



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

ROBIN BERG TABAKIN, Chair  
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COMMISSIONER LUCILLE DAVY  
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**FINAL DECISION**

**June 25, 2008 Government Records Council Meeting**

Michael L. Pisauro  
Complainant

Complaint No. 2007-146

v.

Township of Long Beach (Ocean)  
Custodian of Record

At the June 25, 2008 public meeting, the Government Records Council (“Council”) considered the June 18, 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 the amended findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian provided the requested documents to the Complainant within the five (5) business days ordered by the Council and the only documents not released were the unapproved minutes which are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1, the Custodian has not unlawfully denied access to the requested meeting minutes and as such, the Custodian is in compliance with the Council’s April 30, 2008 order.
2. Because the Custodian sought and followed legal advice from legal counsel and promptly released the records responsive once the Custodian received a copy of the Council’s April 30, 2007 Interim Order, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. *See Blanchard v. Rahway Board of Education*, GRC Complaint No. 2003-57 (October 2003). However, the Custodian’s unlawful denial of access appears negligent and heedless since she 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 25<sup>th</sup> Day of June, 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: July 2, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
June 25, 2008 Council Meeting**

**Michael L. Pisauro<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-146**

v.

**Township of Long Beach (Ocean)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. A copy of any notes or records, whether in hard copy or electronic format, made by the Board of Commissioners of the Township at any meeting, including executive sessions, where windmills or Ordinance No. 07-21C was discussed.
2. All correspondence or other communication, whether in hard copy or electronic format, that has been made or received by the Township officials and employees regarding this ordinance or windmills in general.
3. Any and all documents that the Township relied on at the regular meeting on May 4, 2007 or may rely on at the regular meeting on June 15, 2007.
4. A copy of any complaints the Township has received regarding windmills.

**Request Made:** May 22, 2007

**Response Made:** May 31, 2007

**Custodian:** Bonnie Leonetti

**GRC Complaint Filed:** June 13, 2007

**Background**

**April 30, 2008**

Government Records Council's ("Council") Interim Order. At its April 30, 2008 public meeting, the Council considered the April 23, 2008 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Pursuant to Mid-Atlantic Recycling Tech v. City of Vineland, 222 F.R.D. 81, 2004 U.S. Dist. Lexis 10549 (D.NJ 2004), the U.S. District Court for New Jersey stated that the Federal Court Rules do not preempt or limit a person's ability to seek documents under OPRA. See also MAG v. Division of ABC, 375 N.J.

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<sup>1</sup>Represented by Thomas Frascella, Esq., of Frascella & Pisauro, LLC (Princeton, NJ). Mr. Frascella is the Complainant's law partner.

<sup>2</sup>Represented by Richard J. Shackleton, Esq. (Ship Bottom, NJ)

Super. 534, 545 (App. Div. 2005). Moreover, OPRA contains no exemption to disclosure for records which are a part of litigation. Thus, the Custodian unlawfully denied access to the requested records and has failed to bear his burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6. As such, the Custodian shall release the requested records to the Complainant.

2. **The Custodian shall comply with paragraph #1 above within five (5) business days from receipt of the Council's Interim Order, with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
3. The Council defers analysis of whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

#### **April 30, 2008**

Council's Interim Order distributed to the parties.

#### **May 7, 2008**

Custodian's response to the Council's Interim Order. On May 7, 2008, via certified mail, the Custodian released to Complainant all records requested except for the closed session minutes which were not adopted by Long Beach Township as of the date of the request.

### **Analysis**

#### **Whether the Custodian complied with the Council's April 30, 2008 Interim Order?**

On May 7, 2008, via certified mail, the Custodian released to the Complainant all documents requested except for the closed session minutes, which the Custodian certifies had not been approved by the governing body as of the date of the request.

Although the Custodian did not release all records requested, the custodian did comply with the Council's Interim Order because the documents not released were exempt from disclosure as inter-agency, intra-agency advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-1.1.; because these draft minutes were not yet approved by the governing body.

OPRA expressly provides that "inter-agency or intra-agency advisory, consultative, or deliberative material" is not included within the definition of a

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

This exemption is equivalent to the deliberative process privilege, which protects from disclosure pre-decisional records that reflect an agency’s deliberations. In re Readoption of N.J.A.C. 10A:23, 367 N.J. Super. 61, 73-74 (App. Div. 2004), certif. den. 182 N.J. 149 (2004); *see also* In re Liq. Of Integrity Ins. Co., 165 N.J. 75 (2000). As a result, OPRA “shields from disclosure documents ‘deliberative in nature, containing opinions, recommendations, or advice about agency policies,’ and ‘generated before the adoption of an agency’s policy or decision.’” Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), quoting Gannet New Jersey Partners LP v. County of Middlesex, 379 N.J. Super. 205, 219 (App. Div. 2005).

The courts have consistently held that draft records of a public agency fall within the deliberative process privilege. See U.S. v. Farley, 11 F.3d 1385 (7<sup>th</sup> Cir. 1993); Pies v. U.S. Internal Rev. Serv., 668 F.2d 1350 (D.C. Cir. 1981); N.Y.C. Managerial Employee Ass’n, v. Dinkins, 807 F.Supp. 955 (S.D.N.Y. 1992); Archer v. Cirrincione, 722 F. Supp. 1118 (S.D. N.Y. 1989); Coalition to Save Horsebarn Hill v. Freedom of Info. Comm., 73 Conn.App. 89, 806 A.2d 1130 (Conn. App. Ct. 2002); pet. for cert. den. 262 Conn. 932, 815 A.2d 132 (2003). As explained in Coalition, the entire draft document is deliberative because in draft form, it “‘reflect[s] that aspect of the agency’s function that precedes formal and informed decision making.’” *Id.* at 95, quoting Wilson v. Freedom of Info. Comm., 181 Conn. 324, 332-33, 435 A.2d 353 (1980).

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

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

the presumption of nondisclosure has been overcome. *Ibid.* (Emphasis added.)

The court similarly held that memos containing draft procedures and protocols were entirely protected from disclosure. *Id.* at 19. *See also* Edwards v. City of Jersey City, GRC Complaint No. 2002-71 (February 27, 2004) (noting that in general, drafts are deliberative materials).

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

Because the Custodian provided the requested documents to the Complainant, except for the unapproved minutes which were exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1, and provided certified proof of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days as ordered by the Council, the Custodian has complied with the Council's April 30, 2008 Interim Order.

**Whether the Custodian's delay in 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.

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).

The evidence of record shows that the Complainant requested the records relevant to this complaint, but was denied access by the Custodian on the grounds that the requested records are part of a litigation file.

The Custodian's Counsel asserted that he advised the Custodian that because the matter was in litigation, it was appropriate that the Complainant follow the New Jersey Rules of Court, and advised the Custodian that instead of providing a response to the Complainant, the Custodian should inform the Complainant that his request for discovery should be directed to the Custodian's Counsel.

In Blanchard v. Rahway Board of Education, GRC Complaint No. 2003-57 (October 2003), the Council determined that a custodian's delay in providing access to the requested records was not unreasonable under the totality of the circumstances given the custodian's stated need to obtain legal advice concerning the OPRA request.

The evidence on record in this matter does not support a determination that the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances. The Custodian in this case behaved in a reasonable and prudent manner. She sought legal advice when confused or unsure of the proper actions that would discharge her legal obligations under OPRA. The Custodian followed the legal advice given to her by counsel. Unfortunately, the information conveyed to her by counsel was incorrect. The Custodian, having reasonably relied on incorrect legal advice, does not display the knowing intent necessary to find a knowing and willful violation of OPRA.

Because the Custodian sought and followed legal advice from legal counsel and promptly released the records responsive once the Custodian received a copy of the Council's April 30, 2007 Interim Order, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. *See* Blanchard v. Rahway Board of Education, GRC Complaint No. 2003-57 (October 2003). However, the Custodian's unlawful denial of access appears negligent and heedless since she 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 Custodian provided the requested documents to the Complainant within the five (5) business days ordered by the Council and the only documents not released were the unapproved minutes which are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1, the Custodian has not unlawfully denied access to the requested meeting minutes and as such, the Custodian is in compliance with the Council's April 30, 2008 order.
2. Because the Custodian sought and followed legal advice from legal counsel and promptly released the records responsive once the Custodian received a copy of the Council's April 30, 2007 Interim Order, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. *See Blanchard v. Rahway Board of Education*, GRC Complaint No. 2003-57 (October 2003). However, the Custodian's unlawful denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By:

Sherin Keys, Esq.  
Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

June 18, 2008





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

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DAVID FLEISHER  
CATHERINE STARGHILL Esq., Executive Director

**INTERIM ORDER**

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

Michael Pisauro  
Complainant

Complaint No. 2007-146

v.

Township of Long Branch (Ocean)  
Custodian of Record

At the April 30, 2008 public meeting, the Government Records Council (“Council”) considered the April 23, 2008 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimous to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Pursuant to Mid-Atlantic Recycling Tech v. City of Vineland, 222 F.R.D. 81, 2004 U.S. Dist. Lexis 10549 (D.NJ 2004), the U.S. District Court for New Jersey stated that the Federal Court Rules do not preempt or limit a person’s ability to seek documents under OPRA. See also MAG v. Division of ABC, 375 N.J. Super. 534, 545 (App. Div. 2005). Moreover, OPRA contains no exemption to disclosure for records which are a part of litigation. Thus, the Custodian unlawfully denied access to the requested records and has failed to bear his burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6. As such, the Custodian shall release the requested records to the Complainant.
2. **The Custodian shall comply with paragraph #1 above within five (5) business days from receipt of the Council’s Interim Order, with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
3. The Council defers analysis of whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees pending the Custodian’s compliance with the Council’s Interim Order.



4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 30<sup>th</sup> 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: April 30, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Michael L. Pisauro<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-146**

v.

**Township of Long Beach (Ocean)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. A copy of any notes or records, whether in hardcopy or electronic format, made by the Board of Commissioners of the Township at any meeting, including executive sessions, where windmills or Ordinance No. 07-21C was discussed.
2. All correspondence or other communication, whether in hardcopy or electronic format, that has been made or received by the Township officials and employees regarding this ordinance or windmills in general.
3. Any and all documents that the Township has relied on at the regular meeting on May 4, 2007 or may rely on at the regular meeting on June 15, 2007.
4. A copy of any complaints the Township has received regarding windmills.

**Request Made:** May 22, 2007

**Response Made:** May 31, 2007

**Custodian:** Bonnie Leonetti

**GRC Complaint Filed:** May 10, 2007

**Background**

**May 22, 2007**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the record relevant to this complaint listed above in a letter attached to an official OPRA request form.

**May 31, 2007**

Custodian's Response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixth (6<sup>th</sup>) business day following receipt of such request. The Custodian states that because the Complainant is engaged in litigation on the requested matter, all communications must go through the Township Counsel, Richard J. Shackleton. The Custodian noted that she was closing the request on the advice of Counsel.

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<sup>1</sup>Represented by Thomas Frascella, Esq., of Frascella & Pisauro, LLC (Princeton, NJ). Mr. Frascella is the Complainant's law partner. The GRC notes that neither the OPRA request form nor the accompanying letter stated that Complainant was represented by counsel.

<sup>2</sup> Represented by Richard J. Shackleton, Esq. (Ship Bottom, NJ).

**June 1, 2007**

Letter from the Complainant to the Custodian's Counsel. The Complainant states that he has received the Custodian's response to his OPRA request. The Complainant also states that it is his position that the Township's proposed Ordinance 07-21C is not part of the litigation entitled Caplicki v. Township of Long Beach, Docket No: OCN-L-664-07, therefore his OPRA request was appropriate. The Complainant further states that he hopes that the Township's response was a miscommunication.

The Complainant asserts that he provided the Custodian's Counsel with a copy of his OPRA request form when it was sent to the Custodian, and it is still the Complainant's understanding that the Township is under an obligation to provide the requested records. The Complainant also asserts that even if his OPRA request was regarding the same subject as the litigation, he is still entitled to the obtain the requested records. The Complainant refers the Custodian's Counsel to Mid-Atlantic Recycling Technologies, Inc. v. City of Vineland, 222 F.R.D. 81, 2004 U.S. Dist. Lexis 10549 (D. NJ 2004).

**June 13, 2007**

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

- Complainant's OPRA request attached to a letter dated May 22, 2007
- Complainant's fax transmittal confirmations dated May 22, 2007
- Custodian's response to the Complainant's OPRA request attached to a copy of the original OPRA request form dated May 31, 2007
- Letter from the Complainant to the Custodian's Counsel dated June 1, 2007

The Complainant asserts that he submitted his OPRA request on May 22, 2007 and that he received the Custodian's response on June 1, 2007. The Complainant also asserts that he spoke with the Custodian's Counsel on June 5, 2007, at which time the Custodian's Counsel refused to provide the requested records.

**June 20, 2007**

Offer of Mediation sent to both parties.

**June 22, 2007**

The Custodian agreed to mediate this complaint. The Complainant did not agree to mediate this complaint.

**July 10, 2007**

Request for the Statement of Information sent to the Custodian.

**July 18, 2007**

Letter from the Custodian's Counsel to the Custodian. The Custodian's Counsel acknowledges the Custodian's request for assistance in setting forth the legal facts and arguments on which the Custodian based her denial of the Complainant's OPRA request. The Custodian's Counsel informs the Custodian that a specific action was filed in

Superior Court against the Township and a client of the Complainant. The Custodian's Counsel also informs the Custodian that the Complainant filed a counterclaim and cross-claim against the Township on behalf of his client on April 16, 2007, and in return the Township filed a cross-claim against the Complainant's client, thus joining the issue.

The Custodian's Counsel asserts that when the issue was joined, Chapter 3 of the New Jersey Rules of Court came into play and Chapter 3 specifically deals with the manner in which counsel shall engage in pre-trial discovery. The Custodian's Counsel also asserts that shortly after the Township filed the cross-claim, the Complainant filed his OPRA request. The Custodian's Counsel further asserts that he advised the Custodian that because the matter is in litigation, it is appropriate that the Complainant follow the New Jersey Rules of Court, and advised the Custodian that instead of providing a response to the Complainant, the Custodian should inform the Complainant that his request for discovery should be directed to the Custodian's Counsel.

The Custodian's Counsel states that shortly after he advised the Custodian to deny the Complainant's request, the plaintiff in the litigation submitted her own separate OPRA request. The Custodian's Counsel also contends that he advised the Custodian that since the plaintiff in the litigation was not an attorney engaged in litigation, but rather was represented by an attorney, the plaintiff's request as a taxpayer was to be honored by the Custodian.

The Custodian's Counsel asserts that after practicing law for forty-seven (47) years, he considers it imperative that attorneys comply with the New Jersey Rules of Court and that discovery be conducted through the procedures provided for in the Rules. The Custodian's Counsel also asserts that the issue of responding to OPRA requests when matters are in litigation is complex. The Custodian's Counsel further asserts that MAG v. Division of ABC, 375 N.J. Super. 534 (App. Div. 2005) addressed an issue where the Plaintiff or Petitioner filed an OPRA request and also sought discovery through the Courts, and the courts held:

“...although the purpose or motive for which information is sought is generally immaterial to the disclosure determination under OPRA, here the manner in which MAG attempted to use OPRA as a vehicle to transfer management of the discovery process in the administrative proceeding from the ALJ to the Law Division was patently improper.”

### **July 23, 2007**

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

- Complainant's OPRA request attached to a letter dated May 22, 2007
- Government Records Request Receipt from the Custodian to the Complainant dated May 4, 2007<sup>3</sup>

The Custodian certifies that she received the Complainant's OPRA request on May 22, 2007 and she responded in writing to the request on May 31, 2007. The

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<sup>3</sup> The Custodian attached other documents not relevant to the adjudication of this complaint.  
Michael Pisauro v. Township of Long Beach (Ocean), 2007-146 – Findings and Recommendations of the Executive Director

Custodian also certifies within the document index format that there are nine (9) records that are responsive to the Complainant’s OPRA request. However, none of the records were provided to the Complainant because they are all part of a litigation file pursuant to NJ Rules of Court, Chapter 3 and MAG v. Division of ABC, 375 N.J. Super. 534 (App. Div. 2005), as stated in the Custodian Counsel’s letter of July 18, 2007.

The Custodian provided the GRC with the following responses to the document index format:

<b>List of all records responsive to Complainant’s OPRA request (include the number of pages for each record).</b>	<b>List of all records provided to Complainant, in their entirety or with redactions (include the date such records were provided).</b>	<b>If records were disclosed with redactions, give a general nature description of the redactions.</b>	<b>If records were denied in their entirety, give a general nature description of the record.</b>	<b>List the legal explanation and statutory citation for the denial of access (including redactions) as required under <u>N.J.S.A. 47:1A-6</u>.</b>
<ul style="list-style-type: none"> <li>• Meeting specifications on windmill model- approx. 23 pages</li> <li>• Ordinance 07-21C with relevant documents- 6 pages</li> <li>• Lawsuit and relevant documents- 25 pages</li> <li>• Residents Letters- approx. 5 pages</li> <li>• Miscellaneous Correspondence - approx. 15 pages</li> <li>• Governments Executed Ordinance #54-7 pages</li> <li>• Newspaper Articles- approx. 4 pages</li> <li>• Building Department file- approx. 85</li> </ul>	None	Correspondence Minutes Specifications Permits & Violations. <sup>4</sup>	All records are part of litigation file.	NJ Rules of Court, Chapter 3 and <u>MAG v. Division of ABC</u> , 375 N.J. Super. 534 (App. Div. 2005) as stated in the Custodian Counsel’s letter of July 18, 2007.

<sup>4</sup> The Custodian mistakenly included this information due to a misinterpretation of the question. Further clarification is in the Custodian’s Counsel’s submission dated August 3, 2007.

pages • Minutes of Executive and/or Closed Sessions- approx. 20 pages				
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**July 30, 2007**

Letter from Complainant’s Counsel to the GRC in response to the Custodian’s Statement of Information. The Complainant’s Counsel asserts that the Custodian’s submission in Item #9, stating that the correspondence, minutes, specification, permits and violations have been provided with redactions, is false because the Custodian has not provided the Complainant with any records responsive to his OPRA request. The Complainant’s Counsel also asserts that the Custodian contends that the requested records are involved in the litigation instituted by Mrs. Caplicki, in which the Complainant’s client, Mr. Mercurio, is a defendant. The Complainant’s Counsel further states that the Custodian contends that the Complainant, as an attorney for Mr. Mercurio, is unable to request records under OPRA.

The Complainant’s Counsel attests that the OPRA request was not in response to the litigation filed by Mrs. Caplicki; the OPRA request relates to a proposed ordinance that the Township sought to enact. The Complainant’s Counsel asserts that Township Ordinance 07-21C seeks to ban the installation of wind turbines because they are deemed to be a safety hazard. The Complainant’s Counsel also asserts that the Township had their first reading of the ordinance on May 4, 2007 and this is what prompted the Complainant to request the records pursuant to OPRA; further, the Township scheduled a second reading on June 15, 2007. The Complainant’s Counsel further asserts that a careful review of the complaint and the litigation matter will reveal that the litigation does not involve either wind turbine safety or the proposed ordinance.

The Complainant’s Counsel explains that in the litigation, Mrs. Caplicki seeks to have Mr. Mercurio’s wind turbine declared a nuisance because of noise and because it throws a strobe-like shadow on Mrs. Caplicki’s property, and a determination of whether the Township should not have issued the permits and whether Mr. Mercurio constructed the wind turbine in accordance with the approved plans. The Complainant’s Counsel states that none of the issues in the civil case concern the safety aspects of the wind turbine and the litigation does not directly touch upon the Township’s proposed ordinance. The Complainant’s Counsel further states that, even if the records requested under OPRA were involved in the litigation, OPRA may be used to obtain publicly available documents.

The Complainant’s Counsel contends that the Custodian’s citation of MAG v. Division of ABC, 375 N.J. Super 534 (App. Div. 2005) as the justification for denial of the OPRA request is incorrect and the Custodian seeks to abridge the Complainant’s OPRA rights. The Complainant’s Counsel also contends that in MAG, the court cited to Mid-Atlantic Recycling Tech v. City of Vineland, 222 F.R.D. 81, 2004 U.S. Dist. Lexis 10549 (D.NJ 2004), in which the U.S. District Court for New Jersey stated that the Federal Court Rules do not preempt or limit a person’s ability to seek documents under

OPRA. The Complainant's Counsel further contends that the OPRA request was made in anticipation of addressing the Township's concerns regarding windmills during the public meeting held by the Township on June 15, 2007, when the Township intended to vote on the proposed ordinance on the second reading.

The Complainant's Counsel asserts that it is up to the Custodian to prove its denial of access to the requested records was authorized by law pursuant to N.J.S.A. 47:1A-6 and the Custodian has not shown a valid reason for its denial of the Complainant's OPRA request. The Complainant's Counsel requests that the Council find that the Custodian has violated OPRA, order the Township to provide the requested records and award attorney's fees.

### **August 3, 2007**

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel clarifies the error that the Custodian made when responding to the GRC's request for the Statement of Information by stating that in the column "if records were disclosed with redactions, give a general nature description of the redactions," the response should have been "not applicable."

The Custodian's Counsel asserts that the Complainant contends that he was seeking records to prepare opposition to a Zoning Ordinance amendment proposed by the Township. The Custodian's Counsel also asserts that the Complainant's letter dated June 1, 2007 does state that his OPRA request is not part of the litigation, but goes on to refer to Mid-Atlantic Recycling Technologies, Inc. v. City of Vineland, and, based on that, the Custodian's Counsel asserted that the Complainant was really requesting the information through OPRA. The Custodian's Counsel further asserts that he does not believe that the federal court ruling on the Federal Rules of Civil Procedure is applicable to matters in litigation in the state court system.

The Custodian's Counsel contends that the Complainant and his Counsel are seeking attorney's fees but are not justified in this situation because the Township relied on the advice of Counsel when denying the records.

### **Analysis**

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

OPRA provides that:

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

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or



in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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

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

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6. A custodian must also release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1.

The evidence of record shows that the Complainant requested the records relevant to this complaint listed above, but was denied access by the Custodian on the grounds that the requested records are part of a litigation file.

The Custodian Counsel’s reliance on MAG Entertainment, LLC v. Division Of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), for the proposition that a litigant may only use the discovery process to obtain records, rather than OPRA, is misplaced. The Custodian’s Counsel states that the Appellate Division in MAG held that:

“...although the purpose or motive for which information is sought is generally immaterial to the disclosure determination under OPRA, here the manner in which MAG attempted to use OPRA as a vehicle to transfer management of the discovery process in the administrative proceeding from the ALJ to the Law Division was patently improper.” *Id.* at 543.

However, this language is taken out of its context within the Appellate Division’s decision. The Appellate Division clearly recognized that requests for records pursuant to OPRA and discovery activities are not mutually exclusive when it specifically stated that “[a] party’s right to access public records [under OPRA] is not abridged because it may be involved in other litigation with the governmental agency required to respond to the OPRA request.” *Id.* at 545.

Pursuant to Mid-Atlantic Recycling Tech v. City of Vineland, 222 F.R.D. 81, 2004 U.S. Dist. Lexis 10549 (D.NJ 2004), the U.S. District Court for New Jersey stated that the Federal Court Rules do not preempt or limit a person’s ability to seek documents under OPRA.<sup>5</sup> Moreover, OPRA contains no exemption to disclosure for records which are a part of litigation. Thus, the Custodian unlawfully denied access to the requested records and has failed to bear his burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6. As such, the Custodian shall release the requested records to the Complainant.

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<sup>5</sup> Cited by the Appellate Division in MAG, 375 N.J. Super. at 543.  
Michael Pisauro v. Township of Long Beach (Ocean), 2007-146 – Findings and Recommendations of the Executive Director

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

The Council defers analysis of whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees pending the Custodian’s compliance with the Council’s Interim Order.

**Whether the Custodian’s delay in access to the requested meeting minutes rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Pursuant to Mid-Atlantic Recycling Tech v. City of Vineland, 222 F.R.D. 81, 2004 U.S. Dist. Lexis 10549 (D.NJ 2004), the U.S. District Court for New Jersey stated that the Federal Court Rules do not preempt or limit a person’s ability to seek documents under OPRA. See also MAG v. Division of ABC, 375 N.J. Super. 534, 545 (App. Div. 2005). Moreover, OPRA contains no exemption to disclosure for records which are a part of litigation. Thus, the Custodian unlawfully denied access to the requested records and has failed to bear his burden of proof that the denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6. As such, the Custodian shall release the requested records to the Complainant.
2. **The Custodian shall comply with paragraph #1 above within five (5) business days from receipt of the Council’s Interim Order, with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
3. The Council defers analysis of whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees pending the Custodian’s compliance with the Council’s Interim Order.
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Prepared By:

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Approved By:

Catherine Starghill, Esq.  
Executive Director

April 23, 2008