



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

April 30, 2008 Government Records Council Meeting

Carlton Levine
Complainant

Complaint No. 2006-96

v.

Bergen County Improvement Authority
Custodian of Record

At the April 30, 2008 public meeting, the Government Records Council (“Council”) considered the April 23, 2008 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, dismisses this complaint because the Complainant voluntarily withdrew this complaint in writing to the GRC on April 4, 2008.

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 30th Day of April, 2008

Robin Berg Tabakin , Chairman
Government Records Council

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



David Fleisher, Vice Chairman & Secretary
Government Records Council

Decision Distribution Date: May 13, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 30, 2008 Council Meeting**

**Carlton Levine¹
Complainant**

GRC Complaint No. 2006-96

v.

**Bergen County Improvement Authority²
Custodian of Records**

Records Relevant to Complaint:

Any and all documents and reports in the custody of Bergen County Improvement Authority (“BCIA”) that were submitted by the Open Minds Consultants regarding Bergen Regional Medical Center (“BRMC”) on or about November 1, 2006 to present.

Request Made: April 26, 2006

Response Made: May 10, 2006

Custodian: Quentin W. Wiest, II, Deputy Executive Director

GRC Complaint Filed: May 23, 2006

Background

April 25, 2007

Government Records Council’s (“Council”) Interim Order. At its April 25, 2007 public meeting, the Council considered the April 18, 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, finds that:

1. The Custodian failed to properly notify the Complainant of the reasons for denial pursuant to OPRA. Therefore, based on the GRC decision in DeLuca v. Town of Guttenburg, GRC Complaint No. 2006-25 (May 2006), the Custodian has violated N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. by failing to properly inform the Complainant of the reasons for the denial of access in writing within the statutorily mandated seven (7) business days, resulting in a deemed denial of access pursuant to N.J.S.A. 47:1A-5.i.
2. In the current matter, the requested records were prepared by an outside third-party consultant hired to provide expertise and opinions on formulating new policy. However, pursuant to the GRC’s decision in

¹ No legal representation listed on record.

² Represented by Daniel E. Zwillenberg, Esq. (Hackensack, NJ).

Rademacher v. Borough of Eatontown, GRC Complaint No. 2004-18 (November 2005), the GRC should perform an *in camera* inspection of the following requested records to determine whether they meet the “inter-agency or intra-agency advisory, consultative, or deliberative” exemption under OPRA:

- a. Analysis and Recommendations Regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated February 28, 2006, 5 pages;
- b. Recommendations regarding the creation of a Clinical Quality Performance Reporting Scorecard for the Behavioral Health Division, BRMC, dated March 14, 2006, 31 pages;
- c. E-mail dated 4/10/2006 - Analysis and Recommendations regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated March 14, 2006, 33 pages;
- d. E-mail dated April 17, 2006 - Analysis and Recommendations regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated March 14, 2006, 33 pages;
- e. E-mail dated April 21, 2006
 - * Analysis and Recommendations regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated April 21, 2006, 33 pages,
 - * Memo regarding 65% Rule, dated April 21, 2006, 2 pages,
 - * Memo re: Management and Clinical Research Stakeholder Input, dated April 21, 2006, 25 pages,
 - * Analysis and Recommendations regarding the creation of a clinical quality performance scorecard for Behavioral Health Division, BRMC, dated April 21, 2006, 19 pages, and
 - * Analysis and Recommendations regarding quality data and outcome measurements of the Behavioral Health Division, BRMC, dated April 21, 2006, 60 pages.

3. **The Custodian must deliver³ to the Council in a sealed envelope six copies of the requested unredacted documents (see #2 above), a documents or redactions index detailing the lawful basis for denial of each document and/or each redaction asserted and the Custodian’s legal certification, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection within five (5) business days from receipt of the Council’s Interim Order.**

April 30, 2007

Council’s Interim Order and the Findings and Recommendations of the Executive Director distributed to the parties.

April 30, 2007

³ The *in camera* documents may be sent overnight mail, regular mail or be hand-delivered, at the discretion of the custodian, as long as they arrive at the GRC by the deadline.
Carlton Levine v. Bergen County Improvement Authority, 2006-96 – Supplemental Findings and Recommendations of the Executive Director

Telephone call from Custodian's Counsel. Counsel states he will forward the documents identified in the Council's April 25, 2007 Interim Order to the GRC for an *in camera* examination. The GRC informs Custodian's Counsel that once the documents are received and reviewed by the GRC, a determination will be made regarding whether a document index will be necessary. Custodian's Counsel informs the GRC that a certification was provided as part of the SOI wherein the Custodian avers that the final versions of the documents ordered for *in camera* examination have been provided to the Complainant.

May 1, 2007

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel confirms a telephone conversation this date wherein approval by the GRC to extend the time for compliance by the Custodian with Paragraph 3 of the Council's April 25, 2007 Interim Order was granted until May 10, 2007.

May 10, 2007

Letter from the Custodian's Counsel to the GRC. Counsel forwards to the GRC six (6) copies each of the following unredacted records for *in camera* examination:

- Analysis and Recommendations Regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated February 28, 2006, 5 pages;
- Recommendations regarding the creation of a Clinical Quality Performance Reporting Scorecard for the Behavioral Health Division, BRMC, dated March 14, 2006, 31 pages;
- E-mail dated 4/10/2006 - Analysis and Recommendations regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated March 14, 2006, 33 pages;
- E-mail dated April 17, 2006 - Analysis and Recommendations regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated March 14, 2006, 33 pages;
- E-mail dated April 21, 2006
 - Analysis and Recommendations regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated April 21, 2006, 33 pages,
 - Memo regarding 65% Rule, dated April 21, 2006, 2 pages,
 - Memo re: Management and Clinical Research Stakeholder Input, dated April 21, 2006, 25 pages,
 - Analysis and Recommendations regarding the creation of a clinical quality performance scorecard for Behavioral
 - Health Division, BRMC, dated April 21, 2006, 19 pages, Analysis and Recommendations regarding quality data and outcome measurements of the Behavioral Health Division, BRMC, dated April 21, 2006, 60 pages.

Counsel emphasizes the importance of maintaining the confidentiality of the unredacted documents. Counsel reiterates that the documents were generated by a third-party consultant hired to provide expertise and opinions to the BCIA relating to formulation of a new policy. Counsel states that as part of an extended deliberative process, employees of BRMC were interviewed to elicit their input and that the employees were advised that their comments would be held as confidential so that those employees could freely express their opinions and concerns about the contemplated BCIA policies and decisions without fear of retaliation. Counsel points out that the earlier drafts of these reports contain the names and identifying information relating to those individuals who participated in the information gathering process. Counsel states that subsequent revisions were made to the drafts to protect this confidential information because release of it could cause the interviewed employees severe and irreparable personal and professional harm. Further, Counsel contends that due to some misunderstandings, revisions of the earlier drafts were necessary to correct discrepancies.

Counsel also states that the Complainant may have been misled to understand that the requested documents had already been finalized as of the date of his April 26, 2006 OPRA request. Counsel asserts that a statement made during a meeting of BCIA's Community Oversight Board ("COB") indicating the documents were finalized was inaccurate. Counsel states that a review of the minutes from several meeting dates will reveal the reports were not final as of the date of the Complainant's OPRA request. The Custodian's Counsel attaches six (6) copies each of the following documents in support of his assertion:

- COB minutes for April 25, 2006
- COB minutes (closed session) for April 25, 2006
- COB minutes for May 23, 2006
- COB minutes for June 27, 2006
- Final Report transmittal letter via e-mail from the consultants dated April 21, 2006
- Five (5) additional pages of e-mails provided with the unredacted records

March 3, 2008

Letter from the GRC to the Custodian's Counsel. The GRC requests the Custodian's position regarding the present status of the case, particularly with respect to any changed circumstances affecting previously asserted exemptions to disclosure.

March 6, 2008

Telephone call from the Custodian's Counsel to the GRC. Counsel informs the GRC that the Custodian disclosed a finalized copy of the unredacted records to the Complainant and that the Complainant should not be entitled to disclosure of draft copies because they are exempt from disclosure as advisory, consultative, or deliberative material.

March 11, 2008

Telephone call from the GRC to the Complainant. The GRC confirms that the Custodian disclosed a finalized copy of the unredacted records to the Complainant. The Complainant acknowledges such disclosure, but states that he still wants the draft copies of the records that were prepared before the record was finalized. The GRC advises the Complainant that draft records are exempt from disclosure as advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-1.1. The GRC refers the Complainant to GRC and court decisions which support this conclusion. The Complainant states he will let the GRC know how he wishes to proceed after consulting legal counsel.⁴

March 14, 2008

Letter from the GRC to the Complainant. The GRC confirms the issues discussed in the GRC's March 11, 2008 telephone conversation with the Complainant.

March 26, 2008

E-mail from the Custodian's Counsel to the GRC. Counsel forwards a copy of the Custodian's SOI which was originally transmitted to the GRC on June 26, 2006, to confirm statements made to the GRC in his March 6, 2008 telephone call.

April 4, 2008

Letter from the Complainant to the GRC. The Complainant voluntarily withdraws his complaint in this matter.

April 7, 2008

E-mail from the GRC to the Custodian. The GRC provides a copy of the Complainant's letter withdrawing his complaint to the Custodian.

April 7, 2008

E-mail from the GRC to the Custodian's Counsel. The GRC provides a copy of the Complainant's letter withdrawing his complaint to the Custodian's Counsel.

Analysis

Because the Complainant voluntarily withdrew this complaint in writing to the GRC on April 4, 2008, no analysis is necessary.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council dismiss this complaint because the Complainant voluntarily withdrew this complaint in writing to the GRC on April 4, 2008.

Prepared By:

John E. Stewart
Case Manager/*In Camera* Attorney

⁴ The Complainant provided the GRC with no legal Counsel of record.
Carlton Levine v. Bergen County Improvement Authority, 2006-96 – Supplemental Findings and Recommendations of the Executive Director

Approved By:

Catherine Starghill, Esq.
Executive Director

April 23, 2008



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

VINCENT P. MALTESE, Chairman
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INTERIM ORDER

April 25, 2007 Government Records Council Meeting

Carlton Levine
Complainant
v.

Complaint No. 2006-96

Bergen County Improvement Authority
Custodian of Record

At the April 25, 2007 public meeting, the Government Records Council (“Council”) considered the April 18, 2007 *In Camera* 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 failed to properly notify the Complainant of the reasons for denial pursuant to OPRA. Therefore, based on the GRC decision in DeLuca v. Town of Guttenburg, GRC Complaint No. 2006-25 (May 2006), the Custodian has violated N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. by failing to properly inform the Complainant of the reasons for the denial of access in writing within the statutorily mandated seven (7) business days, resulting in a deemed denial of access pursuant to N.J.S.A. 47:1A-5.i.
2. In the current matter, the requested records were prepared by an outside third-party consultant hired to provide expertise and opinions on formulating new policy. However, pursuant to the GRC’s decision in Rademacher v. Borough of Eatontown, GRC Complaint No. 2004-18 (November 2005), the GRC should perform an *in camera* inspection of the following requested records to determine whether they meet the “inter-agency or intra-agency advisory, consultative, or deliberative” exemption under OPRA:
 - a. Analysis and Recommendations Regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated February 28, 2006, 5 pages;
 - b. Recommendations regarding the creation of a Clinical Quality Performance Reporting Scorecard for the Behavioral Health Division, BRMC, dated March 14, 2006, 31 pages;



- c. E-mail dated 4/10/2006 - Analysis and Recommendations regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated March 14, 2006, 33 pages;
 - d. E-mail dated April 17, 2006 - Analysis and Recommendations regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated March 14, 2006, 33 pages;
 - e. E-mail dated April 21, 2006
 - * Analysis and Recommendations regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated April 21, 2006, 33 pages,
 - * Memo regarding 65% Rule, dated April 21, 2006, 2 pages,
 - * Memo re: Management and Clinical Research Stakeholder Input, dated April 21, 2006, 25 pages,
 - * Analysis and Recommendations regarding the creation of a clinical quality performance scorecard for Behavioral Health Division, BRMC, dated April 21, 2006, 19 pages, and
 - * Analysis and Recommendations regarding quality data and outcome measurements of the Behavioral Health Division, BRMC, dated April 21, 2006, 60 pages.
3. **The Custodian must deliver¹ to the Council in a sealed envelope six copies of the requested unredacted documents (see #2 above), a documents or redactions index detailing the lawful basis for denial of each document and/or each redaction asserted and the Custodian's legal certification, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection within five (5) business days from receipt of the Council's Interim Order.**

Interim Order Rendered by the
Government Records Council
On The 25th Day of April, 2007

David Fleisher, Vice Chairman
Government Records Council

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

¹ The *in camera* documents may be sent overnight mail, regular mail or be hand-delivered, at the discretion of the custodian, as long as they arrive at the GRC by the deadline.

Robin Berg Tabakin, Secretary
Government Records Council

Decision Distribution Date: April 27, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 25, 2007 Council Meeting**

**Carlton Levine¹
Complainant**

GRC Complaint No. 2006-96

v.

**Bergen County Improvement Authority²
Custodian of Records**

Records Relevant to Complaint:

Any and all documents and reports in the custody of Bergen County Improvement Authority (“BCIA”) that were submitted by the Open Minds Consultants regarding Bergen Regional Medical Center (“BRMC”) on or about November 1, 2006 to present.

Request Made: April 26, 2006

Response Made: May 10, 2006

Custodian: Quentin W. Wiest, II, Deputy Executive Director

GRC Complaint Filed: May 23, 2006

Background

April 26, 2006

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

May 10, 2006

Custodian’s response to the OPRA request. The Custodian informs the Complainant ten (10) business days after the OPRA request that the only documents in BCIA’s custody that are responsive to the request are working drafts subject to revision, submitted to the BCIA by a consulting company for comment and direction. The Custodian notifies the Complainant that the draft reports have been prepared prior to the adoption of any policy or the making of any decision and contain opinions, recommendations and advice from Open Minds Consultants regarding the operation of the BRMC. The Custodian asserts that because these working drafts do not constitute a final policy or decision of the BCIA and are merely recommendations prior to their adoption they are considered advisory, consultative and deliberative (“ACD”) material. The Custodian asserts that, as ACD material, these documents are not government records pursuant to the definition in N.J.S.A. 47:1A-1.1. The Custodian further asserts

¹ No legal representation on record.

² Legal representation by Daniel E. Zwillenberg, Esq. of the Law Offices of Dennis J. Oury, LLC (Hackensack, NJ).

that the finalized reports will be public documents, but until that time the release of these records may hinder the consultative process.

May 23, 2006

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

- Complainant’s OPRA request and fax transmittal confirmation dated April 26, 2006, and
- Custodian’s response to the OPRA request dated May 10, 2006.

The Complainant alleges that he was wrongfully denied access to the requested reports. The Complainant states that he received no response to his OPRA request until May 10, 2006, ten (10) business days after Complainant’s OPRA request was submitted. The Complainant contends that the reports are not “inter- or intra-agency” ACD material in that they were exchanged between the agency and an outside vendor. Additionally, the Complainant contends that, according to statements of the Custodian at the April 25, 2006 public meeting of the custodial agency, the members of the BCIA had already been provided with copies of the final reports, contrary to the Custodian’s claim that the requested documents were only in draft form at the time of the request.

June 8, 2006

Offer of Mediation sent to both parties.

June 9, 2006

Custodian’s signed Agreement to Mediate. No response was received from the Complainant.

June 19, 2006

Request for the Statement of Information (“SOI”) sent to the Custodian.

June 26, 2006

Custodian’s SOI attaching Complainant’s OPRA request dated April 26, 2006.

The Custodian provides a list of documents held by the agency but not released to the Complainant in response to his OPRA request.

List of all Documents Responsive to Complainant’s April 26, 2006 OPRA Request	Documents Provided to Complainant, in Whole or in Part and the Date(s) Provided	Documents Not Provided to Complainant, in Whole	Legal Explanation and Citation for Non-Disclosure or redactions
Analysis and Recommendations regarding Staffing Ratios of the Behavioral Health		Not provided	Draft reports, which were prepared prior to the adoption of any policy or the making of any decision, contain opinions,

<p>Division, BRMC, dated February 28, 2006, 5 pages</p>			<p>recommendations and advice from Open Minds Consultants regarding the operation of the BRMC. Not a government record pursuant to the definition in <u>N.J.S.A.</u> 47:1A-1.1 because they are considered ACD in content.</p>
<p>Recommendations regarding the creation of a Clinical Quality Performance Reporting Scorecard for the Behavioral Health Division, BRMC, dated March 14, 2006, 31 pages</p>		<p>Not provided</p>	<p>Draft reports, which were prepared prior to the adoption of any policy or the making of any decision, contain opinions, recommendations and advice from Open Minds Consultants regarding the operation of the BRMC. Not a government record pursuant to the definition in <u>N.J.S.A.</u> 47:1A-1.1 because they are considered ACD in content.</p>
<p>E-mail dated April 10, 2006 - Analysis and Recommendations regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated March 14, 2006, 33 pages</p>		<p>Not provided</p>	<p>Draft reports and e-mail referencing the draft reports, prepared prior to the adoption of any policy or the making of any decision, contain opinions, recommendations and advice regarding the operation of the BRMC. Not a government record pursuant to the definition in <u>N.J.S.A.</u> 47:1A-1.1 because they are considered ACD in content.</p>
<p>E-mail dated April 17, 2006 - Analysis and Recommendations regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated March 14, 2006,</p>		<p>Not provided</p>	<p>Draft reports and e-mail referencing the draft reports, prepared prior to the adoption of any policy or the making of any decision, contain opinions, recommendations and advice regarding the</p>

33 pages			operation of the BRMC. Not a government record pursuant to the definition in <u>N.J.S.A.</u> 47:1A-1.1 because they are considered ACD in content.
<p>E-mail dated April 21, 2006</p> <ul style="list-style-type: none"> • Analysis and Recommendations regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated April 21, 2006, 33 pages, • Memo regarding 65% Rule, dated April 21, 2006, 2 pages, • Memo re: Management and Clinical Research Stakeholder Input, dated April 21, 2006, 25 pages, • Analysis and Recommendations regarding the creation of a clinical quality performance scorecard for Behavioral Health Division, BRMC, dated April 21, 2006, 19 pages, and • Analysis and Recommendations regarding quality data and outcome measurements of the Behavioral Health Division, BRMC, dated April 21, 2006. 60 pages. 		Not provided	Draft reports and e-mail referencing the draft reports, prepared prior to the adoption of any policy or the making of any decision, contain opinions, recommendations and advice regarding the operation of the BRMC. Not a government record pursuant to the definition in <u>N.J.S.A.</u> 47:1A-1.1 because they are considered ACD in content.

The Custodian contends that the requested records are ACD material and are not a government record pursuant to the definition in N.J.S.A. 47:1A-1.1. The Custodian asserts that in Rademacher v. Borough of Eatontown, GRC Complaint No. 2004-18 (June 2004), the GRC found that “a showing that material is pre-decisional and deliberative creates a presumption of non-disclosure” and that the ACD exemption is meant to “promote frank and independent discussion of contemplated policies and procedures.” *Id.* The Custodian asserts that the requested documents fall squarely within the exemption for ACD because the documents were generated by a third-party hired to provide expertise and opinions to the BCIA as part of an extended deliberative process, during which the agency will attempt to formulate policy for the future of BRMC.

The Custodian certifies that these documents contain the opinions of Open Minds and employees of BRMC relating to the recommendations on new policy. Additionally, the Custodian certifies that the employees of BRMC who were interviewed in relation to this report were advised that their comments would be held as confidential so that those employees could freely express their opinions and concerns about the contemplated BCIA policies and decisions without fear of retaliation. The Custodian alleges that the drafts of these reports do contain the names and identifying information relating to those individuals who participated in the information gathering process conducted by Open Minds. The Custodian further contends that release of this information would hinder honest and frank communications between the agency and its employees in the future.

The Custodian states that the Complainant has received the finalized versions of the requested records.

Analysis

Whether the Custodian unlawfully denied the Complainant access to the requested documents and reports submitted by the Open Minds Consultants regarding BRMC?

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.

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

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

OPRA also 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.

Additionally, OPRA states 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 places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states that “...[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 asserts that he received no response to his OPRA request until May 10, 2006. The Custodian certifies that he informed the Complainant ten (10) business days after the OPRA request that the only responsive documents in BCIA’s custody are working drafts subject to revision, submitted by a third party consultant and containing opinions, recommendations and advice from Open Minds Consultants regarding the operation of the BRMC. The Custodian asserts that because these working drafts do not constitute a final policy or decision of the BCIA and are merely recommendations prior to their adoption, they are considered ACD and will not be made available.

The Custodian therefore failed to provide the Complainant with a written response indicating the specific basis for denial within the statutorily mandated seven (7) business days. In DeLuca v. Town of Guttenburg, GRC Complaint No. 2006-25 (May 2006), the Council found that the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a written response within the statutorily mandated seven (7) business days, therefore creating a “deemed” denial. Therefore, based on the GRC decision in DeLuca, the Custodian violated N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. by failing to properly inform the Complainant of the reasons for the denial of access in writing within the statutorily mandated seven (7) business days, resulting in a deemed denial of access pursuant to N.J.S.A. 47:1A-5.i.

Advisory, Consultative, or Deliberative Material

The Complainant alleges that he was wrongfully denied access to the requested reports. The Complainant asserts that he received no response to his OPRA request until May 10, 2006, ten (10) business days after the Complainant’s OPRA request was

submitted. The Complainant contends that these reports are not “inter- or intra-agency” ACD material because they were exchanged between the agency and an outside vendor. Additionally, the Complainant contends that, although the Custodian claims that the requested documents were only in draft form at the time of the request, according to statements of the Custodian at the April 25, 2006, public meeting of the custodial agency, the members of the BCIA had already been provided with copies of the final reports.

The Custodian alleges that the requested records are ACD in content and are therefore not government records pursuant to the definition in N.J.S.A. 47:1A-1.1. The Custodian contends that the requested documents fall within the exemption for ACD because the documents were generated by Open Minds Consulting, a consultant hired to provide expertise and opinions on formulating new policy for the future of BRMC. The Custodian alleges that the documents were provided to the BCIA as part of an extended deliberative process regarding BRMC. The Custodian certifies that these documents contain the opinions of Open Minds and employees of BRMC relating to recommendations on new policy. The Custodian asserts that the drafts of these reports contain the names and identifying information relating to those individuals and employees who participated in the information gathering process conducted by Open Minds. Additionally, the Custodian asserts that the release of this information would hinder honest and frank communications between the agency and its employees in the future.

In Rademacher v. Borough of Eatontown, GRC Complaint No. 2004-18 (November 2005), the central issue raised was the accessibility of a report compiled for the Borough of Eatontown by an independent consultant. The Borough hired the Jersey Professional Management Company to perform a management study to assist the municipality in determining if organizational changes might increase the efficiency of its operations. The custodian denied the requestor access to the consultant’s report on the grounds that it constituted advisory, consultative or deliberative material exempt from disclosure under N.J.S.A. 47:1A-1.1. The GRC concluded that the requested report was prepared by an outside third party consultant and did meet the definition of the “inter-agency or intra-agency advisory, consultative, or deliberative” exemption under OPRA, and therefore the requested record was properly withheld. Upon appeal and subsequent motion of the GRC, the Appellate Division remanded the case to the GRC to conduct an *in camera* review of the requested document. After completing the *in camera* inspection of the unredacted document, the GRC voted unanimously to order that the Custodian disclose the requested Management Study for the Borough of Eatontown – Task I Organizational Structure, except for certain specific information exempt from disclosure as inter-agency or intra-agency advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.

In the current matter, the requested records were prepared by an outside third-party consultant hired to provide expertise and opinions on formulating new policy. Based on the GRC’s decision in Rademacher, the GRC should perform an *in camera* inspection of the following requested records to determine whether they meet the inter-agency or intra-agency advisory, consultative, or deliberative exemption under OPRA:

1. Analysis and Recommendations Regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated February 28, 2006, 5 pages.
2. Recommendations regarding the creation of a Clinical Quality Performance Reporting Scorecard for the Behavioral Health Division, BRMC, dated March 14, 2006, 31 pages.
3. E-mail dated April 10, 2006 - Analysis and Recommendations regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated March 14, 2006, 33 pages.
4. E-mail dated April 17, 2006 - Analysis and Recommendations regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated March 14, 2006, 33 pages.
5. E-mail dated April 21, 2006.
 - Analysis and Recommendations regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated April 21, 2006, 33 pages,
 - Memo regarding 65% Rule, dated April 21, 2006, 2 pages,
 - Memo re: Management and Clinical Research Stakeholder Input, dated April 21, 2006, 25 pages,
 - Analysis and Recommendations regarding the creation of a clinical quality performance scorecard for Behavioral Health Division, BRMC, dated April 21, 2006, 19 pages, and
 - Analysis and Recommendations regarding quality data and outcome measurements of the Behavioral Health Division, BRMC, dated April 21, 2006, 60 pages.

Whether the Custodian’s denial of access to the requested records rises 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.

In his April 26, 2006, OPRA request, the Complainant requests any and all documents in the custody of BCIA submitted by the Open Minds Consultants regarding BRMC from November 1, 2006 to the present. The Custodian informs the Complainant ten (10) business days after the OPRA request was submitted that the only documents in BCIA's custody that are responsive to the request are working drafts subject to revision, submitted to the BCIA by a consulting company for comment and direction. The Custodian notifies the Complainant that the draft reports have been prepared prior to the adoption of any policy or the making of any decision and contain opinions, recommendations and advice from Open Minds Consultants regarding the operation of the BRMC. The Custodian asserts that because these working drafts do not constitute a final policy or decision of the BCIA and are merely recommendations prior to their adoption, they are considered ACD. The Custodian asserts that, as ACD material, these documents are not government records pursuant to N.J.S.A. 47:1A-1.1. The Custodian further asserts that the finalized reports will be public documents, but until that time, the release of these records may hinder the consultative process.

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).

There is no evidence in the record to support a conclusion that the Custodian's actions contained the element of conscious wrongdoing necessary to find a knowing and willful violation of OPRA. There is no evidence of record to indicate that the Custodian intentionally and deliberately delayed the Complainant's access to the documents. The Custodian certifies that the denial of access was based upon a legal interpretation of N.J.S.A. 47:1A-1.1. The Custodian's delay in responding to the Complainant's OPRA request appears to be merely negligent, heedless or unintentional, as the response occurred ten (10) days after Complainant made his OPRA request, in violation of the statutorily mandated response time under OPRA. Therefore, Custodian's denial of access does not constitute a knowing and willful violation of OPRA.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to properly notify the Complainant of the reasons for denial pursuant to OPRA. Therefore, based on the GRC decision in DeLuca v. Town of Guttenburg, GRC Complaint No. 2006-25 (May

2006), the Custodian has violated N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. by failing to properly inform the Complainant of the reasons for the denial of access in writing within the statutorily mandated seven (7) business days, resulting in a deemed denial of access pursuant to N.J.S.A. 47:1A-5.i.

2. In the current matter, the requested records were prepared by an outside third-party consultant hired to provide expertise and opinions on formulating new policy. However, pursuant to the GRC's decision in Rademacher v. Borough of Eatontown, GRC Complaint No. 2004-18 (November 2005), the GRC should perform an *in camera* inspection of the following requested records to determine whether they meet the "inter-agency or intra-agency advisory, consultative, or deliberative" exemption under OPRA:
 - a. Analysis and Recommendations Regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated February 28, 2006, 5 pages;
 - b. Recommendations regarding the creation of a Clinical Quality Performance Reporting Scorecard for the Behavioral Health Division, BRMC, dated March 14, 2006, 31 pages;
 - c. E-mail dated 4/10/2006 - Analysis and Recommendations regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated March 14, 2006, 33 pages;
 - d. E-mail dated April 17, 2006 - Analysis and Recommendations regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated March 14, 2006, 33 pages;
 - e. E-mail dated April 21, 2006
 - * Analysis and Recommendations regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated April 21, 2006, 33 pages,
 - * Memo regarding 65% Rule, dated April 21, 2006, 2 pages,
 - * Memo re: Management and Clinical Research Stakeholder Input, dated April 21, 2006, 25 pages,
 - * Analysis and Recommendations regarding the creation of a clinical quality performance scorecard for Behavioral Health Division, BRMC, dated April 21, 2006, 19 pages, and
 - * Analysis and Recommendations regarding quality data and outcome measurements of the Behavioral Health Division, BRMC, dated April 21, 2006, 60 pages.
3. **The Custodian must deliver³ to the Council in a sealed envelope six copies of the requested unredacted documents (see #2 above), a documents or redactions index detailing the lawful basis for denial of each document and/or each redaction asserted and the Custodian's legal certification, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for**

³ The *in camera* documents may be sent overnight mail, regular mail or be hand-delivered, at the discretion of the custodian, as long as they arrive at the GRC by the deadline.

the *in camera* inspection within five (5) business days from receipt of the Council's Interim Order.

Prepared By:

Karyn Gordon
In House Counsel

April 18, 2007

Approved By:
Catherine Starghill, Esq.
Executive Director

April 18, 2007