



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

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

**FINAL DECISION**

**July 30, 2008 Government Records Council Meeting**

Paul Bellan-Boyer  
Complainant

Complaint No. 2007-143

v.

NJ Department of Community Affairs,  
Commissioner's Office  
Custodian of Record

At the July 30, 2008 public meeting, the Government Records Council ("Council") considered the July 23, 2008 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. By a majority vote, the Council adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Director of Operations certified that she provided the Complainant with the redacted records on June 6, 2008 as ordered by the Council and provided her certification of compliance to the Executive Director within the five (5) business days as also ordered by the Council, the Custodian has complied with the Council's May 28, 2008 Interim Order.
2. Because the original Custodian properly responded to the Complainant's OPRA request in regard to timeliness and form, and provided all records responsive to the Complainant with the exception of the reports from NJ Historic Trust to Commissioner Bass Levin, and even though the original Custodian unlawfully denied access to portions of said reports, because the current Custodian complied with the Council's May 28, 2008 Interim Order by providing the redacted reports to the Complainant within the ordered five (5) business days, it is concluded that neither the original nor the current 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. However, the original Custodian's unlawful denial of access to portions of the NJ Historic Trust reports appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law

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 30<sup>th</sup> Day of July, 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, Secretary  
Government Records Council

**Decision Distribution Date: August 4, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Paul Bellan-Boyer<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-143**

v.

**NJ Department of Community Affairs, Commissioner's Office<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. All communications from March 15, 2007 to the present, in the form of letters, e-mails, faxes, electronic and handwritten notes, and other public records and files in Department of Community Affairs' ("DCA") possession from DCA Commissioner Bass Levin to William G. Dressel, Jr., the NJ State League of Municipalities, or the Honorable David DelVecchio (Mayor of Lambertville and President of the League), and all records of such communications, such as phone or fax logs, fax cover sheets, etc.
2. Records detailed above from William G. Dressel, Jr., the NJ State League of Municipalities, or the Honorable David DelVecchio (Mayor of Lambertville and President of the League) to DCA Commissioner Bass Levin.
3. Faxes to (609) 984-6696 from (609) 695-0151 and (609) 695-5156 (and vice versa), as well as e-mails between DCA Commissioner Bass Levin and [BDressel@njslom.com](mailto:BDressel@njslom.com).
4. All communications from April 4, 2007 to the present, in the form of letters, e-mails, faxes, electronic and handwritten notes, and other public records and files in DCA's possession from the NJ Economic Development Authority or the NJ Historic Trust to DCA Commissioner Bass Levin, and any return communications from DCA Commissioner Bass Levin to the above named entities, and all records of such communications, such as phone or fax logs, fax cover sheets, etc.

**Request Made:** May 15, 2007

**Response Made:** May 25, 2007

**Custodian:** Paul G. Stridick<sup>3</sup>

**GRC Complaint Filed:** June 18, 2007

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<sup>1</sup> No legal representation listed on file.

<sup>2</sup> Represented by DAG Daniel P. Reynolds, on behalf of the NJ Attorney General.

<sup>3</sup> The Custodian at the time of the request was Brian Bauerle.

## Background

**May 28, 2008**

Government Records Council's ("Council") Interim Order. At its May 28, 2008 public meeting, the Council considered the May 21, 2008 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. By a majority vote, the Council adopted the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian has complied with the Council's December 19, 2007 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council's Order, as extended.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the table below within five (5) business days from receipt of this Order and provide certified confirmation of compliance pursuant to N.J. Court Rules, R. 1:4-4 to the Executive Director.**

Number	Record Name/Date	Description of Document And/or Redaction	Custodian's Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination
1	Unredacted Report from the NJHT to the DCA Commissioner dated April 04, 2007	One (1) page "Confidential Weekly Division Report to Commissioner Susan Bass Levin." The report contains eight (8) prompts for completion by the preparer.	The information contained in the report reflects the discretionary and deliberative judgment of the individual preparing the report as to what information and comments should be included in the confidential report for the consideration and evaluation of the Commissioner. As such, it is subject to the advisory,	"Hot Issues" prompt: Redact everything following the word "memo" pursuant to <u>N.J.S.A. 47:1A-1.1</u> as intra-agency advisory, consultative or deliberative material. The balance of the record is disclosable. <sup>4</sup>

<sup>4</sup> In the context of this report, it is the GRC's position that the word "none" written in response to a prompt does not reflect the preparer's discretionary and deliberative judgment which may result in the preparer's decision to withhold comment or exclude an issue from consideration by the Commissioner. Rather, it connotes the non-existence of information or comment responsive to the prompt for the time period encompassed by the report. Such usage is not indicative of the deliberative process; therefore, it does not fall within the purview of the ACD exemption.

			consultative and deliberative process privilege.	
2	Unredacted Report from the NJHT to the DCA Commissioner dated April 11, 2007	One (1) page “Confidential Weekly Division Report to Commissioner Susan Bass Levin”	The information contained in the report reflects the discretionary and deliberative judgment of the individual preparing the report as to what information and comments should be included in the confidential report for the consideration and evaluation of the Commissioner. As such, it is subject to the advisory, consultative and deliberative process privilege.	Disclose entire record (see footnote 7).
3	Unredacted Report from the NJHT to the DCA Commissioner dated April 18, 2007	One (1) page “Confidential Weekly Division Report to Commissioner Susan Bass Levin” with an attached OPRA request from the Complainant dated April 6, 2007	The information contained in the report reflects the discretionary and deliberative judgment of the individual preparing the report as to what information and comments should be included in the confidential report for the consideration and evaluation of the Commissioner. As such, it is subject to the advisory, consultative and deliberative process privilege.	“OPRA Requests” prompt: Redact the last three (3) sentences pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as intra-agency advisory, consultative or deliberative material. The balance of the record is disclosable.
4	Unredacted Report from the NJHT to the DCA Commissioner	One (1) page “Confidential Weekly Division Report to	The information contained in the report reflects the discretionary and deliberative	Disclose entire record except for the four (4) page attachment

	dated April 24, 2007	Commissioner Susan Bass Levin” with an attached four (4) page workshop itinerary dated May 1, 2007	judgment of the individual preparing the report as to what information and comments should be included in the confidential report for the consideration and evaluation of the Commissioner. As such, it is subject to the advisory, consultative and deliberative process privilege.	containing the overview of workshop content and presenters. This is a draft document, exempt from disclosure as intra-agency advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and the Council’s decision in <u>O’Shea v. West Milford Board of Education, GRC</u> Complaint No. 2004-93 (April 2006). The comments following the “General Issues of Concern, Note, Information” prompt constitute factual material not subject to the ACD exemption.
5	Unredacted Report from the NJHT to the DCA Commissioner dated May 02, 2007	One (1) page “Confidential Weekly Division Report to Commissioner Susan Bass Levin”	The information contained in the report reflects the discretionary and deliberative judgment of the individual preparing the report as to what information and comments should be	Disclose entire record (see footnote 7).

			included in the confidential report for the consideration and evaluation of the Commissioner. As such, it is subject to the advisory, consultative and deliberative process privilege.	
6	Unredacted Report from the NJHT to the DCA Commissioner dated May 09, 2007	One (1) page "Confidential Weekly Division Report to Commissioner Susan Bass Levin"	The information contained in the report reflects the discretionary and deliberative judgment of the individual preparing the report as to what information and comments should be included in the confidential report for the consideration and evaluation of the Commissioner. As such, it is subject to the advisory, consultative and deliberative process privilege.	Redact everything following the word "Trenton." The balance of the record is disclosable.
7	Unredacted Report from the NJHT to the DCA Commissioner dated May 16, 2007	One (1) page "Confidential Weekly Division Report to Commissioner Susan Bass Levin"	The information contained in the report reflects the discretionary and deliberative judgment of the individual preparing the report as to what information and comments should be included in the confidential report for the consideration and evaluation of the Commissioner. As such, it is subject to the advisory, consultative and	Disclose entire record (see footnote 7).

			deliberative process privilege.	
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**June 3, 2008**

Council’s Interim Order distributed to the parties.

**June 6, 2008**

Director of Operations’<sup>5</sup> response to the Council’s Interim Order in the absence of the Custodian. The Director of Operations certifies that on June 6, 2008 she provided the Complainant with a copy of the redacted records as ordered by the Council on May 28, 2008.

**Analysis**

**Whether the Custodian complied with the Council’s May 28, 2008 Interim Order?**

Because the Director of Operations certified that she provided the Complainant with the redacted records on June 6, 2008 as ordered by the Council and provided her certification of compliance to the Executive Director within the five (5) business days as also ordered by the Council, the Custodian has complied with the Council’s May 28, 2008 Interim Order.

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

OPRA states that:

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

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

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

The original Custodian in this complaint provided the Complainant with a written response granting access in part and denying access in part to the Complainant’s request within the statutorily mandated seven (7) business days. As such, the original Custodian’s response was proper regarding timeliness and form pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. The current Custodian certified that no other records

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<sup>5</sup> Suzanne Winderman.  
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responsive exist in addition to the records provided to the Complainant and the records denied on the basis that said records are exempt from disclosure as advisory, consultative or deliberative (“ACD”) material pursuant to N.J.S.A. 47:1A-1.1. After an *in camera* review of these records, confidential reports from NJ Historic Trust to Commissioner Bass Levin dated April 4, 2007, April 11, 2007, April 18, 2007, April 24, 2007, May 2, 2007, May 9, 2007 and May 16, 2007, the Council determined that certain portions of said records are exempt as ACD material but the balance must be disclosed to the Complainant. The Custodian complied with the Council’s May 28, 2008 Interim Order to provide the Complainant with the redacted reports.

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).

Therefore, because the original Custodian properly responded to the Complainant’s OPRA request with regard to timeliness and form, and provided all records responsive to the Complainant with the exception of the reports from NJ Historic Trust to Commissioner Bass Levin, and even though the original Custodian unlawfully denied access to portions of said reports, because the current Custodian complied with the Council’s May 28, 2008 Interim Order by providing the redacted reports to the Complainant within the ordered five (5) business days, it is concluded that neither the original nor the current 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. However, the original Custodian’s unlawful denial of access to portions of the NJ Historic Trust reports appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Director of Operations certified that she provided the Complainant with the redacted records on June 6, 2008 as ordered by the Council and provided her certification of compliance to the Executive Director within the five (5) business days as also ordered by the Council, the Custodian has complied with the Council’s May 28, 2008 Interim Order.

2. Because the original Custodian properly responded to the Complainant's OPRA request in regard to timeliness and form, and provided all records responsive to the Complainant with the exception of the reports from NJ Historic Trust to Commissioner Bass Levin, and even though the original Custodian unlawfully denied access to portions of said reports, because the current Custodian complied with the Council's May 28, 2008 Interim Order by providing the redacted reports to the Complainant within the ordered five (5) business days, it is concluded that neither the original nor the current 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. However, the original Custodian's unlawful denial of access to portions of the NJ Historic Trust reports appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law

Prepared By: Dara Lownie  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

July 23, 2008



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

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

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**INTERIM ORDER**

**May 28, 2008 Government Records Council Meeting**

Paul Bellan-Boyer

Complaint No. 2007-143

Complainant

v.

NJ Department of Community Affairs,

Commissioner's Office

Custodian of Record

At the May 28, 2008 public meeting, the Government Records Council ("Council") considered the May 21, 2008 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. By a majority vote, the Council adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has complied with the Council's December 19, 2007 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council's Order, as extended.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the table below within five (5) business days from receipt of this Order and provide certified confirmation of compliance pursuant to N.J. Court Rules, R. 1:4-4 to the Executive Director.**

Number	Record Name/Date	Description of Document And/or Redaction	Custodian's Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination
1	Unredacted Report from the NJHT to the DCA Commissioner dated April 04,	One (1) page "Confidential Weekly Division Report to Commissioner	The information contained in the report reflects the discretionary	"Hot Issues" prompt: Redact everything following the word "memo"



	2007	Susan Bass Levin.” The report contains eight (8) prompts for completion by the preparer.	and deliberative judgment of the individual preparing the report as to what information and comments should be included in the confidential report for the consideration and evaluation of the Commissioner. As such, it is subject to the advisory, consultative and deliberative process privilege.	pursuant to <u>N.J.S.A. 47:1A-1.1</u> as intra-agency advisory, consultative or deliberative material. The balance of the record is disclosable. <sup>1</sup>
2	Unredacted Report from the NJHT to the DCA Commissioner dated April 11, 2007	One (1) page “Confidential Weekly Division Report to Commissioner Susan Bass Levin”	The information contained in the report reflects the discretionary and deliberative judgment of the individual preparing the report as to what information and comments should be included in the confidential	Disclose entire record (see footnote 7).

<sup>1</sup> In the context of this report, it is the GRC’s position that the word “none” written in response to a prompt does not reflect the preparer’s discretionary and deliberative judgment which may result in the preparer’s decision to withhold comment or exclude an issue from consideration by the Commissioner. Rather, it connotes the non-existence of information or comment responsive to the prompt for the time period encompassed by the report. Such usage is not indicative of the deliberative process; therefore, it does not fall within the purview of the ACD exemption.

			report for the consideration and evaluation of the Commissioner. As such, it is subject to the advisory, consultative and deliberative process privilege.	
3	Unredacted Report from the NJHT to the DCA Commissioner dated April 18, 2007	One (1) page "Confidential Weekly Division Report to Commissioner Susan Bass Levin" with an attached OPRA request from the Complainant dated April 6, 2007	The information contained in the report reflects the discretionary and deliberative judgment of the individual preparing the report as to what information and comments should be included in the confidential report for the consideration and evaluation of the Commissioner. As such, it is subject to the advisory, consultative and deliberative process privilege.	"OPRA Requests" prompt: Redact the last three (3) sentences pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as intra-agency advisory, consultative or deliberative material. The balance of the record is disclosable.
4	Unredacted Report from the NJHT to the DCA Commissioner	One (1) page "Confidential Weekly Division Report to	The information contained in the report reflects the	Disclose entire record except for the four (4) page attachment

	dated April 24, 2007	Commissioner Susan Bass Levin” with an attached four (4) page workshop itinerary dated May 1, 2007	discretionary and deliberative judgment of the individual preparing the report as to what information and comments should be included in the confidential report for the consideration and evaluation of the Commissioner. As such, it is subject to the advisory, consultative and deliberative process privilege.	containing the overview of workshop content and presenters. This is a draft document, exempt from disclosure as intra-agency advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and the Council’s decision in <u>O’Shea v. West Milford Board of Education</u> , GRC Complaint No. 2004-93 (April 2006). The comments following the “General Issues of Concern, Note, Information” prompt constitute factual material not subject to the ACD exemption.
5	Unredacted Report from the NJHT to the DCA Commissioner dated May 02, 2007	One (1) page “Confidential Weekly Division Report to Commissioner Susan Bass Levin”	The information contained in the report reflects the discretionary and deliberative judgment of the	Disclose entire record (see footnote 7).

			individual preparing the report as to what information and comments should be included in the confidential report for the consideration and evaluation of the Commissioner. As such, it is subject to the advisory, consultative and deliberative process privilege.	
6	Unredacted Report from the NJHT to the DCA Commissioner dated May 09, 2007	One (1) page "Confidential Weekly Division Report to Commissioner Susan Bass Levin"	The information contained in the report reflects the discretionary and deliberative judgment of the individual preparing the report as to what information and comments should be included in the confidential report for the consideration and evaluation of the Commissioner. As such, it is subject to the advisory,	Redact everything following the word "Trenton." The balance of the record is disclosable.

			consultative and deliberative process privilege.	
7	Unredacted Report from the NJHT to the DCA Commissioner dated May 16, 2007	One (1) page "Confidential Weekly Division Report to Commissioner Susan Bass Levin"	The information contained in the report reflects the discretionary and deliberative judgment of the individual preparing the report as to what information and comments should be included in the confidential report for the consideration and evaluation of the Commissioner. As such, it is subject to the advisory, consultative and deliberative process privilege.	Disclose entire record (see footnote 7).

Interim Order Rendered by the  
Government Records Council  
On The 28<sup>th</sup> Day of May, 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, Secretary  
Government Records Council

**Decision Distribution Date: June 3, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
May 30, 2008 Council Meeting**

**Paul Bellan-Boyer<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-143**

v.

**NJ Department of Community Affairs, Commissioner's Office<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. All communications from March 15, 2007 to the present, in the form of letters, e-mails, faxes, electronic and handwritten notes, and other public records and files in Department of Community Affairs' ("DCA") possession from DCA Commissioner Bass Levin to William G. Dressel, Jr., the NJ State League of Municipalities, or the Honorable David DeVecchio (Mayor of Lambertville and President of the League), and all records of such communications, such as phone or fax logs, fax cover sheets, etc.
2. Records detailed above from William G. Dressel, Jr., the NJ State League of Municipalities, or the Honorable David DeVecchio (Mayor of Lambertville and President of the League) to DCA Commissioner Bass Levin.
3. Faxes to (609) 984-6696 from (609) 695-0151 and (609) 695-5156 (and vice versa), as well as e-mails between DCA Commissioner Bass Levin and [BDdressel@njslom.com](mailto:BDdressel@njslom.com).
4. All communications from April 4, 2007 to the present, in the form of letters, e-mails, faxes, electronic and handwritten notes, and other public records and files in DCA's possession from the NJ Economic Development Authority or the NJ Historic Trust to DCA Commissioner Bass Levin, and any return communications from DCA Commissioner Bass Levin to the above named entities, and all records of such communications, such as phone or fax logs, fax cover sheets, etc.

**Request Made:** May 15, 2007

**Response Made:** May 25, 2007

**Custodian:** Paul G. Stridick<sup>3</sup>

**GRC Complaint Filed:** June 18, 2007

**Background**

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by DAG Daniel P. Reynolds, on behalf of the NJ Attorney General.

<sup>3</sup> The Custodian at the time of the request was Brian Bauerle.

## December 19, 2007

Interim Order of the Government Records Council. At the December 19, 2007 public meeting, the Government Records Council (“Council”) considered the December 12, 2007 Supplemental Findings and Recommendations of the Executive Director and all related documents submitted by the parties. The Council voted to adopt the entirety of said findings and recommendations by majority vote. Therefore, the Council found that:

1. Because the original Custodian provided a written response to the Complainant either granting access or denying access to the requested records within the statutorily mandated seven (7) business days, the original Custodian’s response was proper pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and thus the original Custodian did not unlawfully deny access to the requested records. Additionally, the current Custodian certifies that although he was not the Custodian at the time of the Complainant’s request, upon his search of agency files, he has not located any records responsive to the Complainant’s request in addition to those provided by the original Custodian.
2. It cannot be determined whether the Custodian has met the burden of proving that the requested records are exempt from disclosure without actually reviewing the records to confirm the Custodian’s legal conclusion. Therefore, it is recommended that the Council conduct an *in camera* inspection of the confidential reports from NJ Historic Trust to Commissioner Bass Levin dated April 4, 2007; April 11, 2007; April 18, 2007; April 24, 2007; May 2, 2007; May 9, 2007 and May 16, 2007 to determine whether the records are exempt from disclosure in whole or in part because of “advisory, consultative or deliberative material” pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver<sup>4</sup> to the Council in a sealed envelope six copies of the requested unredacted documents (see #2 above), a document or redaction index,<sup>5</sup> as well as a legal certification from the Custodian, 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. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
4. Because pursuant to MAG Entertainment, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 53 (App. Div. 2005), public agencies are required under OPRA to disclose only “identifiable” government records not otherwise exempt, and wholesale requests for information are not encompassed therein, the Complainant’s request for answers to those questions set forth by the court in John Paff v. N.J. Department of Labor, 392 N.J. Super. 334 (App. Div. 2007) is an invalid request for information under OPRA. However, the Custodian is

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<sup>4</sup> 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 office by the deadline.

<sup>5</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

required to provide answers to these questions as part of the Custodian's Statement of Information, as directed by the court in Paff, *supra*.

5. The Council defers analysis of a possible knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pending the outcome of the *in camera* review.

**December 20, 2007**

Interim Decision sent to both parties.

**December 21, 2007**

E-mail from the Custodian to the GRC. The Custodian requests an extension of time to comply with the Council's December 19, 2007 Interim Order.

**December 27, 2007<sup>6</sup>**

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until January 4, 2008 in order to comply with the Council's December 19, 2007 Interim Order.

**January 3, 2008**

Certification of the Custodian with six (6) copies each of the following attachments:

- Document index
- Unredacted Confidential Weekly Report ("Report") from the New Jersey Historic Trust ("NJHT") to the DCA Commissioner dated April 4, 2007
- Unredacted Report from the NJHT to the DCA Commissioner dated April 11, 2007
- Unredacted Report from the NJHT to the DCA Commissioner dated April 18, 2007 with an attached OPRA request from the Complainant dated April 6, 2007
- Unredacted Report from the NJHT to the DCA Commissioner dated April 24, 2007 with an attached four (4) page workshop itinerary dated May 1, 2007
- Unredacted Report from the NJHT to the DCA Commissioner dated May 2, 2007
- Unredacted Report from the NJHT to the DCA Commissioner dated May 9, 2007
- Unredacted Report from the NJHT to the DCA Commissioner dated May 16, 2007

The Custodian certifies that the document index incorporated into his certification lists the documents that are requested by the GRC for *in camera* inspection. The Custodian further certifies that the information contained in the documents reflects the discretionary and deliberative judgment of the individual preparing them as to what information and comments should be included for consideration and evaluation by the Commissioner. As such, the

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<sup>6</sup> Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.  
Paul Bellan-Boyer v. NJ Department of Community Affairs, Commissioner's Office, 2007-143 – *In Camera* Findings and Recommendations of the Executive Director

Custodian contends the records are exempt from disclosure because they constitute advisory, deliberative or consultative material pursuant to N.J.S.A. 47:1A-1.1.

### Analysis

#### **Whether the records are exempt from disclosure in whole or in part because they contain advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1?**

OPRA places the burden on the Custodian to prove that a denial of access to government records is lawful pursuant to N.J.S.A. 47:1A-6; however, N.J.S.A. 47:1A-1.1 excludes advisory, consultative or deliberative (“ACD”) materials from the definition of a government record. It is evident that this phrase is intended to exclude from the definition of a government record those documents that are the subject of the “deliberative process privilege.”

In O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006), the Council stated that “neither the statute nor the courts have defined the terms... ‘advisory, consultative, or deliberative’ in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. Strictly factual segments of an otherwise deliberative document are not exempted from disclosure. In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J.149 (App. Div. 2004).

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

The deliberative process privilege was discussed at length in In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000). There, the court addressed the question of whether the Commissioner of Insurance, acting in the capacity of Liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. *Id.* at 81. The court adopted a qualified deliberative process privilege based upon the holding of McClain v. College Hospital, 99 N.J. 346 (1985), Liquidation of Integrity, *supra*, 165 N.J. at 88. In doing so, the court noted that:

“[a] document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. ...

Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. ... Purely factual material that does not reflect deliberative processes is not protected.” (Citations omitted.) *Id.* at 84.

An *in camera* inspection was performed on the submitted records to determine if the records were comprised of excludable ACD material either in whole or in part. The results of the *in camera* inspection are set forth in the following table:

<b>Number</b>	<b>Record Name/Date</b>	<b>Description of Document And/or Redaction</b>	<b>Custodian’s Explanation/ Citation for Non-disclosure</b>	<b>Findings of the <i>In Camera</i> Examination</b>
1	Unredacted Report from the NJHT to the DCA Commissioner dated April 04, 2007	One (1) page “Confidential Weekly Division Report to Commissioner Susan Bass Levin.” The report contains eight (8) prompts for completion by the preparer.	The information contained in the report reflects the discretionary and deliberative judgment of the individual preparing the report as to what information and comments should be included in the confidential report for the consideration and evaluation of the Commissioner. As such, it is subject to the advisory, consultative	“Hot Issues” prompt: Redact everything following the word “memo” pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as intra-agency advisory, consultative or deliberative material. The balance of the record is disclosable. <sup>7</sup>

<sup>7</sup> In the context of this report, it is the GRC’s position that the word “none” written in response to a prompt does not reflect the preparer’s discretionary and deliberative judgment which may result in the preparer’s decision to withhold comment or exclude an issue from consideration by the Commissioner. Rather, it connotes the non-existence of information or comment responsive to the prompt for the time period encompassed by the report. Such usage is not indicative of the deliberative process; therefore, it does not fall within the purview of the ACD exemption.

			and deliberative process privilege.	
2	Unredacted Report from the NJHT to the DCA Commissioner dated April 11, 2007	One (1) page “Confidential Weekly Division Report to Commissioner Susan Bass Levin”	The information contained in the report reflects the discretionary and deliberative judgment of the individual preparing the report as to what information and comments should be included in the confidential report for the consideration and evaluation of the Commissioner. As such, it is subject to the advisory, consultative and deliberative process privilege.	Disclose entire record (see footnote 7).
3	Unredacted Report from the NJHT to the DCA Commissioner dated April 18, 2007	One (1) page “Confidential Weekly Division Report to Commissioner Susan Bass Levin” with an attached OPRA request from the Complainant dated April 6, 2007	The information contained in the report reflects the discretionary and deliberative judgment of the individual preparing the report as to what information and comments should be included in the	“OPRA Requests” prompt: Redact the last three (3) sentences pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as intra-agency advisory, consultative or deliberative material. The balance of the record is

			confidential report for the consideration and evaluation of the Commissioner. As such, it is subject to the advisory, consultative and deliberative process privilege.	disclosable.
4	Unredacted Report from the NJHT to the DCA Commissioner dated April 24, 2007	One (1) page “Confidential Weekly Division Report to Commissioner Susan Bass Levin” with an attached four (4) page workshop itinerary dated May 1, 2007	The information contained in the report reflects the discretionary and deliberative judgment of the individual preparing the report as to what information and comments should be included in the confidential report for the consideration and evaluation of the Commissioner. As such, it is subject to the advisory, consultative and deliberative process privilege.	Disclose entire record except for the four (4) page attachment containing the overview of workshop content and presenters. This is a draft document, exempt from disclosure as intra-agency advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1</u> and the Council’s decision in <u>O’Shea v. West Milford Board of Education</u> , GRC Complaint No. 2004-93 (April 2006). The comments following the “General Issues of Concern,



				Note, Information” prompt constitute factual material not subject to the ACD exemption.
5	Unredacted Report from the NJHT to the DCA Commissioner dated May 02, 2007	One (1) page “Confidential Weekly Division Report to Commissioner Susan Bass Levin”	The information contained in the report reflects the discretionary and deliberative judgment of the individual preparing the report as to what information and comments should be included in the confidential report for the consideration and evaluation of the Commissioner. As such, it is subject to the advisory, consultative and deliberative process privilege.	Disclose entire record (see footnote 7).
6	Unredacted Report from the NJHT to the DCA Commissioner dated May 09, 2007	One (1) page “Confidential Weekly Division Report to Commissioner Susan Bass Levin”	The information contained in the report reflects the discretionary and deliberative judgment of the individual preparing the report as to	Redact everything following the word “Trenton.” The balance of the record is disclosable.

			<p>what information and comments should be included in the confidential report for the consideration and evaluation of the Commissioner. As such, it is subject to the advisory, consultative and deliberative process privilege.</p>	
7	<p>Unredacted Report from the NJHT to the DCA Commissioner dated May 16, 2007</p>	<p>One (1) page “Confidential Weekly Division Report to Commissioner Susan Bass Levin”</p>	<p>The information contained in the report reflects the discretionary and deliberative judgment of the individual preparing the report as to what information and comments should be included in the confidential report for the consideration and evaluation of the Commissioner. As such, it is subject to the advisory, consultative and deliberative process privilege.</p>	<p>Disclose entire record (see footnote 7).</p>

## Conclusions and Recommendations

The Executive Director respectfully recommends that the Council find that:

1. The Custodian has complied with the Council's December 19, 2007 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council's Order, as extended.
  
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and provide certified confirmation of compliance pursuant to N.J. Court Rules, R. 1:4-4 to the Executive Director.**

Prepared By:

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

Approved By:

Catherine Starghill  
Executive Director

May 21, 2008

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
May 30, 2008 Council Meeting**

**Paul Bellan-Boyer<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-143**

v.

**NJ Department of Community Affairs, Commissioner's Office<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. All communications from March 15, 2007 to the present, in the form of letters, e-mails, faxes, electronic and handwritten notes, and other public records and files in Department of Community Affairs' ("DCA") possession from DCA Commissioner Bass Levin to William G. Dressel, Jr., the NJ State League of Municipalities, or the Honorable David DeVecchio (Mayor of Lambertville and President of the League), and all records of such communications, such as phone or fax logs, fax cover sheets, etc.
2. Records detailed above from William G. Dressel, Jr., the NJ State League of Municipalities, or the Honorable David DeVecchio (Mayor of Lambertville and President of the League) to DCA Commissioner Bass Levin.
3. Faxes to (609) 984-6696 from (609) 695-0151 and (609) 695-5156 (and vice versa), as well as e-mails between DCA Commissioner Bass Levin and [BDdressel@njslom.com](mailto:BDdressel@njslom.com).
4. All communications from April 4, 2007 to the present, in the form of letters, e-mails, faxes, electronic and handwritten notes, and other public records and files in DCA's possession from the NJ Economic Development Authority or the NJ Historic Trust to DCA Commissioner Bass Levin, and any return communications from DCA Commissioner Bass Levin to the above named entities, and all records of such communications, such as phone or fax logs, fax cover sheets, etc.

**Request Made:** May 15, 2007

**Response Made:** May 25, 2007

**Custodian:** Paul G. Stridick<sup>3</sup>

**GRC Complaint Filed:** June 18, 2007

**Background**

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by DAG Daniel P. Reynolds, on behalf of the NJ Attorney General.

<sup>3</sup> The Custodian at the time of the request was Brian Bauerle.

## December 19, 2007

Interim Order of the Government Records Council. At the December 19, 2007 public meeting, the Government Records Council (“Council”) considered the December 12, 2007 Supplemental Findings and Recommendations of the Executive Director and all related documents submitted by the parties. The Council voted to adopt the entirety of said findings and recommendations by majority vote. Therefore, the Council found that:

1. Because the original Custodian provided a written response to the Complainant either granting access or denying access to the requested records within the statutorily mandated seven (7) business days, the original Custodian’s response was proper pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and thus the original Custodian did not unlawfully deny access to the requested records. Additionally, the current Custodian certifies that although he was not the Custodian at the time of the Complainant’s request, upon his search of agency files, he has not located any records responsive to the Complainant’s request in addition to those provided by the original Custodian.
2. It cannot be determined whether the Custodian has met the burden of proving that the requested records are exempt from disclosure without actually reviewing the records to confirm the Custodian’s legal conclusion. Therefore, it is recommended that the Council conduct an *in camera* inspection of the confidential reports from NJ Historic Trust to Commissioner Bass Levin dated April 4, 2007; April 11, 2007; April 18, 2007; April 24, 2007; May 2, 2007; May 9, 2007 and May 16, 2007 to determine whether the records are exempt from disclosure in whole or in part because of “advisory, consultative or deliberative material” pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver<sup>4</sup> to the Council in a sealed envelope six copies of the requested unredacted documents (see #2 above), a document or redaction index,<sup>5</sup> as well as a legal certification from the Custodian, 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. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
4. Because pursuant to MAG Entertainment, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 53 (App. Div. 2005), public agencies are required under OPRA to disclose only “identifiable” government records not otherwise exempt, and wholesale requests for information are not encompassed therein, the Complainant’s request for answers to those questions set forth by the court in John Paff v. N.J. Department of Labor, 392 N.J. Super. 334 (App. Div. 2007) is an invalid request for information under OPRA. However, the Custodian is

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<sup>4</sup> 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 office by the deadline.

<sup>5</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

required to provide answers to these questions as part of the Custodian's Statement of Information, as directed by the court in Paff, *supra*.

5. The Council defers analysis of a possible knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pending the outcome of the *in camera* review.

#### **December 20, 2007**

Interim Decision sent to both parties.

#### **December 21, 2007**

E-mail from the Custodian to the GRC. The Custodian requests an extension of time to comply with the Council's December 19, 2007 Interim Order.

#### **December 27, 2007<sup>6</sup>**

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until January 4, 2008 in order to comply with the Council's December 19, 2007 Interim Order.

#### **January 3, 2008**

Certification of the Custodian with six (6) copies each of the following attachments:

- Document index
- Unredacted Confidential Weekly Report ("Report") from the New Jersey Historic Trust ("NJHT") to the DCA Commissioner dated April 4, 2007
- Unredacted Report from the NJHT to the DCA Commissioner dated April 11, 2007
- Unredacted Report from the NJHT to the DCA Commissioner dated April 18, 2007 with an attached OPRA request from the Complainant dated April 6, 2007
- Unredacted Report from the NJHT to the DCA Commissioner dated April 24, 2007 with an attached four (4) page workshop itinerary dated May 1, 2007
- Unredacted Report from the NJHT to the DCA Commissioner dated May 2, 2007
- Unredacted Report from the NJHT to the DCA Commissioner dated May 9, 2007
- Unredacted Report from the NJHT to the DCA Commissioner dated May 16, 2007

The Custodian certifies that the document index incorporated into his certification lists the documents that are requested by the GRC for *in camera* inspection. The Custodian further certifies that the information contained in the documents reflects the discretionary and deliberative judgment of the individual preparing them as to what information and comments should be included for consideration and evaluation by the Commissioner. As such, the

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The deliberative process privilege was discussed at length in In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000). There, the court addressed the question of whether the Commissioner of Insurance, acting in the capacity of Liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. *Id.* at 81. The court adopted a qualified deliberative process privilege based upon the holding of McClain v. College Hospital, 99 N.J. 346 (1985), Liquidation of Integrity, *supra*, 165 N.J. at 88. In doing so, the court noted that:

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An *in camera* inspection was performed on the submitted records to determine if the records were comprised of excludable ACD material either in whole or in part. The results of the *in camera* inspection are set forth in the following table:

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<sup>7</sup> In the context of this report, it is the GRC’s position that the word “none” written in response to a prompt does not reflect the preparer’s discretionary and deliberative judgment which may result in the preparer’s decision to withhold comment or exclude an issue from consideration by the Commissioner. Rather, it connotes the non-existence of information or comment responsive to the prompt for the time period encompassed by the report. Such usage is not indicative of the deliberative process; therefore, it does not fall within the purview of the ACD exemption.



			and deliberative process privilege.	
2	Unredacted Report from the NJHT to the DCA Commissioner dated April 11, 2007	One (1) page “Confidential Weekly Division Report to Commissioner Susan Bass Levin”	The information contained in the report reflects the discretionary and deliberative judgment of the individual preparing the report as to what information and comments should be included in the confidential report for the consideration and evaluation of the Commissioner. As such, it is subject to the advisory, consultative and deliberative process privilege.	Disclose entire record (see footnote 7).
3	Unredacted Report from the NJHT to the DCA Commissioner dated April 18, 2007	One (1) page “Confidential Weekly Division Report to Commissioner Susan Bass Levin” with an attached OPRA request from the Complainant dated April 6, 2007	The information contained in the report reflects the discretionary and deliberative judgment of the individual preparing the report as to what information and comments should be included in the	“OPRA Requests” prompt: Redact the last three (3) sentences pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as intra-agency advisory, consultative or deliberative material. The balance of the record is

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			what information and comments should be included in the confidential report for the consideration and evaluation of the Commissioner. As such, it is subject to the advisory, consultative and deliberative process privilege.	
7	Unredacted Report from the NJHT to the DCA Commissioner dated May 16, 2007	One (1) page “Confidential Weekly Division Report to Commissioner Susan Bass Levin”	The information contained in the report reflects the discretionary and deliberative judgment of the individual preparing the report as to what information and comments should be included in the confidential report for the consideration and evaluation of the Commissioner. As such, it is subject to the advisory, consultative and deliberative process privilege.	Disclose entire record (see footnote 7).

## Conclusions and Recommendations

The Executive Director respectfully recommends that the Council find that:

1. The Custodian has complied with the Council's December 19, 2007 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council's Order, as extended.
  
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and provide certified confirmation of compliance pursuant to N.J. Court Rules, R. 1:4-4 to the Executive Director.**

Prepared By:

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

Approved By:

Catherine Starghill  
Executive Director

May 21, 2008