



## State of New Jersey

### GOVERNMENT RECORDS COUNCIL

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### FINAL DECISION

#### February 27, 2008 Government Records Council Meeting

Darnell Hardwick  
Complainant

Complaint No. 2007-164

v.

NJ Department of Transportation  
Custodian of Record

At the February 27, 2008 public meeting, the Government Records Council (“Council”) considered the February 20, 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, finds that:

1. Because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s written response to the Complainant dated June 20, 2007 and request for an extension of time dated June 29, 2007 are inadequate under OPRA and the Complainant’s request is “deemed” denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because no official meeting minutes exist for the requested staff meetings and the personal notes of the attendees, which are responsive to the request, are informal memory aids, said records are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and Martin O’Shea v. West Milford Board of Education, 391 N.J. Super. 534 (App. Div. 2007). Therefore, because the Custodian provided a lawful basis for the denial of access at the time of the denial, the Custodian has met his burden of proving a lawful denial of access to the personal notes of the meeting attendees pursuant to N.J.S.A. 47:1A-6. Further, the Custodian’s actions in response to additional requests which are not the subject of this complaint have no bearing on said complaint.
3. Because the requested records are not government records because they are advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1



and Martin O'Shea v. West Milford Board of Education, 391 N.J. Super. 534, 538 (App. Div. 2007), the Custodian would not have unlawfully denied access. However, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by providing the Complainant with an inadequate response under OPRA resulting in a "deemed" denial. Nevertheless, 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 "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the  
Government Records Council  
On The 27<sup>th</sup> Day of February, 2008

Robin Berg Tabakin, Vice Chairman  
Government Records Council

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

Kathryn Forsyth  
Government Records Council

**Decision Distribution Date: February 29, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 27, 2008 Council Meeting**

**Darnell Hardwick<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-164**

v.

**NJ Department of Transportation<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Any paper, notes, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed document, information stored or maintained electronically or by sound keeping or in similar device, or any copy thereof, that has been made, maintained or kept on file to include but not limited to minutes by any and all attendees of the NJ Department of Transportation Region South Construction or Material monthly staff meetings held during the months between December 2005 to June 2007. This is to include the separate staff meetings held by both the Construction and Materials South units.

**Request Made:** June 20, 2007

**Response Made:** June 20, 2007

**Custodian:** Alfred Brenner

**GRC Complaint Filed:** July 22, 2007

**Background**

**June 20, 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.

**June 20, 2007**

E-mail from Custodian to Complainant. The Custodian confirms receipt of the Complainant's OPRA request. The Custodian states that the requested records may not be readily available and the Custodian may have to reach out to several units within the Department to obtain said records. The Custodian also states that he will contact the Complainant again shortly.

**June 29, 2007**

E-mail from Complainant to Custodian. The Complainant requests that the Custodian return his phone calls or e-mails regarding his OPRA request.<sup>3</sup>

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

<sup>2</sup> Represented by DAG Nonee Wagner, on behalf of the NJ Attorney General.

**June 29, 2007**

E-mail from Custodian to Complainant. On the seventh (7<sup>th</sup>) business day after the receipt of the Complainant's OPRA request the Custodian requests an extension of time to respond to the Complainant's OPRA request. The Custodian requests that the Complainant respond to his request for an extension by July 4, 2007.

**July 2, 2007**

E-mail from Complainant to Custodian. The Complainant states that the Custodian made the request for an extension of time beyond the seven (7) business day time period mandated by OPRA. The Complainant asks the Custodian when the records will be made available.

**July 3, 2007**

E-mail from Custodian to Complainant. The Custodian states that he is working with the offices impacted by the Complainant's OPRA request to determine what records are responsive to the request. The Custodian requests a two (2) week extension until July 13, 2007. The Custodian requests that the Complainant respond to his request for an extension by July 8, 2007.

Additionally, the Custodian states that because he received the Complainant's request on June 20, 2007, the seven (7) business day deadline to respond expired on June 29, 2007. Thus, the Custodian contends that his request for an extension was made within the appropriate time period.

**July 3, 2007**

E-mail from Complainant to Custodian. The Complainant agrees to the two (2) week extension of time until July 13, 2007 to provide the requested records.

**July 13, 2007**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixteenth (16<sup>th</sup>) business day following receipt of such request. The Custodian states that no official minutes exist. The Custodian also states that personal notes are not government records under the "inter-agency, intra-agency advisory, consultative or deliberative material" exemption pursuant to N.J.S.A. 47:1A-1.1 and Martin O'Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006). The Custodian states that in O'Shea, the Council held that handwritten notes were exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. Thus, the Custodian contends that in accordance with the foregoing case law, all draft documents containing handwritten notes, including the draft minutes of a meeting held by a public body, are entitled to the protection of the deliberative process privilege. The Custodian also states that the GRC decision was upheld in the Appellate Division of the NJ Superior Court.<sup>4</sup> Further, the

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<sup>3</sup> The Complainant also requested that the Custodian contact him regarding an additional OPRA request which is not the subject of this complaint.

<sup>4</sup> The Custodian provides the Complainant with a hyperlink to the text of the Appellate Division's decision: <http://lawlibrary.rutgers.edu/courts/appellate/a2026-05.opn.html>. This decision has been published at O'Shea v. West Milford Board of Education, 391 N.J. Super. 534 (App.Div. 2007).

Custodian states that the Department has no records responsive to the Complainant's request, and that said request will be closed as of July 13, 2007.

**July 22, 2007**

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

- Complainant's OPRA request dated June 20, 2007
- E-mail from Custodian to Complainant dated June 20, 2007
- E-mail from Complainant to Custodian dated June 29, 2007
- E-mail from Custodian to Complainant dated June 29, 2007
- E-mail from Complainant to Custodian dated July 2, 2007
- E-mail from Custodian to Complainant dated July 3, 2007
- E-mail from Complainant to Custodian dated July 3, 2007
- E-mail from Custodian to Complainant dated July 13, 2007<sup>5</sup>

The Complainant states that he submitted his OPRA request on June 20, 2007 and received a confirmation e-mail from the Custodian on the same day in which the Custodian stated that he will reach out to several units within the Department for assistance in obtaining the requested records. The Complainant states that via e-mail dated June 29, 2007 the Custodian requested an extension of time without giving a deadline date as is required under OPRA. The Complainant states that he replied to the Custodian informing him that his request for an extension exceeded the seven (7) business days required to respond. The Complainant states that via e-mail dated July 3, 2007, the Custodian requested a two (2) week extension until July 13, 2007 to respond to the request. The Complainant also states that via e-mail dated July 3, 2007, he agreed to the extension. The Complainant further states that the Custodian denied his request on July 13, 2007.

The Complainant asserts that the Custodian deliberately misinterpreted the ruling in O'Shea, supra. The Complainant states that in O'Shea, the court ruled that the Secretary's handwritten notes were not public records because the Board's intentions were to provide official meeting minutes which were provided to Mr. O'Shea. The Complainant asserts that because the Department of Transportation ("DOT") does not intend to provide official meeting minutes, the personal handwritten notes on file are government records subject to public access.

Further, the Complainant states that in Gannet New Jersey Partners, LP v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005), the court held that the County Planner's thirteen (13) pages of factual handwritten notes were public records. Additionally, the Complainant states that there was no indication that the notes had been translated into a more formal form.

The Complainant contends that the requested meeting minutes (handwritten notes) are not advisory, consultative or deliberative material ("ACD") and the Custodian bears the burden of establishing that the requested records are pre-decisional and

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<sup>5</sup> The Complainant attaches additional records to his Denial of Access Complaint; however, said records are not relevant to the adjudication of this complaint.

deliberative in nature, containing opinions, recommendations or advice about agency policies. The Complainant also states that he made a similar OPRA request in 2005 and while the Custodian initially denied the request by asserting that no official meeting minutes were on file, the Custodian eventually released handwritten notes which contained factual information.

Additionally, the Complainant disagrees with the Custodian's request for a two (2) week extension because the Complainant claims that the Custodian should have known within seven (7) business days that no official meeting minutes existed. The Complainant also states that the Custodian did not provide a privilege log regarding the handwritten notes. The Complainant requests that the Council conduct an *in camera* review of the handwritten notes. Further, the Complainant asserts that the Custodian's actions are not only negligent, but a willful attempt to circumvent OPRA.

**July 30, 2007**

Offer of Mediation sent to both parties.

**July 30, 2007**

The Complainant declines mediation and requests that the GRC begin a full investigation of this complaint. The Custodian did not respond to the Offer of Mediation.

**July 31, 2007**

Request for the Statement of Information sent to the Custodian.

**August 20, 2007**

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

- Complainant's OPRA request dated June 20, 2007
- E-mail from Custodian to Complainant dated June 20, 2007
- E-mail from Custodian to Complainant dated June 25, 2007
- E-mail from Complainant to Custodian dated June 29, 2007
- E-mail from Custodian to Complainant dated June 29, 2007
- E-mail from Complainant to Custodian dated July 2, 2007
- E-mail from Custodian to Complainant dated July 3, 2007
- E-mail from Custodian to Complainant dated July 13, 2007
- E-mail from Complainant to Custodian dated July 13, 2007

The Custodian certifies that he received the Complainant's OPRA request on March 14, 2006<sup>6</sup> and immediately provided the Complainant with an e-mail indicating that the requested records are not readily available and that the Custodian will reach out to several units for assistance. The Custodian certifies that because several staff members in the Region South office were on vacation at the time of the Complainant's request, the Custodian was unable to assemble all of the requested records within the seven (7) business day deadline and conduct a legal review of the records. As such, the Custodian certifies that he requested an extension of time from the Complainant via e-mail dated June 29, 2007. The Custodian also certifies that he received an e-mail from the Complainant dated July 2, 2007 indicating that the Complainant believed the Custodian's

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<sup>6</sup> The actual date of the Complainant's request is June 20, 2007.

request for an extension exceeded the seven (7) business day deadline. Additionally, the Custodian certifies that he e-mailed the Complainant on July 3, 2007 requesting a two (2) week extension until July 13, 2007. The Custodian certifies that he received an e-mail from the Complainant in which the Complainant agreed to said extension.

Further, the Custodian certifies that between July 9, 2007 and July 12, 2007 the OPRA Unit received personal notes from the attendees of the Region South staff meetings and sought legal guidance. The Custodian certifies that after a legal review and a review of prior GRC decisions, the OPRA Unit determined that the requested records constitute ACD material and are not public records pursuant to N.J.S.A. 47:1A-1.1 and O’Shea, supra. The Custodian also certifies that he notified the Complainant of the DOT’s denial via e-mail dated July 13, 2007.

The Custodian states that in Martin O’Shea v. West Milford Board of Education, 391 N.J. Super. 534, 538 (App. Div. 2007),<sup>7</sup> the court held that requested handwritten notes are intra-agency ACD material because said notes were informal notes taken prior to the finalization of any formalized minutes. The Custodian states that the court further held that the personal notes were an informal memory aid and were not government records at all. Id. at 538-539. The Custodian states that the court also stated that “every yellow sticky note penned by a government official to help him or her remember a work-related task would be a public record. Such absurd results were not contemplated or required by OPRA.” Id. at 539. The Custodian distinguishes this present matter from O’Shea, supra, in that according to the Open Public Meetings Act (“OPMA”), formal minutes were required to be made by the West Milford Board of Education, which is not the case in this present matter because the DOT’s monthly staff meetings are not public meetings and are not subject to the requirement of releasing meeting minutes.

The Custodian certifies that the following records are all the records responsive to the Complainant’s OPRA request:

1. Staff meeting notes for Region South from December 2005 to June 2007 taken by T. Guerriere (14 pages)
2. Staff meeting notes for Region South from December 2005 to June 2007 taken by D. Matlack (16 pages)
3. Staff meeting notes for Region South from December 2005 to June 2007 taken by S. Powell (18 pages)
4. Staff meeting notes for Region South from December 2005 to June 2007 taken by B. Mallowney (15 pages)
5. Staff meeting notes for Region South from December 2005 to June 2007 taken by F. Babbitt (31 pages)
6. Staff meeting notes for Region South from December 2005 to June 2007 taken by D. Barbalace (17 pages)
7. Staff meeting notes for Region South from December 2005 to June 2007 taken by V. Baglivo (31 pages)
8. Staff meeting notes for Region South from December 2005 to June 2007 taken by J. Palmer (20 pages)

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<sup>7</sup> Appealing the GRC’s decision in Martin O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006).

The Custodian certifies that all of the above listed notes were taken by the attendees at their internal staff meetings for the purpose of personal reminders of issues and follow-up items.

### **August 23, 2007**

Complainant's response to the Custodian's SOI. The Complainant asserts that the Custodian's legal argument lacks sufficient factual merit and contradicts the factual record upon which his alleged position is based. The Complainant states that his request was not only for notes and minutes as the Custodian suggests. The Complainant states that his request was specifically for:

“any paper, notes, written or printed book, document, drawing, map, plan, photograph, microfilm, data 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 to include but not limited to minutes...”

The Complainant contends that the DOT utilizes the terms “notes and minutes” in an attempt to unfairly deny his request. The Complainant states that in a previous OPRA request (which is not the subject of this complaint), the Custodian utilized the term “handwritten agenda” to characterize J. Palmer's notes, which the Custodian provided to the Complainant. However, in this matter before the Council, the Complainant states that the DOT characterized J. Palmer's twenty (20) pages of documentation as “personal notes and reminders.” The Complainant asserts that J. Palmer's handwritten agendas are government records pursuant to OPRA.

Additionally, the Complainant states that he has attached an e-mail from J. Palmer directing his Secretary to distribute a memorandum dated October 31, 2005 to all staff which states that the information contained therein can be written into staff meeting minutes, suggesting that meeting minutes exist.

Further, the Complainant contends that the Custodian has not met the burden of proof that the requested records are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. The Complainant asserts that the Custodian did not sign, date and return his request form as is required by OPRA and GRC Advisory Opinion 2006-01.

### **September 4, 2007<sup>8</sup>**

Letter from Custodian's Counsel to the GRC. Counsel states that the DOT referred to the handwritten notes in its Statement of Information because the notes were all the records responsive on file. Counsel states that although the Complainant refers to examples of where other units created meeting minutes, no such minutes exist for the specific dates requested. Counsel asserts that this matter is different than Gannett New Jersey Partners, LP v. County of Middlesex, 379 N.J. Super. 205 because the Custodian in this matter was not able to distinguish the factual information from the impressions and deliberative material. Counsel contends that if the handwritten agenda provided the

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<sup>8</sup> Additional correspondence was submitted by the parties; however, said correspondence is not relevant to the adjudication of this complaint.



framework or impressions for the decision making process such as the staff meetings itself, the agenda is deliberative in nature.

Additionally, Counsel asserts that the Custodian's e-mailed response to the Complainant's request contains the same information as is listed on the Government Records Request Form. Counsel contends that the Complainant was provided with a privilege log as indicated by the fact that the Complainant produced said log with his Denial of Access Complaint.

Included in this letter is the Custodian's certification dated August 29, 2007. The Custodian certifies that after a review of the existing records and discussions with the various units cited in the Complainant's OPRA request, the Custodian determined that no minutes of the staff meetings for the time period requested exist. The Custodian certifies that other than the personal notes of various attendees of the staff meetings, there are no other records responsive to the Complainant's request.

Also included in this letter is the certification of Malcolm Jeffrey Palmer, Regional Engineer dated August 30, 2007. Mr. Palmer certifies that as the person who regularly convenes the staff meetings for Regional South Construction, formal minutes of the requested meetings were not made or kept on file by the NJDOT Region South Construction Office. Mr. Palmer certifies that it is not common practice for his office to generate or maintain formal minutes of staff meetings.

### **Analysis**

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

OPRA provides that:

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

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ... *The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.*" (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA provides that:

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

*and promptly return it to the requestor.* The custodian shall sign and date the form and provide the requestor with a copy thereof ... If the government record requested is temporarily unavailable because it is in use or in storage, the custodian shall so advise the requestor and shall make arrangements to promptly make available a copy of the record...” (Emphasis added.) N.J.S.A. 47:1A-5.g.

Additionally, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request...The requestor shall be advised by the custodian when the record can be made available.* If the record is not made available by that time, access shall be deemed denied...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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

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

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.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.<sup>9</sup> A custodian’s failure to respond in writing to a complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the complainant’s OPRA request. Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Further, N.J.S.A. 47:1A-5.i. provides that a custodian shall advise the requestor when a record can be made available.

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<sup>9</sup> It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

In this matter, the Custodian provided the Complainant with a written response to the Complainant's June 20, 2007 OPRA request on the same date indicating that the requested records may not be readily available and the Custodian may have to reach out to several units within the Department to obtain said records. Additionally, the Custodian provided the Complainant with a written response on June 29, 2007, the seventh (7<sup>th</sup>) business day following the Custodian's receipt of said request, in which the Custodian requested an extension of time to respond to the Complainant's request; however, the Custodian failed to notify the Complainant when the requested records would be provided. An open ended request for an extension of time goes against the spirit of OPRA. Thus, the Custodian's response is inadequate under OPRA. Additionally, while the Custodian did inform the Complainant in writing on July 3, 2007 that he would respond to the Complainant's request by July 13, 2007, said response was not made within the statutorily mandated seven (7) business days.

Therefore, because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5.i., the Custodian's written response to the Complainant dated June 20, 2007 and the request for an extension of time dated June 29, 2007 are inadequate under OPRA and the Complainant's request is "deemed" denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley, supra.

Additionally, the Custodian denied the Complainant access to the requested records in writing on July 13, 2007 on the basis that no official meeting minutes exist. In Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005), the Council held that "[t]he Custodian has certified that the records responsive to the request do not exist, therefore there was no unlawful denial of access."

Conversely in this complaint, although the Custodian certifies that no meeting minutes exist and thus would not have unlawfully denied access to the requested records, the Custodian failed to deny access to the Complainant's request in writing within the statutorily mandated seven (7) business days, thus resulting in a "deemed" denial.

Further, in the Custodian's response to the Complainant dated July 13, 2007 the Custodian stated that the existing personal notes of the meeting attendees are not government records because said notes are advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and Martin O'Shea v. West Milford Board of Education, GRC Complaint No. 2004-96 (April 2006).<sup>10</sup>

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."

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

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<sup>10</sup> Appealed at Martin O'Shea v. West Milford Board of Education, 391 N.J. Super. 534 (App. Div. 2007).  
Darnell Hardwick v. NJ Department of Transportation, 2007-164 – Findings and Recommendations of the Executive Director

formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). Federal district courts and circuit courts of appeal subsequently adopted the privilege and its rationale. 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, 492 A.2d 991.

In In Re Liquidation of Integrity, *supra*, 165 N.J. at 84-5, the judiciary set forth the legal standard for applying the deliberative process privilege as follows:

- (1) The initial burden falls on the government agency to establish that matters are both *pre-decisional* and *deliberative*.
  - a. Pre-decisional means that the records were generated before an agency adopted or reached its decision or policy.
  - b. Deliberative means that the record contains opinions, recommendations, or advice about agency policies or decisions.
    - i. Deliberative materials do not include purely factual materials.
    - ii. Where factual information is contained in a record that is deliberative, such information must be produced so long as the factual material can be separated from its deliberative context.
  - c. The exemption covers recommendations, draft documents, proposals, suggestions, and other subjective documents *which reflect the personal opinions of the writer rather than the policy of the agency*.
  - d. Documents which are protected by the privilege are those *which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is only a personal position*.
  - e. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves *whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency*.

In Martin O’Shea v. West Milford Board of Education, 391 N.J. Super. 534, 538 (App. Div. 2007),<sup>11</sup> the Complainant requested handwritten notes of an executive session meeting. The court held that:

“[w]e reject O’Shea’s contention that the Secretary’s handwritten notes, jotted down as a memory aid to assist in preparing the formal minutes, are public records merely because they were ‘made’ by a government official. Under that rationale any Board member’s personal handwritten notes, taken during a meeting to assist the member to recall what occurred, would be a public record because the member might arguably refer to them later in reviewing the Secretary’s draft of the formal minutes. Taken further, every yellow-sticky note penned by a government official to help him or her remember a work-related task would be a public record. Such absurd results were not contemplated or required by OPRA.”

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<sup>11</sup> This case is an appeal of the GRC’s decision of Martin O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006).

Additionally, in Gannett New Jersey Partners, LP v. County of Middlesex, 379 N.J. Super. 205, 877 A.2d 330 (App.Div. 2005),

“[t]he County refused to release the handwritten notes of ...a principal planner in the County Planning Department, regarding the possible entry into the Farmland Preservation Program...on the ground that those notes fall within the exemption from disclosure provided by N.J.S.A. 47:1A-1.1 for ‘inter-agency or intra-agency advisory, consultative or deliberative material.’”

The court held that the:

“...thirteen pages of handwritten notes contain primarily factual material...However, there are a number of entries within her notes that appear deliberative in nature...Therefore, the trial court should have redacted the deliberative entries in [the] notes and then released the notes with those redactions to Gannett.”

The court in O’Shea, *supra*, distinguished the facts of Gannett, *supra*, from its case. Specifically, the court stated that:

“[i]n Gannett, it appeared that the notes were made as part of the planner’s investigation of the application. There was no indication that the notes had been translated onto some more formal form, such as an official report. Nor were they the kind of informal memory aid at issue here.”

Such distinction applies to the complaint at issue here. No official meeting minutes exist for the requested staff meetings and the personal notes of the attendees which are responsive to the request are informal memory aids and are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and O’Shea, *supra*.

Therefore, because the Custodian provided a lawful basis for the denial of access at the time of the denial, the Custodian has met his burden of proving a lawful denial of access to the personal notes of the meeting attendees pursuant to N.J.S.A. 47:1A-6. Further, the Custodian’s actions in response to additional requests which are not the subject of this complaint have no bearing on said complaint.

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

OPRA states that:

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

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

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

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).

Because the requested records are not government records because they are advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and O’Shea, *supra*, the Custodian would not have unlawfully denied access. However, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by providing the Complainant with an inadequate response under OPRA resulting in a “deemed” denial. Nevertheless, 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 “deemed” denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s written response to the Complainant dated June 20, 2007 and request for an extension of time dated June 29, 2007 are inadequate under OPRA and the Complainant’s request is “deemed” denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

2. Because no official meeting minutes exist for the requested staff meetings and the personal notes of the attendees, which are responsive to the request, are informal memory aids, said records are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and Martin O’Shea v. West Milford Board of Education, 391 N.J. Super. 534 (App. Div. 2007). Therefore, because the Custodian provided a lawful basis for the denial of access at the time of the denial, the Custodian has met his burden of proving a lawful denial of access to the personal notes of the meeting attendees pursuant to N.J.S.A. 47:1A-6. Further, the Custodian’s actions in response to additional requests which are not the subject of this complaint have no bearing on said complaint.
  
3. Because the requested records are not government records because they are advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and Martin O’Shea v. West Milford Board of Education, 391 N.J. Super. 534, 538 (App. Div. 2007), the Custodian would not have unlawfully denied access. However, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by providing the Complainant with an inadequate response under OPRA resulting in a “deemed” denial. Nevertheless, 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 “deemed” denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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February 20, 2008