GRC's OPRA request form, which indicates that a citizen may be charged a 50% or other deposit when a request for copies exceeds \$25.

### **October 19, 2005**

Letter from Custodian to Complainant. The Custodian states that any meeting minutes that had been requested that were not originally available can now be located on the Borough's website.

### **December 20, 2005**

Letter from the Complainant's Counsel to GRC with the following attachments:

- Borough of Emerson's meeting schedule from July 2003 to December 2004
- Borough of Emerson's meeting minutes dated July 27, 2004
- Letter from Custodian to Complainant dated October 19, 2005
- Internet printouts from the Borough's website

The Complainant's Counsel asserts that contrary to the Custodian's statement, all of the meeting minutes requested by the Complainant are not located on the Borough's website. Counsel states that the following requested minutes are not online:

- April 27, 2004
- July 13, 2004
- October 19, 2004
- September 23, 2003



Additionally, Counsel brings up the Custodian's statement that certain minutes were not available in paper copies, but were maintained on file via audio tape. Counsel claims that the Custodian's statement is an attempt to cover up the original denial of access and asserts that the Complainant's request was not for tapes, but for actual meeting minutes.

Counsel also contends that the Complainant has been and continues to be denied access to requested draft minutes. Counsel states that the Complainant received a copy of the unapproved draft minutes from the Borough Council's July 27, 2004 meeting. Counsel claims that a secretary in the Clerk's office printed these minutes off of her computer at the request of Councilman Ken Hoffman. Further, Counsel claims that these minutes show several revisions addressed to Steve, who Counsel presumes is Mayor Steve Setteducati. Counsel claims that when asked, the Custodian denied any knowledge of the document. Also, Counsel asserts that data taken off of the Borough's website from the July 27, 2004 minutes indicate that the minutes were e-mailed from the Mayor's internet address at his private office.

To date, Counsel states that the Complainant has not received any set of draft minutes from the Custodian, but asserts that these drafts exist based on the title names of documents posted to the Borough's website. Counsel claims that there are several documents on the Borough's website that suggest changes had been made to the draft minutes and questions who is making the changes if it is not the Custodian of Records.

Additionally, Counsel contends that the Custodian's response to the Complainant was not timely pursuant to OPRA. Counsel states that the Complainant made his OPRA request in May 2005 and claims that at no time prior to October 2005 did the Custodian notify the Complainant of when the requested records would become available as required by law. Counsel claims that the Custodian's delay in response was intentional and classifies as knowing and willful.

Moreover, Counsel asserts the following:

1. The Custodian failed to provide the Complainant with copies of any draft minutes
2. The Custodian intentionally withheld a draft version of at least one set of minutes, as the Complainant received it from another source
3. The Custodian failed to notify the Complainant when the requested records were expected to become available
4. The Custodian did not notify the Complainant when the requested records would be available in a timely manner.

## **February 14, 2006**

Letter from Custodian to GRC in response to the Complainant Counsel's letter dated December 20, 2005. In response to Counsel's claim that certain meeting minutes were missing from the Borough's website, the Custodian states that this is correct. The Custodian claims that perhaps by human error, these minutes were not placed on the website, but were maintained in the official minute books. The Custodian states that she has since corrected the error. Regarding Counsel's claim that draft minutes have been

intentionally withheld, the Custodian states that the Complainant was provided with all of the draft minutes that were available at the time of his original request.

The Custodian states that regarding the matter of notifying the Complainant when the draft minutes became available, she waited until all of the minutes had been approved before notifying the Complainant so that he would not have another complaint. The Custodian maintains that she has not withheld any documents from the Complainant in any form that had been created and maintained on file. The Custodian asserts that all the requested meeting minutes have now been prepared, approved, and posted on the Borough's website and are available for viewing.

### **March 20, 2006**

Letter from Complainant's Counsel to GRC in response to the Custodian's letter dated February 14, 2006. Counsel claims that the Custodian's statement that she provided the Complainant with all draft minutes that were available at the time of his request is false. Counsel states that the Complainant's request was made in May 2005 and claims that in July 2005 the Complainant received a copy of draft minutes from an alternate source. Therefore, Counsel asserts that the minutes did exist at the time the request was pending and pursuant to OPRA, the Custodian was obligated to provide the records when they became available. Additionally, Counsel contends that the Complainant was not provided with draft minutes from the Council's 2003 and 2004 meetings.

Further, Counsel asserts the following:

1. That OPRA requires the Custodian to provide all records that are available and claims that the Custodian initially withheld draft minutes
2. OPRA requires Custodians to give a good faith estimate of when records will become available and claims that none of the Custodian's responses included this estimate
3. OPRA requires the Custodian to formally notify the requestor when records become available and claims that the Custodian notified him indirectly via a letter to GRC staff
4. OPRA requires Custodians to respond in a timely manner and claims that the Custodian did not do this appropriately.

### **March 22, 2006<sup>3</sup>**

Letter from Custodian to GRC in response to Counsel's letter dated March 20, 2006. The Custodian maintains that at the time of the Complainant's May 2005 OPRA requests, the Complainant was provided with all of the requested documents that were maintained in the minute books. The Custodian claims that the Complainant refused to accept audio tapes of the meetings for which the minutes had not yet been reduced to writing. The Custodian states that she notified the Complainant once all the minutes had been prepared and approved.

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<sup>3</sup> Additional submissions were submitted by the parties. However, said submissions are not relevant to this complaint.

## Analysis

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

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 ... The 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 states that:

“[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the actual cost of duplicating the record. Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following:

- first page to tenth page, \$0.75 per page;
- eleventh page to twentieth page, \$0.50 per page;
- all pages over twenty, \$0.25 per page.

The actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but *shall not include the cost of labor* or other overhead expenses associated with making the copy except as provided for in subsection c. of this section. If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record. (Emphasis added.) N.J.S.A. 47:1A-5.b.

OPRA mandates that:

“[a] custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. *If the public agency does not maintain the record*

*in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium.”* (Emphasis added.) N.J.S.A. 47:1A-5.d.

OPRA provides that:

*“...[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore 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

Additionally, OPRA 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.

The Complainant states that he submitted an OPRA request on May 4, 2005 for the following records:

- all regular and special Council meeting agendas for the years 2003, 2004, and 2005
- all approved minutes of regular and special open Council meetings for the years 2003, 2004, and 2005
- all draft minutes of regular and special open Council meetings for the year 2003, 2004, and 2005
- all resolutions authorizing the Council to go into closed session for the years 2003, 2004, and 2005
- all approved closed session minutes for the years 2003, 2004, and 2005.

The Custodian certifies that she received the Complainant’s request on May 4, 2005 and the same day provided the Complainant with a written response advising that the Complainant needed to schedule an appointment to view the requested records. The Custodian certifies that on May 11, 2005, she provided the Complainant with all the minute books as maintained on file. The Complainant alleges that as many as twenty four (24) dates were missing from the minute books.

The Complainant states that on May 17, 2005, he submitted an additional request for an estimate of the cost for photocopies of all minutes, whether approved or in draft form for the following dates:

- January 21, 2003
- March 18, 2003
- April 1, 2003
- May 6, 2003
- June 10, 2003
- June 24, 2003
- August 19, 2003
- September 29, 2003
- October 7, 2003
- October 21, 2003
- all regular and special meetings in November 2003
- January 24, 2004
- February 7, 2004
- April 27, 2004
- July 13, 2004
- August 3, 2004
- September 20, 2004 both open and closed sessions
- September 21, 2004
- October 5, 2004
- October 19, 2004
- November 9, 2004
- December 14, 2004
- December 28, 2004

The Complainant states that he received a written response from the Custodian dated May 18, 2005 in which the Custodian provided him with an estimate including a \$40.00 an hour charge for labor. Additionally, the Complainant asserts that the Custodian failed to identify if the requested records actually exist. The Custodian asserts that her estimate was based on the average number of pages for meeting minutes, and claims that if the Complainant confirmed that he wanted actual copies of the records, she would have calculated the actual cost of the copies.

In a letter dated May 25, 2005, the Custodian states that she informed the Complainant that the following meeting minutes currently do not exist:

- March 18, 2003
- May 6, 2003
- June 10, 2003
- June 24, 2003
- September 23, 2003
- October 7, 2003
- October 21, 2003
- November 11, 2003 (the only meeting held in November 2003)
- January 24, 2004
- February 7, 2004
- September 20, 2004.

Also, the Complainant states that he received a subsequent letter from the Custodian dated June 6, 2005 indicating that the May 2, 2003 and the August 19, 2003 meeting minutes also do not exist.

The Complainant contends that he has been denied access to the twenty four (24) sets of minutes that were allegedly missing from the minute books, all draft minutes from 2005 and minutes from the July 13, 2004 and August 3, 2004 meetings. The Custodian certifies that on June 8, 2005, she provided the Complainant with all the requested records that were maintained on file as of May 23, 2005. A detail summary of the documents requested on May 17, 2005 and the Custodian's response are listed in the table below:

<b>Minutes Requested</b>	<b>Custodian's May 18, 2005 Response</b>	<b>Received by Complainant</b>
January 21, 2003	Available for release	Yes
March 18, 2003	Does not exist	Not applicable
April 1, 2003	Available for release	Yes
May 6, 2003	Does not exist	Not applicable
June 10, 2003	Does not exist	Not applicable
June 24, 2003	Does not exist	Not applicable
August 19, 2003	Does not exist	Not applicable
September 29, 2003	Available for release	Yes
October 7, 2003	Does not exist	Not applicable
October 21, 2003	Does not exist	Not applicable
November 3, 2003	Does not exist	Not applicable
January 24, 2004	Does not exist	Not applicable
February 7, 2004	Does not exist	Not applicable
April 27, 2004	Available for release	Yes
July 13, 2004	Available for release	No
August 3, 2004	Available for release	No
September 20, 2004	Does not exist	Not applicable
September 21, 2004	Available for release	Yes
October 5, 2004	Available for release	Yes
October 19, 2004	Available for release	Yes
November 9, 2004	Available for release	Yes
December 14, 2004	Available for release	Yes
December 28, 2004	Available for release	Yes

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. 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.

Further, pursuant to N.J.S.A. 47:1A-5.i., a custodian must either grant or deny access to a government record within seven (7) business days of receiving said request. Additionally, N.J.S.A. 47:1A-5.g. provides that if a custodian is unable to comply with a

records request, he/she must indicate such in writing and provide said response to the requestor.

#### May 4, 2005 OPRA Request

In response to the Complainant's May 4, 2005 OPRA request, the Custodian certifies that she provided a written response to the Complainant on May 4, 2005 requesting that the Complainant schedule an appointment to view the requested records. Additionally, the Custodian certifies that on May 11, 2005, she provided the Complainant with all the minute books as maintained on file with the Borough. Therefore, the Custodian has not unlawfully denied access to the requested records.

#### May 17, 2005 OPRA Request

Regarding the Complainant's May 17, 2005 request, the Custodian did provide a written response within the statutorily mandated seven (7) business days required to respond to requests. However, the Custodian's initial response was not appropriate pursuant to OPRA as the Custodian never explicitly granted or denied access to the specific requested records. The Custodian violated N.J.S.A. 47:1A-5.i. by not granting or denying access to the requested records within the statutorily mandated seven (7) business days. Additionally, the Custodian has unlawfully denied access to the requested July 13, 2004 and August 3, 2004 meeting minutes as the Complainant contends he never received such records and it appears the Custodian did not state a lawful basis for such a denial pursuant to N.J.S.A. 47:1A-6. As such, the Custodian must release said records to the Complainant.

Additionally, the Custodian's May 18, 2005 response to the Complainant provided the estimated cost of the requested records, under the assumption that all the requested records exist on file. The Custodian claims that she is not required to research the minute books to determine which requested minutes are maintained.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super 534, 546 (March 2005). The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files.*" (Emphasis added.) *Id.* at 549.

In James Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007), the GRC held that:

[p]ursuant to Mag, the Custodian is obligated to **search** her files to **find** the identifiable government records listed in the Complainant's OPRA request (all motor vehicle accident reports for the period of September 5,

2005 through September 15, 2005). However, the Custodian is not required to **research** her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word **search** is defined as “to go or look through carefully in order to find something missing or lost.”<sup>4</sup> The word **research**, on the other hand, means “a close and careful study to find new facts or information.”<sup>5</sup>

In the Complainant’s May 17, 2005 OPRA request, the Complainant lists specific dates of meeting minutes of which he would like copied. As such, the Custodian would not have to research any information in response to the Complainant’s OPRA request pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super 534, 546 (March 2005) and James Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007). As the Complainant clearly identified the specific records he was seeking, the Custodian should have reviewed the Borough’s files to determine if said records exist, and either grant or deny access. The Custodian did not indicate that some of the requested records did not exist until May 25, 2005 (the sixth business day following the date of the request), and June 6, 2005 (the fourteenth business day following the date of the request.) Therefore, while both the Custodian’s May 25, 2005 and June 6, 2005 responses to the Complainant indicate that specific meeting minutes do not exist, the Custodian’s June 6, 2005 response goes beyond the seven (7) business day time frame required to respond to request and as such, the Custodian violated N.J.S.A. 47:1A-5.i.

Additionally, N.J.S.A. 47:1A-5.b. states that copies of requested records can be purchased upon payment of the actual cost of said records. In the Complainant’s second OPRA request, he requests the estimated cost for specific meeting minutes. In response to said request, the Custodian provides an estimate based on the assumption that the meeting minutes actually exist, a guess as to the number of pages based on the average length of the Borough’s meeting minutes, and a \$40.00 an hour charge for labor. As the Complainant has requested the estimated cost for specific meeting minutes, pursuant to N.J.S.A. 47:1A-5.b., the Custodian should have provided the exact copying costs for the actual amount of pages and not her best guess estimate. Further, the Custodian’s \$40.00 an hour charge for labor is not likely warranted pursuant to the GRC’s decision in James Donato v. Jersey City Police Department, GRC Complaint No. 2005-251 (December 2006). In said complaint, the GRC held that, “[t]he rate established in the Custodian’s municipal code does not qualify as “a fee prescribed by law or regulation” as was contemplated in OPRA under N.J.S.A. 47:1A-5.b.”

N.J.S.A. 47:1A-5.d. provides that if a custodian does not maintain a requested record in the medium requested, he/she must either convert the record or provide a copy in another medium. Although the Custodian certifies that several of the requested meeting minutes did not exist at the time of the Complainant’s request, the Custodian also certifies in the Borough’s Statement of Information that the Borough maintained the same meeting minutes on audio tape. The Custodian’s failure to offer the requested

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<sup>4</sup> “Search.” Dictionary.com Unabridged (v 1.1) Based on the Random House Unabridged Dictionary. Random House, Inc. 2006 .

<sup>5</sup> “Research.” Kerneman English Multilingual Dictionary (Beta Version), 2000-2006 K Dictionaries Ltd .  
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meeting minutes in another meaningful medium (audio tape) at this time of the request, is a violation of N.J.S.A. 47:1A-5.d.

Further, the Complainant's Counsel claims that the Custodian had an obligation to notify the Complainant when the requested draft minutes would become available as said minutes did not exist at the time of the Complainant's request. In Robert Blau v. Union County, GRC Complaint No. 2003-75 (January 2005), the Council ruled that "[t]he request for copies 'on a continuing basis' is not valid under OPRA and that the requestor must submit a new OPRA request to the custodian for each new batch of documents sought." While the facts of this complaint are not exactly the same as those in Blau, a similar ruling applies. At the time of the Complainant's request, the requested meeting minutes did not exist. The Custodian is not obligated any further than to either grant or deny access at the time of the request. The Custodian denied the Complainant's request on the basis that the meeting minutes did not exist. If the Complainant wants to receive a copy of said meeting minutes once they become available as approved, he must submit a new OPRA request pursuant to Robert Blau v. Union County, GRC Complaint No. 2003-75 (January 2005).

### **Whether draft meeting minutes are exempt from disclosure pursuant to OPRA?**

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

The draft minutes in question are prepared as part of the process of producing minutes of a meeting of a public body that was held pursuant to the Open Public Meetings Act (OPMA). Specifically, OPMA provides:

"[e]ach public body shall keep reasonable comprehensible minutes of all its meetings showing the time and place, the members present, the subjects considered, the actions taken, the vote of each member, and any other information required to be shown in the minutes by law, which shall be promptly available to the public to the extent that making such matters public shall not be inconsistent with section 7 of this act." N.J.S.A. 10:4-14.

The question of whether such draft minutes are exempt from disclosure requires consideration of the general question of the status of draft documents under OPRA. As a general matter, draft documents are advisory, consultative and deliberative communications. Although OPRA broadly defines a "government record" as information

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.

This exemption is equivalent to the deliberative process privilege, which protects from disclosure pre-decisional records that reflect an agency’s deliberations. In re Readoption of N.J.A.C. 10A:23, 367 N.J. Super. 61, 73-74 (App. Div. 2004), certif. den. 182 N.J. 149 (2004); *see also* In re Liq. Of Integrity Ins. Co., 165 N.J. 75 (2000). As a result, OPRA “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 Department, 381 N.J. Super. 30, 37 (App. Div. 2005), quoting Gannet New Jersey Partners LP v. County of Middlesex, 379 N.J. Super. 205, 219 (App. Div. 2005).

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 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.)

The court similarly held that memos containing draft procedures and protocols were entirely protected from disclosure. *Id.* at 19. *See also* Edwards v. City of Jersey

City, GRC Complaint No. 2002-71 (February 27, 2004) (noting that in general, drafts are deliberative materials).

Although draft minutes always fall under OPRA's exemption for deliberative material, the Appellate Division has suggested that the confidentiality accorded to deliberative records may be overcome if the requestor asserts and is able to demonstrate an overriding need for the record in question. *See In re Readoption*, *supra*, 367 N.J.Super. at 73. Resolution of such a claim, if raised by the requestor, will depend upon the particular circumstances of the case in question.

Additionally, in *O'Shea v. West Milford Board of Education*, GRC Complaint No. 2004-93 (April 2006), the Council held that "the Board Secretary's handwritten notes taken during the June 22, 2004 executive session [to assist her in preparing formal minutes to be approved by the Board at a later date] were exempt from disclosure under the 'inter-agency, intra-agency advisory, consultative, or deliberative' privilege pursuant to N.J.S.A. 47:1A-1.1."

Also, the GRC has previously ruled on the issue of whether draft meeting minutes are exempt from disclosure pursuant to OPRA. In *Dina Parave-Fogg v. Lower Alloways Creek Township*, GRC Complaint No. 2006-51 (August 2006), 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 decisions in *O'Shea* and *Parave-Fogg*, all draft documents including the 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.

Therefore, the unapproved, draft meeting minutes of the Borough Council's meetings constitutes inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant the definition of a government record in N.J.S.A. 47:1A-1.1. As such, the unapproved draft meeting minutes are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and *Dina Parave-Fogg v. Lower Alloways Creek Township*, GRC Complaint No. 2006-51 (August 2006). Accordingly, the Custodian has borne her burden of proving a lawful denial of access to the draft minutes pursuant to N.J.S.A. 47:1A-6 as she certifies that the requested draft minutes which had not been provided to the Complainant had not been approved at the time of the request.

## **Whether the Government Records Council has authority over the Open Public Meetings Act (“OPMA”)?**

OPRA mandates the duties and responsibilities of the GRC. Specifically the GRC is statutorily mandated to:

- establish an informal mediation program to facilitate the resolution of disputes regarding access to government records;
- receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian;
- issue advisory opinions, on its own initiative, as to whether a particular type of record is a government record which is accessible to the public;
- prepare guidelines and an informational pamphlet for use by records custodians in complying with the law governing access to public records;
- prepare an informational pamphlet explaining the public's right of access to government records and the methods for resolving disputes regarding access, which records custodians shall make available to persons requesting access to a government record;
- prepare lists for use by records custodians of the types of records in the possession of public agencies which are government records;
- make training opportunities available for records custodians and other public officers and employees which explain the law governing access to public records;
- operate an informational website and a toll-free helpline staffed by knowledgeable employees of the council during regular business hours which shall enable any person, including records custodians, to call for information regarding the law governing access to public records and allow any person to request mediation or to file a complaint with the council when access has been denied...” N.J.S.A. 47:1A-7.b.

Thus, OPRA does not authorize the GRC to adjudicate whether a Custodian has complied with OPMA.

The Complainant asserts that upon inspection of the Borough’s official meeting minute books in response to his May 4, 2005 OPRA request, as many as twenty four (24) meeting minutes were missing. The Complainant states that meeting minutes are required to be maintained pursuant to the Open Public Meetings Act (“OPMA”). The Custodian certifies that she provided the Complainant with all the official minute books as maintained by the Borough at the time of the request.

In Thomas Allegretta v. Borough of Fairview, GRC Complaint No. 2005-132 (December 2006), the Council held that, “[b]ased on N.J.S.A. 47:1A-7.b., the GRC does not have authority adjudicate whether a Custodian has complied with OPMA or any statute other than OPRA.” The same ruling applies to this complaint. The matter of whether the meeting minutes should have been prepared and maintained in the Borough’s official minute books does not fall under the authority of the Government Records Council and is not governed by OPRA pursuant to N.J.S.A. 47:1A-7.b. and Allegretta.

### **Whether the Custodian may require a deposit for records requests?**

Regarding the issue of a monetary deposit for requested copies, the Complainant did not agree with the Custodian's insistence on a \$5.00 deposit for the requested copies. However, pursuant to the GRC's model request form, a requestor may be charged a 50% deposit or other deposit should the cost of copies exceed \$25.00. Additionally, the Handbook for Records Custodians states that, "OPRA permits the custodian to require a deposit or prepayment of fees for any request received. Further, in Santos v. New Jersey State Parole Board, GRC Complaint No. 2004-74 (August, 2004), the Council held that as "the Custodian did not receive payment for the actual duplication cost of the requested records, [he] was not required under OPRA to release said copies." Also, in Cuba v. Northern State Prison, GRC Complaint No. 2004-146 (February, 2005), the Council held that "the Custodian was proper in withholding the release of the requested record until receiving payment for the copying fee from the Complainant." Although the Custodian eventually waived the deposit in favor of a complete payment, the deposit was indeed warranted as the total charge did exceed \$25 with a total of \$32.25.

### **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:

"...[i]f 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.

The Complainant's Counsel contends that the Custodian's response to the Complainant was not timely pursuant to OPRA. Counsel states that the Complainant made his OPRA request in May 2005 and claims that at no time prior to October 2005 did the Custodian notify the Complainant of when the requested records would become available as required by law. Counsel claims that the Custodian's delay in response was intentional and classifies as knowing and willful. Additionally, Counsel claims that the Custodian initially withheld draft minutes and states that OPRA requires the Custodian to provide all records that are available.

The Custodian certifies that on May 11, 2005, in response to the Complainant's May 4, 2005 OPRA request, she provided the Complainant with all the records that had been created and maintained in accordance with the definition of OPRA. Regarding Counsel's claim that draft minutes have been intentionally withheld, the Custodian contends that the Complainant was provided with all of the draft minutes that were available at the time of his original request. The Custodian states that regarding the matter of notifying the Complainant when the draft minutes became available, she waited until all of the minutes had been approved before notifying the Complainant so that he would not have another complaint. The Custodian maintains that she has not withheld any documents from the Complainant in any form that had been created and maintained on file.

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 "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).

In this complaint, the Complainant's Counsel asserts that the Custodian's actions were intentional as the Custodian did not notify the Complainant until October 2005 that the requested records were available even though the Complainant requested said records in May 2005. However, pursuant to OPRA, the Custodian does not have an obligation to notify the Complainant when records become available if said records do not exist at the time of the request. The Custodian, however, did maintain contact with the Complainant and advised him when all the requested records became available. While the Custodian did fail to offer the existing audio tapes for the dates in which the meeting minutes did not exist at the time of the request, such failure appears merely negligent, heedless, or unintentional. Nevertheless, the Custodian did release the records responsive to the request that existed at the time of the request, except for the July 13, 2004 and August 3, 2004 meeting minutes. Therefore, 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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. In response to the Complainant's May 4, 2005 OPRA request, the Custodian has not unlawfully denied access to the requested records as the

- Custodian certifies that she provided the Complainant with all responsive records as maintained on file with the Borough.
2. Regarding the Complainant's May 17, 2005 request, the Custodian did provide a written response within the statutorily mandated seven (7) business days required to respond to requests. However, the Custodian's initial response was not appropriate pursuant to OPRA as the Custodian never explicitly granted or denied access to the specific requested records. As such, the Custodian violated N.J.S.A. 47:1A-5.i.
  3. The Custodian has unlawfully denied access to the requested July 13, 2004 and August 3, 2004 meeting minutes as the Complainant contends he never received such records and it appears the Custodian did not state a lawful basis for such denial pursuant to N.J.S.A. 47:1-6. As such, the Custodian shall release said records to the Complainant with appropriate redactions, if any, and a legal justification for any redacted part thereof.
  4. **The Custodian shall comply with # 3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, pursuant to *N.J. Court Rules, 1969 R. 1:4-4* (2005), to the Executive Director.**
  5. Based on the decision in Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super 534 (March 2005) and James Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007), the Custodian was obligated to fulfill the records request which requires that she search her files for the requested identifiable government records.
  6. As the Complainant requested the estimated cost for specific meeting minutes, pursuant to N.J.S.A. 47:1A-5.b., the Custodian should have provided the exact copying costs for the actual amount of pages and not her best guess estimate.
  7. The Custodian's \$40.00 an hour charge for labor is not likely warranted pursuant to the GRC's decision in James Donato v. Jersey City Police Department, GRC Complaint No. 2005-251 (December 2006).
  8. Although the Custodian certifies that several of the requested meeting minutes did not exist at the time of the Complainant's request, the Custodian also certifies in the Borough's Statement of Information that the Borough maintained the same meeting minutes on audio tape. The Custodian's failure to offer the requested meeting minutes in another meaningful medium (audio tape) at the time of the request, is a violation of N.J.S.A. 47:1A-5.d.
  9. At the time of the Complainant's May 17, 2005 request, the requested meeting minutes did not exist. The Custodian is not obligated any further than to either grant or deny access at the time of the request. The Custodian denied the Complainant's request on the basis that the meeting minutes did not exist. If the Complainant wants to receive a copy of said meeting minutes once they become available as approved, he must submit a new OPRA request pursuant to Robert Blau v. Union County, GRC Complaint No. 2003-75 (January 2005).
  10. Because the unapproved, draft meeting minutes of the Borough Council's meetings constitutes inter-agency or intra-agency advisory, consultative,

or deliberative material, they are not government records pursuant to the definition of same in N.J.S.A. 47:1A-1.1 and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Dina Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). As such, the Custodian has borne her burden of proving a lawful denial of access to the draft minutes pursuant to N.J.S.A. 47:1A-6 as she certifies that the requested draft minutes which had not been provided to the Complainant had not been approved at the time of the request.

11. The matter of whether the meeting minutes should have been prepared and maintained in the Borough's official minute books does not fall under the authority of the Government Records Council and is not governed by OPRA pursuant to N.J.S.A. 47:1A-7.b. and Thomas Allegretta v. Borough of Fairview, GRC Complaint No. 2005-132 (December 2006).
12. Although the Custodian eventually waived the deposit in favor of a complete payment, the deposit was indeed warranted as the total charge did exceed \$25 with a total of \$32.25, pursuant to the Handbook for Records Custodians, Santos v. New Jersey State Parole Board, GRC Complaint No. 2004-74 (August, 2004), and Cuba v. Northern State Prison, GRC Complaint No. 2004-146 (February, 2005).
13. While the Custodian did fail to offer the existing audio tapes for the dates in which the meeting minutes did not exist at the time of the request, such failure appears merely negligent, heedless, or unintentional. Nevertheless, the Custodian did release the records responsive to the request that existed at the time of the request, except for the July 13, 2004 and August 3, 2004 meeting minutes. Therefore, 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.

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Approved By:

Catherine Starghill, Esq.  
Executive Director

February 21, 2007