



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

November 4, 2009 Government Records Council Meeting

Howard A. Kupferman
Complainant

Complaint No. 2007-152

v.

Long Hill Township Board of Education (Morris)
Custodian of Record

At the November 4, 2009 public meeting, the Government Records Council (“Council”) considered the October 21, 2009 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian certified he previously made all working spreadsheets used to project the 2007-2008 budget available in electronic format to the Complainant, and because the Custodian provided certified confirmation of compliance, pursuant to N.J. Court Rule 1:4-4, to the Executive Director within five (5) business days of receiving the Council’s Interim Order, the Custodian has complied with the Council’s September 30, 2009 Interim Order.
2. Although the Custodian failed to provide the audited financial statements for 2005-2006 in the requested electronic medium and failed to make the 2007-2008 budgetary records immediately available upon receipt of the Complainant’s OPRA request, because the Custodian did disclose those records to which the Complainant was entitled, lawfully denied access to the balance of the requested records and complied with the Council’s September 30, 2009 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. However, the Custodian’s unlawful denial of access by failing to immediately disclose budgetary records appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.
3. Because no change has come about in the Custodian’s actions as a result of the complaint, the Complainant is not a prevailing party as defined in Teeters



v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and as such is not entitled to prevailing party attorney's fees. *See also, Mason v. City of Hoboken and City Clerk of the City of Hoboken*, 196 N.J. 51 (2008) and N.J.S.A. 47:1A-6.

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 4th Day of November, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: November 9, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
November 4, 2009 Council Meeting**

**Howard A. Kupferman¹
Complainant**

GRC Complaint No. 2007-152

v.

**Long Hill Township Board of Education (Morris)²
Custodian of Records**

Records Relevant to Complaint:

March 14, 2007 Request

The Complainant requests the following records via e-mail:

1. The proposed line item budget for 2007-2008 in spreadsheet format.
2. The audited financial statements for (a) 2005-2006 and (b) 2006-2007 in spreadsheet format.
3. Any other working spreadsheets used to project the 2007-2008 budget in electronic format.

March 31, 2007 Request

The Complainant requests copies of the following records via e-mail:

1. Any and all electronic spreadsheets in their native form used to produce the 2004-2005, 2005-2006 and 2006-2007 budgets, inclusive of all embedded calculations.
2. Any and all electronic spreadsheets in their native form used to produce the 2003-2004, 2004-2005 and 2005-2006 audited financial statements, inclusive of all embedded calculations.

April 25, 2007 Request

The Complainant requests via e-mail all Board of Education (“BOE”) handwritten detailed meeting minutes for public and private sessions from January 2006 to present in electronic format.

May 8, 2007 Request

The Complainant requests via e-mail copies of minutes, including closed session minutes, for the three (3) most recent BOE meetings.

¹ Represented by Walter M. Luers, Esq. (Oxford, NJ).

² Represented by Nicholas Celso, Esq. (Morristown, NJ).

Requests Made: March 14, 2007, March 31, 2007, April 25, 2007 and May 8, 2007³
Response Made: March 14, 2007, April 11, 2007, April 25, 2007 and May 9, 2007
Custodian: John Esposito
GRC Complaint Filed: July 10, 2007⁴

Background

September 30, 2009

Government Records Council's ("Council") Interim Order. At its September 30, 2009 public meeting, the Government Records Council ("Council") considered the September 23, 2009 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. Because *N.J.A.C.* 6A:23-8.7(a) provides that a board of education budget must be made available to the public upon its submission to the county superintendent or by the statutory submission date, whichever is earlier, and because the 2007-2008 budget's submission to the county superintendent predated the Complainant's OPRA request for said budget, and because *N.J.S.A.* 47:1A-5.e. provides that "[i]mmediate access ordinarily shall be granted to budgets...", by not making the records immediately available upon receipt of the Complainant's OPRA request, the Custodian unlawfully denied the Complainant access to the budget and the budget spreadsheets, listed as Items #1 and #3 of the Complainant's March 14, 2007 records request, respectively.
2. Because the Custodian failed to prove that the denial of access was authorized by law, the Custodian shall disclose in the medium requested the records listed as Item #3 of the Complainant's March 14, 2007 records request with appropriate redactions, if any. If any portions of the record are redacted, the Custodian must provide a redaction index detailing the nature of the information redacted and the lawful basis for the redaction(s).⁵
3. **The Custodian shall comply with item #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, 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 Denial of Access Complaint lists April 29, 2007 and May 9, 2007 as the latter two request dates, but the record reveals the actual dates of the latter two requests were April 25, 2007 and May 8, 2007.

⁴ The GRC received the Denial of Access Complaint on said date. The complaint as received was signed by the Complainant's Counsel; however, the Complainant subsequently signed the complaint on July 17, 2007.

⁵ The record listed as Item #1, the 2007-2008 line item budget, was previously disclosed to the Complainant electronically on April 13, 2007.

4. Because the Custodian responded to the Complainant's March 14, 2007 OPRA request on the same day the request was received by denying the Complainant access to the 2005-2006 audited financial statements via e-mail in spreadsheet format, in a medium conducive to e-mail delivery which was the medium requested, and because N.J.S.A. 47:1A-5.d. provides that a custodian shall permit access to a government record in the medium requested, the Custodian has unlawfully denied access to Item 2(a) of the Complainant's March 14, 2007 request.
5. Because the Custodian certified that he informed the Complainant that there were no records responsive to the Complainant's request for the 2006-2007 audited financial statements, and because there is no credible evidence to refute the Custodian's certification in the record, the Custodian did not unlawfully deny the Complainant access to the audited financial statements for 2006-2007, listed as Item #2(b) of the Complainant's March 14, 2007 records request, pursuant to N.J.S.A. 47:1A-1.1. See Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).
6. Because the records requested in Item #1 and Item #2 of the Complainant's March 31, 2007 request were used as part of the decision-making process to produce the 2003-2004, 2004-2005 and 2005-2006 budgets and audited financial statements, the records are exempt from disclosure under N.J.S.A. 47:1A-1.1 because they constitute advisory, consultative, or deliberative material, therefore the Custodian has no legal duty to disclose said records.
7. The Complainant's records requests dated April 25, 2007 and May 8, 2007 were not valid OPRA requests because the Complainant refused to submit the requests on the official OPRA request forms provided by the Long Hill Township Board of Education, and as such, the Custodian's refusal to fulfill the records requests does not amount to an unlawful denial of access pursuant to the provisions of OPRA.
8. 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.
9. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

October 5, 2009

Council's Interim Order distributed to the parties.

October 8, 2009

Custodian's certification in response to the Council's Interim Order. The Custodian certifies that he received the Council's September 30, 2009 Interim Order on October 5, 2009. The Custodian certifies that all working spreadsheets used to project the 2007-2008 budget have been disclosed to the Complainant because fourteen (14) such

worksheets were linked together and contained within the 2007-2008 budget spreadsheet disclosed to the Complainant on April 13, 2007. The Custodian certifies that no other working spreadsheets used to project the 2007-2008 budget exist.

Analysis

Whether the Custodian complied with the Council's September 30, 2009 Interim Order?

In this matter, the Custodian failed to grant immediate access to the Complainant's request for all working spreadsheets used to project the 2007-2008 budget. The Council determined that said records must be disclosed pursuant to N.J.S.A. 47:1A-5.e. which provides that "[i]mmediate access ordinarily shall be granted to budgets..."

Accordingly, the Council's September 30, 2009 Interim Order directed the Custodian to disclose all working spreadsheets used to project the 2007-2008 budget in electronic format, with all appropriate redactions, if any, within five (5) business days from receipt of the Council's Interim Order.

The Custodian certified that he received a copy of the Interim Order on October 5, 2009 and the Custodian further certified that all working spreadsheets used to project the 2007-2008 budget in electronic format have been disclosed to the Complainant because fourteen (14) such worksheets were linked together and contained within the 2007-2008 budget spreadsheet disclosed to the Complainant on April 13, 2007.

Therefore, because the Custodian made all working spreadsheets used to project the 2007-2008 budget available to the Complainant, and because the Custodian provided certified confirmation of compliance, pursuant to N.J. Court Rule 1:4-4, to the Executive Director within five (5) business days of receiving the Council's Interim Order, the Custodian has complied with the Council's September 30, 2009 Interim Order.

Whether the Custodian's delay in granting 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, 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, 107 (App. Div. 1996).

Although the Custodian failed to provide the audited financial statements for 2005-2006 in the requested electronic medium and failed to make the 2007-2008 budgetary records immediately available upon receipt of the Complainant’s OPRA request, because the Custodian did disclose those records to which the Complainant was entitled, lawfully denied access to the balance of the requested records and complied with the Council’s September 30, 2009 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. However, the Custodian’s unlawful denial of access by failing to immediately disclose budgetary records appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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

OPRA provides that:

“[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. *Id.*

at 432. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

In Teeters, the Complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f., against the Division of Youth and Family Services ("DYFS"). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the Complainant. The Complainant received the records she requested upon entering into a settlement with DYFS. The court found that the Complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS's part. *Id.* As a result, the Complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the court remanded the determination of reasonable attorney's fees to the GRC for adjudication.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). The court in Buckhannon stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7th ed. 1999)). The court in Mason, *supra*, at 76, held that "requestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.'" Singer v. State, 95 N.J. 487, 495, cert denied (1984)."

In the complaint now before the Council the Complainant's Counsel requested the following relief:

1. A declaration that the Custodian violated OPRA by failing to provide immediate access to budget documents.
2. A declaration that the Custodian violated OPRA by denying the Complainant access to records because the Complainant did not sign the BOE's OPRA request form.
3. A decision recommending that the Custodian knowingly and willfully violated OPRA and should be fined pursuant to N.J.S.A. 47:1A-11.
4. An award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6.

With respect to Counsel's first request for relief, the Council did find that the Custodian violated OPRA by failing to provide immediate access to budget documents.⁶ However, on April 13, 2007, several months **before** the complaint was filed in this matter, the Custodian disclosed the 2007-2008 budget. Moreover, in the Council's September 30, 2009 Interim Order, the Council directed the Complainant to disclose all of the working spreadsheets used to project the 2007-2008 budget in electronic format. The Custodian certified, however, that he had already disclosed these records in electronic format along with the budget on April 13, 2007. Therefore the complaint, having been filed after the Custodian acted, had no impact whatsoever upon the Custodian's decision to disclose the budget documents.

Counsel's second request for relief fails to state grounds upon which relief can be granted. Contrary to Counsel's assertion, the Custodian did not deny the Complainant access to records because the Complainant failed to sign the BOE's OPRA request form. Rather, the Custodian properly rejected the requests as invalid OPRA requests because the Complainant failed and refused to submit the requests on the official OPRA request forms provided by the BOE.⁷

Third, Counsel seeks a recommendation that the Custodian knowingly and willfully violated OPRA and should be fined. The issue of whether the Custodian's delay in granting access to the requested records rises to the level of a knowing and willful violation of OPRA was analyzed *supra*. The conclusion reached is 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.

Finally, Counsel asks for an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6. The Complainant, by virtue of filing the complaint in this matter, failed to achieve the desired result of disclosure of requested records. Therefore, because no change has come about in the Custodian's actions as a result of the complaint, the Complainant is not a prevailing party as defined in Teeters, *supra*, and as such is not entitled to prevailing party attorney's fees. *See also*, Mason, *supra*, and N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian certified he previously made all working spreadsheets used to project the 2007-2008 budget available in electronic format to the Complainant, and because the Custodian provided certified confirmation of compliance, pursuant to N.J. Court Rule 1:4-4, to the Executive Director within five (5) business days of receiving the Council's Interim Order, the Custodian has complied with the Council's September 30, 2009 Interim Order.

⁶ See Paragraph 1 of the Council's September 30, 2009 Interim Order.

⁷ The requests at issue were e-mail requests dated April 25, 2007 and May 8, 2007.

2. Although the Custodian failed to provide the audited financial statements for 2005-2006 in the requested electronic medium and failed to make the 2007-2008 budgetary records immediately available upon receipt of the Complainant's OPRA request, because the Custodian did disclose those records to which the Complainant was entitled, lawfully denied access to the balance of the requested records and complied with the Council's September 30, 2009 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. However, the Custodian's unlawful denial of access by failing to immediately disclose budgetary records appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

3. Because no change has come about in the Custodian's actions as a result of the complaint, the Complainant is not a prevailing party as defined in Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and as such is not entitled to prevailing party attorney's fees. *See also*, Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008) and N.J.S.A. 47:1A-6.

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

October 21, 2009



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

September 30, 2009 Government Records Council Meeting

Howard A. Kupferman
Complainant

Complaint No. 2007-152

v.

Long Hill Township Board of Education (Morris)
Custodian of Record

At the September 30, 2009 public meeting, the Government Records Council (“Council”) considered the September 23, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because *N.J.A.C. 6A:23-8.7(a)* provides that a board of education budget must be made available to the public upon its submission to the county superintendent or by the statutory submission date, whichever is earlier, and because the 2007-2008 budget’s submission to the county superintendent predated the Complainant’s OPRA request for said budget, and because *N.J.S.A. 47:1A-5.e.* provides that “[i]mmediate access ordinarily shall be granted to budgets...”, by not making the records immediately available upon receipt of the Complainant’s OPRA request, the Custodian unlawfully denied the Complainant access to the budget and the budget spreadsheets, listed as Items #1 and #3 of the Complainant’s March 14, 2007 records request, respectively.
2. Because the Custodian failed to prove that the denial of access was authorized by law, the Custodian shall disclose in the medium requested the records listed as Item #3 of the Complainant’s March 14, 2007 records request with appropriate redactions, if any. If any portions of the record are redacted, the Custodian must provide a redaction index detailing the nature of the information redacted and the lawful basis for the redaction(s).¹

¹ The record listed as Item #1, the 2007-2008 line item budget, was previously disclosed to the Complainant electronically on April 13, 2007.



3. **The Custodian shall comply with item #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, 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 1:4-4², to the Executive Director.**
4. Because the Custodian responded to the Complainant's March 14, 2007 OPRA request on the same day the request was received by denying the Complainant access to the 2005-2006 audited financial statements via e-mail in spreadsheet format, in a medium conducive to e-mail delivery which was the medium requested, and because N.J.S.A. 47:1A-5.d. provides that a custodian shall permit access to a government record in the medium requested, the Custodian has unlawfully denied access to Item 2(a) of the Complainant's March 14, 2007 request.
5. Because the Custodian certified that he informed the Complainant that there were no records responsive to the Complainant's request for the 2006-2007 audited financial statements, and because there is no credible evidence to refute the Custodian's certification in the record, the Custodian did not unlawfully deny the Complainant access to the audited financial statements for 2006-2007, listed as Item #2(b) of the Complainant's March 14, 2007 records request, pursuant to N.J.S.A. 47:1A-1.1. See Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).
6. Because the records requested in Item #1 and Item #2 of the Complainant's March 31, 2007 request were used as part of the decision-making process to produce the 2003-2004, 2004-2005 and 2005-2006 budgets and audited financial statements, the records are exempt from disclosure under N.J.S.A. 47:1A-1.1 because they constitute advisory, consultative, or deliberative material, therefore the Custodian has no legal duty to disclose said records.
7. The Complainant's records requests dated April 25, 2007 and May 8, 2007 were not valid OPRA requests because the Complainant refused to submit the requests on the official OPRA request forms provided by the Long Hill Township Board of Education, and as such, the Custodian's refusal to fulfill the records requests does not amount to an unlawful denial of access pursuant to the provisions of OPRA.
8. 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.

² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

9. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 30th Day of September, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: October 5, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 30, 2009 Council Meeting**

**Howard A. Kupferman¹
Complainant**

GRC Complaint No. 2007-152

v.

**Long Hill Township Board of Education (Morris)²
Custodian of Records**

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2. The audited financial statements for (a) 2005-2006 and (b) 2006-2007 in spreadsheet format.
3. Any other working spreadsheets used to project the 2007-2008 budget in electronic format.

March 31, 2007 Request

The Complainant requests copies of the following records via e-mail:

1. Any and all electronic spreadsheets in their native form used to produce the 2004-2005, 2005-2006 and 2006-2007 budgets, inclusive of all embedded calculations.
2. Any and all electronic spreadsheets in their native form used to produce the 2003-2004, 2004-2005 and 2005-2006 audited financial statements, inclusive of all embedded calculations.

April 25, 2007 Request

The Complainant requests via e-mail all Board of Education (“BOE”) handwritten detailed meeting minutes for public and private sessions from January 2006 to present in electronic format.

May 8, 2007 Request

The Complainant requests via e-mail copies of minutes, including closed session minutes, for the three (3) most recent BOE meetings.

¹ Represented by Walter M. Luers, Esq. (Oxford, NJ).

² Represented by Nicholas Celso, Esq. (Morristown, NJ).

Requests Made: March 14, 2007, March 31, 2007, April 25, 2007 and May 8, 2007³
Response Made: March 14, 2007, April 11, 2007, April 25, 2007 and May 9, 2007
Custodian: John Esposito
GRC Complaint Filed: July 10, 2007⁴

Background

March 14, 2007

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.⁵

March 14, 2007

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the same business day he receives the request. The Custodian informs the Complainant that the 2007-2008 budget has not been approved. The Custodian states that he delivered it to the County Superintendent's office on March 13, 2007, and it is presently under review by the County Superintendent. The Custodian also informs the Complainant that the audit for 2005-2006 is not available in electronic format, but can be copied, in which case copy fees would be applicable. The Custodian further informs the Complainant that said audit is lengthy but is available for on-site examination by the Complainant. The Custodian advises the Complainant that the audit for 2006-2007 will not be completed until after the year closes on June 30, 2007, therefore it is not available.

March 17, 2007

E-mail from the Complainant to the Custodian. The Complainant sends the Custodian a reprint of a March 16, 2007 Star Ledger article titled, "\$1,000 Fine Looms for Withholding Documents." The Complainant also states that he will see the Custodian on March 19, 2007 at 10:00 a.m.

March 20, 2007

E-mail from the Complainant to the Custodian. The Complainant asks the Custodian for a schedule of budget hearings.

March 20, 2007

E-mail from the Custodian to the Complainant. The Custodian provides the Complainant with the schedule of budget hearings.

³ The Denial of Access Complaint lists April 29, 2007 and May 9, 2007 as the latter two request dates, but the record reveals the actual dates of the latter two requests were April 25, 2007 and May 8, 2007.

⁴ The GRC received the Denial of Access Complaint on said date. The complaint as received was signed by the Complainant's Counsel; however, the Complainant subsequently signed the complaint on July 17, 2007.

⁵ The form used was the OPRA request form designed by the BOE ("old form"); it is not based on the GRC's model request form.

March 20, 2007

E-mail from the Complainant to the Custodian. The Complainant asks the Custodian to explain the purpose of the budget hearing and the Complainant also asks the Custodian whether the Complainant will be able to get the budget spreadsheet before the hearing.

March 28, 2007

E-mail from the Custodian to the Complainant. The Custodian e-mails the Complainant the proposed 2007-2008 budget presentation and the back-up generated by the NJ Department of Education software. The Custodian states that he hopes the information is helpful to the Complainant.

March 29, 2007

E-mail from the Complainant to the Custodian. The Complainant acknowledges that his request may not have been clear because the records the Custodian provided were in a format that could not be manipulated by the Complainant. The Complainant requests the Custodian to disclose the actual spreadsheets used to manipulate the data in its original format. The Complainant parenthetically states “.xis, .wrk, etc.”

March 30, 2007

E-mail from the Custodian to the Complainant. The Custodian attaches a copy of the BOE's OPRA request form and asks the Complainant to resubmit his e-mail request dated March 29, 2007 on the official form.⁶

March 31, 2007

Complainant's Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.⁷

April 11, 2007

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request.⁸ The Custodian informs the Complainant that he is responding to the Complainant's request and will make available to the Complainant electronic copies at no charge in the future; however, the Custodian informs the Complainant that if a significant amount of time is required to convert the records to electronic copies, the BOE will assess a special service charge.

⁶ The Custodian states that later this same date the Complainant visits the Custodian at the Custodian's office and the parties discuss the Complainant's requests for budget items. The Custodian states that he explains the status of the budget to the Complainant and informs the Complainant that the budget was subject to change.

⁷ The form used was the old form.

⁸ The Complainant sent in his records request on Saturday, March 31, 2007; therefore it would have been received by the Custodian on the next business day, Monday, April 2, 2007. April 6, 2007 was a holiday, therefore April 11, 2007 was the sixth (6th) business day following date of receipt.

April 12, 2007

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that the Custodian is compiling the information requested by the Complainant. The Custodian also informs the Complainant that he will provide the Complainant with a copy of the approved 2007-2008 budget once it is passed.

April 12, 2007

E-mail from the Complainant to the Custodian. The Complainant states that if the Custodian charges him any fee whatsoever for electronic copies, the Custodian must justify said fee with a time-motion study.

April 12, 2007

E-mail from the Complainant to the Custodian. The Complainant informs the Custodian that the statutorily mandated time for the Custodian's response to the Complainant's records request had elapsed. The Complainant further admonishes the Custodian for deliberately withholding the requested records and contends that the Custodian will be personally liable for any fines assessed for violating OPRA.

April 13, 2007

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that he has attached a copy of the 2007-2008 budget, but it has not yet been voted upon and is subject to change. The Custodian also advises the Complainant that no spreadsheets exist for previous year budgets and no spreadsheets exist for audits.

April 25, 2007

Complainant's e-mail records request. The Complainant requests the records relevant to this complaint listed above in an e-mail to the Custodian.

April 25, 2007

Custodian's response to the e-mail records request. The Custodian responds in writing to the Complainant's e-mail records request on the same business day he receives the request. The Custodian informs the Complainant that the Complainant must resubmit his request on an official OPRA request form.⁹

April 26, 2007

E-mail from the Complainant to the Custodian. The Complainant states that the OPRA request form the Custodian sent him is unacceptable and the Complainant refuses to complete and submit it to the Custodian. Instead, the Complainant resubmits his records request by e-mail letter format.

April 26, 2007

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that requests for records must be submitted on the official form and attaches a form to the e-mail with instructions for the Complainant to complete and return it.

⁹ This OPRA request form was recently revised by the BOE. The Custodian certifies that it was prepared from the model request form on the GRC website.
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May 8, 2007

Complainant's e-mail records request. The Complainant requests the records relevant to this complaint listed above in an e-mail to the Custodian. The Complainant emphatically informs the Custodian that he will not sign or submit any OPRA request forms.

May 9, 2007

Custodian's response to the e-mail records request. The Custodian responds in writing to the Complainant's e-mail records request on the same business day he receives the request.¹⁰ The Custodian informs the Complainant that the BOE OPRA request form is required for records requests pursuant to BOE policy. The Custodian informs the Complainant that the Complainant must therefore make his request upon the official OPRA request form.

May 10, 2007

E-mail from the Complainant to the Custodian. The Complainant states that he will not prepare any OPRA request forms and demands that the Custodian comply with his requests as submitted within seven (7) business days.

July 10, 2007

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

- Complainant's OPRA request dated March 14, 2007¹¹
- E-mail from the Complainant to the Custodian dated March 20, 2007
- E-mail from the Custodian to the Complainant dated March 20, 2007
- E-mail from the Complainant to the Custodian dated March 20, 2007
- E-mail from the Custodian to the Complainant dated March 28, 2007
- E-mail from the Complainant to the Custodian dated March 29, 2007
- E-mail from the Custodian to the Complainant dated March 30, 2007
- Complainant's OPRA request dated March 31, 2007¹²
- E-mail from the Custodian to the Complainant dated April 12, 2007
- E-mail from the Complainant to the Custodian dated April 12, 2007
- E-mail from the Custodian to the Complainant dated April 13, 2007
- Complainant's records request in the form of an e-mail dated April 25, 2007
- Custodian's response to Complainant's April 25, 2007 e-mail records request dated April 25, 2007
- E-mail from the Complainant to the Custodian dated April 26, 2007
- E-mail from the Custodian to the Complainant dated April 26, 2007
- Complainant's records request in the form of an e-mail dated May 8, 2007

¹⁰ The e-mail request was dated May 8, 2007 at 8:13 pm; therefore, it was received by the agency on the next business day.

¹¹ The Complainant failed to attach to the Denial of Access Complaint the Custodian's March 14, 2007 response to this request.

¹² The Complainant failed to attach to the Denial of Access Complaint the Custodian's April 11, 2007 response to this request.

- Custodian's response to Complainant's May 8, 2007 e-mail records request dated May 9, 2007
- E-mail from the Complainant to the Custodian dated May 10, 2007

The Complainant asserts that on March 14, 2007 he requested from the Custodian the BOE's 2007-2008 budget and the spreadsheets supporting the budget in native format. The Complainant states that he requested the records because the BOE was scheduled to vote on that budget on April 18, 2007 and the Complainant wanted to analyze the budget prior to the vote. The Complainant states that a summary of the BOE's legal expenses reveals that on March 15, 2007, the Custodian's Counsel spent 4.75 hours researching, scanning and copying; however, no records were immediately provided to the Complainant.

The Complainant asserts that he sent an e-mail to the Custodian dated March 20, 2007, inquiring whether the Complainant would receive the records he requested prior to the budget hearing. The Complainant states that the Custodian responded with an e-mail dated March 28, 2007 containing an attached read-only record which contained some of the requested documents. The Complainant states that he sent the Custodian an e-mail on March 29, 2007 wherein he requested the actual spreadsheets used to manipulate the data in their original format. The Complainant further states that in reply to his March 29, 2007 e-mail, the Custodian sent an e-mail to him dated March 30, 2007 containing an official OPRA request form for completion by the Complainant.

The Complainant states that he e-mailed an OPRA records request dated March 31, 2007 to the Custodian in which he requested the records relevant to this complaint. The Complainant contends the Custodian responded to the Complainant by e-mail dated April 12, 2007 in which the Custodian informed the Complainant that he was compiling the requested information. The Complainant states he sent a reply e-mail on April 12, 2007, in which he informed the Custodian that the Custodian failed to respond to his request within the statutorily mandated time. The Complainant states that on April 13, 2007 the Custodian sent him records that were not responsive to his request.

The Complainant further states he subsequently filed additional OPRA requests on April 25, 2007 and May 9, 2007.¹³ The Complainant contends the Custodian refused to respond to these requests because they were not signed by the Complainant.

The Complainant contends the Custodian violated N.J.S.A. 47:1A-5.e., because by providing the requested information on April 13, 2007, the Custodian failed to grant immediate access to budgets and employee salary and overtime information. The Complainant also contends that the Custodian violated OPRA by refusing to respond to the Complainant's OPRA requests that were not signed.

The Complainant requests:

1. A declaration that the Custodian violated OPRA by failing to provide immediate access to budget documents.

¹³ The date of this e-mail request was May 8, 2007.

2. A declaration that the Custodian violated OPRA by denying the Complainant access to records because the Complainant did not sign the BOE's OPRA request form.
3. A decision recommending that the Custodian knowingly and willfully violated OPRA and should be fined pursuant to N.J.S.A. 47:1A-11.
4. An award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6.

July 12, 2007

Offer of Mediation sent to both parties.

July 16, 2007

The Custodian agrees to mediate this complaint.

July 17, 2007

The Complainant agrees to mediate this complaint.

July 17, 2007

The complaint is referred for mediation.

September 11, 2007

The complaint is referred back from mediation to the GRC for adjudication.

September 11, 2007

Request for the Statement of Information sent to the Custodian.

September 17, 2007

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

- Complainant's OPRA request dated March 14, 2007
- Custodian's response to Complainant's March 14, 2007 OPRA request dated March 14, 2007
- E-mail from the Complainant to the Custodian dated March 17, 2007
- E-mail from the Complainant to the Custodian dated March 20, 2007
- E-mail from the Custodian to the Complainant dated March 20, 2007
- E-mail from the Custodian to the Complainant dated March 28, 2007
- E-mail from the Complainant to the Custodian dated March 29, 2007
- E-mail from the Custodian to the Complainant dated March 30, 2007
- Complainant's OPRA request dated March 31, 2007
- Custodian's response to Complainant's March 31, 2007 OPRA request dated April 11, 2007
- E-mail from the Custodian to the Complainant dated April 12, 2007
- E-mail from the Complainant to the Custodian dated April 12, 2007
- E-mail from the Custodian to the Complainant dated April 13, 2007¹⁴

¹⁴ The Complainant attached several other e-mails to his Statement of Information but said e-mails were not relevant to this complaint.

The Custodian certifies that he was in frequent communication with the Complainant via e-mail correspondence in an effort to clarify the records requested by the Complainant. The Custodian certifies that the Complainant will only accept electronic documents and refuses to pay any costs. The Custodian further certifies that, although this is the first year he was employed by the BOE, he searched the office computer files back two (2) years in an effort to locate documents that may have been responsive to the Complainant's requests. The Custodian certifies that, despite his frequent communications with the Complainant, he was uncertain exactly which records were responsive to the Complainant's requests because the Complainant continually modified the requests via e-mails. The Custodian certifies that during the time period of the requests giving rise to the instant complaint, the Complainant submitted to the BOE over twenty (20) requests and over one hundred seventy-five (175) e-mails related to such requests.

The Custodian does not certify as to the last date upon which records that may have been responsive to the requests were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that he received an OPRA request from the Complainant dated March 14, 2007. The Custodian further certifies that he responded to the Complainant's request for the records relevant to this complaint by e-mail dated March 14, 2007. In the e-mail, the Custodian determines that there were records responsive to the Complainant's request for Item #1 and Item #2; however, the Custodian states that Item #1 was delivered to the County Superintendent on March 13, 2007. The Custodian states that the audit for 2005-2006 is available for on-site review, but it is lengthy and not available in electronic format, therefore copy fees would apply. The Custodian further states that the audit for 2006-2007 does not exist.

The Custodian certifies that he sent the Complainant an e-mail dated March 28, 2007 containing the proposed 2007-2008 budget presentation and a budget spreadsheet generated by NJ Department of Education software. The Custodian further certifies the Complainant sent the Custodian an e-mail dated March 29, 2007, wherein the Complainant states that the records are not in a form he can use. The Complainant admits his request may have been unclear and he then asks for the actual spreadsheets. The Custodian states that he sent the Complainant an e-mail on March 30, 2007, in which the Custodian asks the Complainant to submit his request on an OPRA request form.

The Custodian certifies that he received an OPRA request from the Complainant dated March 31, 2007. The Custodian further certifies that the request involved hundreds of records. The Custodian certifies that he responded to the Complainant's request for the records relevant to this complaint by e-mail dated April 11, 2007. The Custodian certifies that he explained to the Complainant how the Custodian could accommodate the Complainant's request.

The Custodian certifies that he never denied the Complainant a request for records because the Complainant refused to sign a request form. The Custodian certifies that on April 25, 2007, he sent the Complainant a copy of the BOE's OPRA request form and

asked the Complainant to submit his request on said form so that the Custodian could better understand which records the Complainant desired. The Custodian contends, however, that the Complainant refused to submit his request on the official request form.

July 15, 2009

E-mail from the GRC to the Custodian. The GRC requests a certification from the Custodian in order to clarify the format of the records disclosed to the Complainant in response to the Complainant's March 14, 2007 request.

July 16, 2009¹⁵

Custodian's certification. The Custodian certifies that the audited financial statements were prepared by the BOE's auditor, William Colantano, on the auditor's proprietary software. The Custodian certifies the auditor submitted to the BOE paper copies of his work product. The Custodian further certifies that the BOE was only able to download spreadsheets which were generated by the Department of Education. The Custodian certifies that the BOE was limited to viewing and/or printing the output. The Custodian certifies that in response to the Complainant's March 14, 2007 request for electronic copies of the records, the Custodian printed the output and then scanned it into an electronic format that could be e-mailed to the Complainant.

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

OPRA also provides that:

"Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected,

¹⁵ 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.
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examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an *extraordinary expenditure of time and effort to accommodate the request*, the public agency may charge, in addition to the actual cost of duplicating the record, a *special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies ...*” (Emphasis added.) N.J.S.A. 47:1A-5.c.

OPRA further provides that:

“A custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium. If a request is for a record...require[es] a substantial amount of manipulation ... the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency...” N.J.S.A. 47:1A-5.d.

Additionally, OPRA provides that:

“[i]mmediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” (Emphasis added.) N.J.S.A. 47:1A-5.e.

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

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

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

Item #1 of the March 14, 2007 records request – proposed line item budget for 2007-2008 via e-mail in spreadsheet format.

Item #3 of the March 14, 2007 records request – any other working spreadsheets used to project the 2007-2008 budget via e-mail in electronic format.

The Complainant contends that pursuant to N.J.S.A. 47:1A-5.e., he was entitled to immediate disclosure of these records and the Custodian violated OPRA by failing to provide such immediate access. The Custodian responded to the request on the same date it was received and informed the Complainant that the 2007-2008 budget had not yet been approved and was still under review by the County Superintendent. The Custodian suggested that the Complainant wait for the requested records until after the budget was finalized and approved. Subsequently, on April 13, 2007, the Custodian sent an e-mail to the Complainant and informed him that a copy of the budget was attached, but that it had not yet been voted upon and was subject to change.

Notwithstanding the fact that the Custodian certified that the budget was not yet approved, the budget along with all supporting documentation should have been disclosed immediately upon request. The New Jersey Department of Education regulations, which govern in this matter, provide that:

“Each district board of education upon submission of its budget application to the county superintendent or by the statutory submission date, whichever is earlier, shall make available upon request for public inspection all budget and supporting documentation contained in the budget application and all other documents listed in N.J.A.C. 6A:23-8.1(e) once the budget application has been submitted to the county superintendent for approval. Nothing in this section shall restrict access by the citizens of this state to documents which otherwise qualify as public records pursuant to [OPRA] or common law.” (Emphasis added) N.J.A.C. 6A:23-8.7(a).¹⁶

The statutory submission date referenced in the above regulation is set forth in N.J.S.A. 18A:7F-5(c), which provides as follows:

“Annually, on or before March 4, each district board of education shall adopt, and submit to the commissioner for approval, together with such supporting documentation as the commissioner may prescribe, a budget that provides for a thorough and efficient education. Notwithstanding the provisions of this subsection to the contrary, the commissioner may adjust the date for the submission of district budgets if the commissioner determines that the availability of preliminary aid numbers for the subsequent school year warrants such adjustment.” (Emphasis added) N.J.S.A. 18A:7F-5(c).

¹⁶Although a new superseding regulation was adopted on June 15, 2009, this regulation was the one in effect on the date of the request. Please note that N.J.S.A. 18A:7F-5.3 defines “supporting documentation” as being limited to employment contract information governing certain employee positions and/or non-union employees earning in excess of \$75,000 annually. N.J.A.C. 6A:23-8.1(e) provides for the following information and records: thoroughness and efficiency standards established pursuant to law, the Quality Assurance Annual Report required by law, pupil achievement on or progress in meeting existing State assessment standards, annual independent audits and other external reviews by a State or Federal agency or reviews required by statute and regulation, the comparative spending guide, the school report card, contractual obligations, the Comprehensive Maintenance Plan and the section of Long-Range Facilities Plan that includes the capital projects proposed in the budget.

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The Custodian certified that the budget was delivered to the County Superintendent on March 13, 2007, and pursuant to *N.J.A.C.* 6A:23-8.7(a), a budget and supporting documentation must be made available to the public upon its submission to the county superintendent. Therefore, the budget and supporting documentation was available for public inspection at the time of the Complainant's March 14, 2007 OPRA request, and the Custodian should have immediately disclosed the records as required pursuant to N.J.S.A. 47:1A-5.e.

Accordingly, because *N.J.A.C.* 6A:23-8.7(a) provides that a board of education budget and supporting documentation must be made available to the public upon its submission to the county superintendent or by the statutory submission date, whichever is earlier, and because the 2007-2008 budget's submission to the county superintendent predated the Complainant's OPRA request for said budget, and because N.J.S.A. 47:1A-5.e. provides that "[i]mmediate access ordinarily shall be granted to budgets...", the Custodian unlawfully denied the Complainant access to the budget, listed as Item #1, and the budget spreadsheets, listed as Item #3, by not making the records immediately available upon receipt of the Complainant's OPRA request.

Item #2(a) of the March 14, 2007 records request – audited financial statements for 2005-2006 via e-mail in spreadsheet format.

The Custodian certified he responded to the Complainant's March 14, 2007 request for Item #2(a) on the day he received the request and informed the Complainant that this record was not available in electronic format. The Custodian certified he informed the Complainant that the record was available for on-site examination or that a copy could be provided for a fee. The Custodian further certified he advised the Complainant that the record was lengthy, and asked the Complainant to let him know if the Complainant would prefer to review it in person.

Although the Complainant's OPRA request did not specify a particular medium (such as an electronic medium) for the requested record, it is clear from the Custodian's response to the OPRA request that the Custodian interpreted the request for delivery via e-mail to require transmission in an electronic medium. Moreover, the Custodian subsequently certified that he scanned the audited financial statements responsive to the Complainant's request into an electronic format and e-mailed the record to the Complainant.¹⁷ The Complainant stated that he received a read-only PDF which contained some of the documents requested via e-mail from the Custodian dated March 28, 2007, which is the tenth (10th) business day following the date of denial.¹⁸

Therefore, because the Custodian responded to the Complainant's OPRA request on the same day the request was received by denying the Complainant access to the record in a medium conducive to e-mail delivery which was the medium requested, and because N.J.S.A. 47:1A-5.d. provides that a custodian shall permit access to a

¹⁷ The Custodian certified that the audited financial statements were prepared by the BOE's auditor on the auditor's proprietary software and that only paper copies of the auditor's work product were submitted to the BOE.

¹⁸ PDF is an abbreviation for Portable Document Format by Adobe Systems, Inc.

government record in the medium requested, the Custodian has unlawfully denied access to Item 2(a) of the Complainant's request.

Item #2(b) of the March 14, 2007 records request – audited financial statements for 2006-2007 via e-mail in spreadsheet format.

The Complainant requested as Item #2(b) the audited financial statements for 2006-2007; however, the Custodian certified that he informed the Complainant that there were no records responsive to this request because said audit would not be done until after June 30, 2007. Pursuant to N.J.S.A. 47:1A-1.1, a government record is only responsive to an OPRA request if it has “been made, maintained or kept on file...or has been received in the course of [the public agency’s] official business ...”

The Council has held that if a custodian has sufficiently borne his/her burden of proving that there is no record responsive to the Complainant's request, the Custodian could not have unlawfully denied access. In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that averred that the requested record was nonexistent. The Council subsequently determined that “[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record can not (sic) be released and there was no unlawful denial of access.”

Therefore, because the Custodian certified that he informed the Complainant that there were no records responsive to the Complainant's request, and because there is no credible evidence to refute the Custodian's certification in the record, the Custodian did not unlawfully deny the Complainant access to the audited financial statements for 2006-2007, listed as Item #2(b) of the Complainant's March 14, 2007 records request, pursuant to N.J.S.A. 47:1A-1.1. See Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).

Item #1 of the March 31, 2007 records request – any and all electronic spreadsheets in their native form used to produce the 2004-2005, 2005-2006 and 2006-2007 budgets, inclusive of all embedded calculations.

Item #2 of the March 31, 2007 records request – any and all electronic spreadsheets in their native form used to produce the 2003-2004, 2004-2005 and 2005-2006 audited financial statements, inclusive of all embedded calculations.

Item #1 and Item #2 of the Complainant's March 31, 2007 OPRA request sought all electronic spreadsheets in their native form with all embedded calculations that were used to produce the budgets and audited financial statements for the years 2003-2004, 2004-2005 and 2005-2006. The Custodian responded to the Complainant's request on April 11, 2007 and informed the Complainant that he would make available electronic copies of the requested records; however, the Custodian stated that if the volume of records which must be converted will cause the BOE to incur great expense, then a fee would have to be charged pursuant to OPRA. The Custodian in the SOI certified that the

Complainant's March 31, 2007 request encompassed hundreds of spreadsheets, each containing multiple worksheets as well as auditor documents.

Because the Complainant sought these records in their *native form with imbedded calculations* and because the Complainant is asking for only those records that were *used to produce* the final product, the Complainant's request contemplates disclosure of deliberative materials.

OPRA excludes from the definition of a government record "inter-agency or intra-agency advisory, consultative or deliberative material." N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of 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 advisory, consultative, or deliberative ("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. 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). Specifically, the New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in the decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Education Law Center v. NJ Department of Education, 198 N.J. 274, 966 A.2d 1054, 1069 (2009). 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. ... Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the "preponderating policy" and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.” (Citations omitted.) *Id.* at 84-85.

The court further set out procedural guidelines based upon those discussed in McClain:

“[t]he initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.” In Re Liquidation of Integrity, *supra*, 165 N.J. at 88, *citing McClain*, *supra*, 99 N.J. at 361-62.

In a factual setting similar to the instant complaint, the Superior Court found that records used to produce a final document constitute ACD material, and as such, are exempt from disclosure. In Home News v. Board of Education of the Borough of Spotswood, 286 N.J. Super. 380 (App. Div. 1996), a reporter sought access to the school district's 1994 budget workbook. The court characterized the budget workbook as “...worksheets reflecting presentations and analyses of budgetary information, gathered by the business administrator and others...” *Id.* at 387. The court in Home News, affirming the trial court's holding that the newspaper was not entitled to disclosure of the workbook, noted “...[the workbook] was no more subject to disclosure than any other papers reflecting work in progress toward the goal of *producing a document* that will eventually become a public record.” *Id.* at 387-88. (Emphasis added.)

Also in a fact pattern similar to the instant complaint, the Council's decision in Tousman v. Township of Edison, GRC Complaint No. 2007-269 (February 2008) is instructive. In that matter, the complainant was seeking salaries and wages for the

municipality's 2008 budget which she claimed were contained in the worksheets that she asserted should have been disclosed with the budget. The Council determined that the draft of the municipal budget and the pre-decisional worksheets used to assist the township in its budgetary decision-making process were exempt from disclosure under N.J.S.A. 47:1A-1.1 because they constituted ACD material.

Here, the Custodian certified the spreadsheets contained worksheets that were used to produce the final documents, i.e., the budgets and the audited financial statements. However, the Complainant did not request the budgets and audited financial statements, but rather, the spreadsheets containing worksheets used to produce those documents for 2003-2004, 2004-2005 and 2005-2006. Such pre-decisional worksheets used to assist the agency in its budgetary decision-making process are exempt from disclosure under N.J.S.A. 47:1A-1.1 because they constitute ACD material.

Moreover, the spreadsheets are not considered "supporting documentation" available for public inspection pursuant to N.J.S.A. 18A:7F-5.3 or "other documents" available for inspection as listed in *N.J.A.C. 6A:23-8.1(e)*. See footnote 16, *infra*.

Therefore, because the records requested in Item #1 and Item #2 of the Complainant's March 31, 2007 request were used as part of the decision-making process to produce the 2003-2004, 2004-2005 and 2005-2006 budgets and audited financial statements, the records are exempt from disclosure under N.J.S.A. 47:1A-1.1 because they constitute ACD material, therefore the Custodian has no legal duty to disclose said records.

April 25, 2007 records request - all BOE handwritten detailed meeting minutes for public and private sessions from January 2006 to present in via e-mail electronic format.

May 8, 2007 records request - copies of minutes, including closed session minutes, for the three (3) most recent BOE meetings via e-mail.

By e-mail dated April 25, 2007, the Custodian informed the Complainant that he must submit requests for government records on the BOE's official OPRA request form. The Custodian certified that the BOE form was prepared from the model request form on the GRC website and it was BOE policy that all requestors submit OPRA requests on said form. The Custodian certified that he sent the Complainant a copy of the BOE's OPRA request form so that the Custodian could better understand which records the Complainant desired.

Instead of preparing and submitting his April 25, 2007 and May 8, 2007 records requests on the official OPRA form, however, the Complainant submitted the requests via e-mail correspondence. Further, the Complainant informed the Custodian in the e-mail requests that he refused to use the form and would continue to send in his records requests via e-mail in letter form.

Review of the OPRA statute and its legislative intent lead the Council to conclude that use of the request form is required for all requestors. The statute provides that the custodian "shall adopt a form for the use of any person who requests access to a

government record held or controlled by the public agency.” N.J.S.A. 47:1A-5.f. The statute specifically prescribes what must be on the form:

- (1) space for the name, address and phone number of the requestor and a brief description of the government record sought;
- (2) space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged;
- (3) specific directions and procedures for requesting a record;
- (4) a statement as to whether prepayment of fees for a deposit is required;
- (5) the time period in which the public agency is required by OPRA to make the record available;
- (6) a statement of the requestor’s right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
- (7) space for the custodian to list reasons if a request is denied in whole or in part;
- (8) space for the requestor to sign and date the form;
- (9) space for the custodian to sign and date the form if the request is fulfilled or denied. *Id.*

Although the statute does not expressly state that OPRA requests must be on the form adopted by the agency pursuant to N.J.S.A. 47:1A-5.f., principles of statutory construction show that the Legislature intended use of this form by all requestors to be mandatory. In interpreting a statute, it is axiomatic that “each part or section [of the statute] should be construed in connection with every other part or section so as to produce a harmonious whole.” Matturi v. Bd. of Trustees of JRS, 173 N.J. 368, 383 (2002), quoting In re Passaic Cty. Utilities Auth., 164 N.J. 270, 300 (2000). In addition, a construction which renders statutory language meaningless must be avoided. Bergen Comm. Bank v. Sisler, 157 N.J. 188, 204 (1999). *See also G.S. v. Dept. of Human Serv.*, 157 N.J. 161, 172 (1999). (a statute should be interpreted so as to give effect to all of its provisions, without rendering any language inoperative, superfluous, void, or insignificant).

As noted, N.J.S.A. 47:1A-5.f. requires that custodians adopt a request form, and sets forth a detailed list of what the form must contain. The next subsection of the statute provides:

If the custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor on the request form and promptly return it to the requestor.* The custodian *shall sign and date the form and provide the requestor with a copy thereof.* (Emphasis added.)
N.J.S.A. 47:1A-5.g.

The form to which N.J.S.A. 47:1A-5.g. refers is the form required by N.J.S.A. 47:1A-5.f. In providing, in 5.g., that the custodian “shall” sign and date the form, indicate the basis for denial on the form, and return the form to the requestor, the Legislature evidenced its clear intent that it is mandatory for the form to be used by requestors. *See Harvey v. Essex Cty. Bd. Of Freeholders*, 30 N.J. 381, 391-92 (1959) (the word “shall” in a statute is generally mandatory). The express requirement that the

custodian use the request form in denying an OPRA request, construed together with the preceding statutory requirement that the custodian adopt a request form, demonstrates that the Legislature intended that this form would be used for all OPRA requests. If all requestors are not required to submit requests on the form prescribed by the statute, then the statutory provisions requiring the custodian to sign and date the form, and return it to the requestor, would be meaningless. Indeed, a custodian would be unable to fulfill these express requirements of N.J.S.A. 47:1A-5.g. if the requestor does not use the form in submitting his request.

Accordingly, nothing in OPRA suggests that some requestors may forgo using the official request form. In enacting the form requirement, the Legislature has expressed its policy that use of the form promotes clarity and efficiency in responding to OPRA requests, consistent with OPRA's central purpose of making government records "readily accessible" to requestors. N.J.S.A. 47:1A-1.

The Appellate Division has indicated that the statute's form requirement serves the additional purpose of prompting the legislative policy that a requestor must specifically describe identifiable records sought. *See* MAG Entertainment LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (an open-ended request that fails to identify records with particularity is invalid). In Bent v. Twp. of Stafford Police Dept., 381 N.J. Super. 30, 33 (App. Div. 2005), the Court held that the requestor's general request for information violated this policy and was therefore invalid. In reaching this conclusion, the Court noted that OPRA mandates that the request form provide space for a "brief description" of the record request. *Id.* Similarly, in Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J. Super. 205, 213 (App. Div. 2005), the Court specifically pointed to the same statutory request form requirement in determining that OPRA does not authorize requestors to make blanket requests for agency records.

Therefore, based on the language of the statute, as well as judicial recognition of the importance of the statutory request form, it is determined that the statute requires all requestors to submit OPRA requests on an agency's official OPRA records request form. OPRA's provisions come into play only where a request for records is submitted on an agency's official OPRA records request form.

It should be noted that the Council takes cognizance of the Appellate Division's recent decision in Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), Docket No. A-0821-07T2. In Renna, the Appellate Division held that:

"...all requests for OPRA records must be in writing; that such requests shall utilize the forms provided by the custodian of records; however, no custodian shall withhold such records if the written request for such records, not presented on the official form, contains the requisite information prescribed in N.J.S.A. 47:1A-5.f. Where the requestor fails to produce an equivalent writing that raises issues as to the nature or substance of the requested records, the custodian may require that the requestor complete the form generated by the custodian pursuant to N.J.S.A. 47:1A-5.g."

Renna was decided on May 21, 2009, over twenty-two (22) months after the complaint was filed in the instant matter. Therefore, for the Renna decision to be considered in this matter it will have to be retroactively applied.

The New Jersey Supreme Court “has adopted the United States Supreme Court's definition that a ‘ “case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government . . . [or] if the result was not dictated by precedent existing at the time the defendant's conviction became final.”’ State v. Lark, 117 N.J. 331, 339 (1989) (quoting Teague v. Lane, 489 U.S. 288, 301, 109 S. Ct. 1060, 1070, 103 L. Ed.2d 334, 349 reh'g denied, 490 U.S. 1031, 109 S. Ct. 1771, 104 L. Ed.2d 266 (1989)). See also State v. Johnson, 166 N.J. 523, 546-47 (2001); State v. Knight, 145 N.J. 233, 250-51 (1996).” State v. Yanovsky, 340 N.J.Super. 1 (App. Div. 2001).

Although retroactive application of laws is generally disfavored, Gibbons v. Gibbons, 86 N.J. 515, 521 (1981), a clear intention by the Legislature that retroactive application is intended will be given effect. Phillips v. Curiale, 128 N.J. 608, 618 (1992). Courts recognize that retroactive laws enacted pursuant to the police power may impair the rights of individuals, Rothman v. Rothman, 65 N.J. 219, 225-226 (1974), but where the public interest sufficiently outweighs the impaired private right, retroactive application is permissible. State Troopers Fraternal Assoc. v. New Jersey, 149 N.J. 38, 57 (1997).

In determining retroactive application of a new rule, four judicial options are available:

(1) make the new rule of law purely prospective, applying it only to cases whose operative facts arise after the new rule is announced; (2) apply the new rule to future cases and to the parties in the case announcing the new rule, while applying the old rule to all other pending and past litigation; (3) grant the new rule limited retroactivity, applying it to cases in (1) and (2) as well as to pending cases where the parties have not yet exhausted all avenues of direct review [pipeline retroactivity]; and, finally, (4) give the new rule complete retroactive effect, applying it to all cases, even those where final judgments have been entered and all avenues of direct review exhausted. State v. Nash, 64 N.J. 464, 468-70 (1974). State v. Knight, 145 N.J. 233, 249 (1996).

The determination of retroactive application is generally guided by three factors: "(1) the purpose of the rule and whether it would be furthered by a retroactive application, (2) the degree of reliance placed on the old rule by those who administered it, and (3) the effect a retroactive application would have on the administration of justice." *Id.* at 251 (citation and internal quotations omitted).

In Knight, the Court granted pipeline retroactivity to the rule previously announced in State v. Sanchez, 129 N.J. 261 (1992), that "post-indictment interrogation of defendant violated his right to counsel under Article 1, paragraph 10 of the New Jersey Constitution" requiring suppression of his confession, *Id.* at 279, because the purpose of

that exclusionary rule was also to enhance the reliability of confessions. Knight supra, 145 N.J. at 256-58.

Although the Knight Court was addressing the retroactive application of a new rule in a criminal setting, the New Jersey Supreme Court has applied similar reasoning in the civil setting. In Olds v. Donnelly, 150 N.J. 424, 442 (1997), the Court abrogated its decision in Circle Chevrolet Co. v. Giordano, Halleran & Ciesla, 142 N.J. 280 (1995) and exempted attorney malpractice actions from the entire controversy doctrine. In addressing whether the decision should be applied retroactively or prospectively, the Court recognized that “[o]rdinarily, judicial decisions apply retroactively. Crespo v. Stapf, 128 N.J. 351, 367 (1992)... [but] [p]olicy considerations may justify giving a decision limited retroactive effect.” *Ibid.* The Court then examined the considerations articulated in Knight and concluded that the Olds decision should be given limited “pipeline” retroactivity because such application “adequately protect existing relationships[,]” and because the application of pipeline retroactivity to pending cases “serves the interests of justice by permitting resolution of their claims on the merits.” *Id.* at 450. Perhaps most importantly, the Court recognized that complete retroactive application potentially exposes the judicial system to the undue burden of revisiting numerous matters already concluded. *Id.* See, e.g., Constantino v. Borough of Berlin, 348 N.J. Super. 327 (App. Div. 2002)(holding that the public interest in retroactive application of the Age Discrimination in Employment Act, 29 U.S.C.A. §621 et seq., which specifically prohibited municipalities from hiring persons as police officer under age 21 or over age 35, outweighs an individual's private rights); State v. Yanovsky, 340 N.J. Super. 1 (App. Div. 2001)(holding that State v. Carty, 332 N.J. Super. 200 (App. Div. 2000) established a new rule of law during the pendency of the case, but that the public interest and administration of justice favored limited application of retroactivity); Zuccarelli v. NJDEP, 376 N.J. Super. 372 (App. Div. 1999)(holding that cases which held New Jersey's waste flow control system was unconstitutional and discriminatory should be applied retroactively only to cases in the “pipeline”).

Here, the GRC examined the degree of reliance upon prevailing Council decisions with respect to the use of request forms and found that the conclusion that ***OPRA’s provisions come into play only where a request for records is submitted on an agency’s official OPRA records request form*** was repeatedly cited by the GRC in prior adjudications. And because records custodians relied upon said decisions, the retroactive application of the new rule articulated in Renna supra, would likely foster confusion among many records custodians who already responded to OPRA requests predating the Renna court’s decision. Accordingly, the GRC will not apply the Renna court’s rule retroactively, but rather only apply it, when applicable, to complaints whose operative facts arise after the rule was articulated.

Under existing procedure then, the Complainant’s records requests dated April 25, 2007 and May 8, 2007 were not valid OPRA requests because the Complainant refused to submit the requests on the official OPRA request forms provided by the BOE, and as such, the Custodian’s refusal to fulfill the records requests does not amount to an unlawful denial of access pursuant to the provisions of OPRA.

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?

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.

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 pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because *N.J.A.C. 6A:23-8.7(a)* provides that a board of education budget must be made available to the public upon its submission to the county superintendent or by the statutory submission date, whichever is earlier, and because the 2007-2008 budget's submission to the county superintendent predated the Complainant's OPRA request for said budget, and because N.J.S.A. 47:1A-5.e. provides that "[i]mmediate access ordinarily shall be granted to budgets...", by not making the records immediately available upon receipt of the Complainant's OPRA request, the Custodian unlawfully denied the Complainant access to the budget and the budget spreadsheets, listed as Items #1 and #3 of the Complainant's March 14, 2007 records request, respectively.
2. Because the Custodian failed to prove that the denial of access was authorized by law, the Custodian shall disclose in the medium requested the records listed as Item #3 of the Complainant's March 14, 2007 records request with appropriate redactions, if any. If any portions of the record are redacted, the Custodian must provide a redaction index detailing the nature of the information redacted and the lawful basis for the redaction(s).¹⁹
3. **The Custodian shall comply with item #2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, 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 1:4-4²⁰, to the Executive Director.**

¹⁹ The record listed as Item #1, the 2007-2008 line item budget, was previously disclosed to the Complainant electronically on April 13, 2007.

²⁰ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

4. Because the Custodian responded to the Complainant's March 14, 2007 OPRA request on the same day the request was received by denying the Complainant access to the 2005-2006 audited financial statements via e-mail in spreadsheet format, in a medium conducive to e-mail delivery which was the medium requested, and because N.J.S.A. 47:1A-5.d. provides that a custodian shall permit access to a government record in the medium requested, the Custodian has unlawfully denied access to Item 2(a) of the Complainant's March 14, 2007 request.
5. Because the Custodian certified that he informed the Complainant that there were no records responsive to the Complainant's request for the 2006-2007 audited financial statements, and because there is no credible evidence to refute the Custodian's certification in the record, the Custodian did not unlawfully deny the Complainant access to the audited financial statements for 2006-2007, listed as Item #2(b) of the Complainant's March 14, 2007 records request, pursuant to N.J.S.A. 47:1A-1.1. See Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).
6. Because the records requested in Item #1 and Item #2 of the Complainant's March 31, 2007 request were used as part of the decision-making process to produce the 2003-2004, 2004-2005 and 2005-2006 budgets and audited financial statements, the records are exempt from disclosure under N.J.S.A. 47:1A-1.1 because they constitute advisory, consultative, or deliberative material, therefore the Custodian has no legal duty to disclose said records.
7. The Complainant's records requests dated April 25, 2007 and May 8, 2007 were not valid OPRA requests because the Complainant refused to submit the requests on the official OPRA request forms provided by the Long Hill Township Board of Education, and as such, the Custodian's refusal to fulfill the records requests does not amount to an unlawful denial of access pursuant to the provisions of OPRA.
8. 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.
9. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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Executive Director

September 23, 2009