



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 18, 2009 Government Records Council Meeting

Randolph Young
Complainant

Complaint No. 2007-210

v.

NJ Department of Personnel
Custodian of Record

At the November 18, 2009 public meeting, the Government Records Council (“Council”) considered the November 10, 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 current Custodian provided the Complainant with a copy of the requested record in redacted form as ordered by the Council, and provided certified confirmation of compliance to the GRC’s Executive Director within five (5) business days from receipt of the Council’s Order, the current Custodian has complied with the Council’s Interim Order dated September 30, 2009.
2. Although the original Custodian’s claimed exemption of advisory, consultative, or deliberative material did not apply to the entirety of the requested record, the majority of said record is exempt from disclosure as a personnel record pursuant to N.J.S.A. 47:1A-10. Additionally, both the original and current Custodians complied with the Council’s Interim Orders which either directed the Custodian to provide the requested record to the Council for an *in camera* review, or directed the Custodian to disclose the record to the Complainant with appropriate redactions. Therefore, it is concluded that neither the original nor the current Custodian’s actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the original Custodian’s “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 18th 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.

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: November 23, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
November 18, 2009 Council Meeting**

**Randolph Young¹
Complainant**

GRC Complaint No. 2007-210

v.

**NJ Department of Personnel²
Custodian of Records³**

Records Relevant to Complaint: Document detailing Dennis Reddick's job responsibilities and salary.⁴

Request Made: February 16, 2007

Response Made: March 2, 2007

Custodian: Mark Perkiss⁵

GRC Complaint Filed: September 11, 2007⁶

Background

September 30, 2009

Government Records Council's ("Council") Interim Order. At its September 30, 2009 public meeting, the Council considered the September 23, 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, found that the table in the Council's August 11, 2009 Interim Order be modified as follows:

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination
1	New Jersey Department of	Record detailing	1) Redactions of supervisory	Page 3, response to Item 15(A):

¹ Represented by Albert Van-Lang, Esq., Law Offices of Albert Van-Lang (New York, NY).

² Represented by DAG Andrea R. Grundfest, on behalf of the NJ Attorney General.

³ Since this complaint was filed, the name of the NJ Department of Personnel has been changed to the NJ Civil Service Commission.

⁴ The Custodian names this record Position Classification Questionnaire.

⁵ Acting Records Custodian. The original Custodian is Warren Barclay.

⁶ The GRC received the Denial of Access Complaint on said date.

	<p>Personnel, Division of Human Resource Management <i>Position Classification Questionnaire</i> for Employee Dennis C. Reddick dated January 12, 2006 (3 pages).</p>	<p>Dennis C. Reddick's job responsibilities and salary.</p>	<p>status and performance evaluation of public employees were based on the personnel exemption contained in <u>N.J.S.A.</u> 47:1A-10</p> <p>2) Initial denial of access to questionnaire was pursuant to <u>N.J.S.A.</u> 47:1A-1.1. for its advisory, consultative or deliberative role in the classification process.</p>	<p>redact the first sentence which contains opinion and is exempt as ACD material pursuant to <u>N.J.S.A.</u> 47:1A- 1.1.</p> <p>Page 3, response to Item 15(B): redact in its entirety because it contains opinion and is exempt as ACD material pursuant to <u>N.J.S.A.</u> 47:1A- 1.1.</p> <p>The balance of the record contains factual material that is not ACD. However, as a personnel record pursuant to <u>N.J.S.A.</u> 47:1A- 10, the entire record is exempt from disclosure except for the individual's name in Block #1, salary in Block #2, position in Block #5, title in Block #6 and payroll record in Block #9.</p>
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On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's clarification of its August 11, 2009 Interim Order set forth in the table above within five (5) business days from receipt of this Order and

simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4, to the Executive Director.

October 5, 2009

Council's Interim Order distributed to the parties.

October 13, 2009

Current Custodian's response to the Council's Interim Order. The current Custodian certifies that he is the Acting Custodian of Records for the Civil Service Commission (formerly the New Jersey Department of Personnel) while the original Custodian, Warren Barclay, is on medical leave. The current Custodian states that the Council's Interim Order found that the requested record is exempt from disclosure as a personnel record pursuant to N.J.S.A. 47:1A-10 with the exception of Mr. Reddick's name in Block # 1, salary in Block # 2, position in Block # 5, title in Block # 6, and payroll record in Block # 9. The current Custodian certifies that he sent the Complainant a copy of the requested record on October 13, 2009 redacted as described above.⁷

Analysis

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

The Council's Interim Order dated September 30, 2009 directed the Custodian to disclose the following information from the requested record: the individual's name in Block # 1, salary in Block # 2, position in Block # 5, title in Block # 6 and payroll record in Block # 9. On October 13, 2009, the fifth (5th) business day following the dissemination of the Council's Interim Order to the parties, the current Custodian submitted a legal certification to the GRC in which the current Custodian certified that he provided the Complainant with a copy of the requested record on October 13, 2009 in redacted form as ordered by the Council.

Therefore, because the current Custodian provided the Complainant with a copy of the requested record in redacted form as ordered by the Council, and provided certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of the Council's Order, the current Custodian has complied with the Council's Interim Order dated September 30, 2009.

Whether the original and/or current Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied

⁷ The current Custodian also states that the same record was provided to the Complainant on January 7, 2008 as a result of mediation.
Randolph Young v. New Jersey Department of Personnel, 2007-210 – Supplemental Findings and Recommendations of the Executive Director 3

access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

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

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

The original Custodian responded to the Complainant’s OPRA request on the ninth (9th) business day following receipt of the request and denied access to the requested record on the basis that said record constitutes advisory, consultative or deliberative material (“ACD”) and is not a government record pursuant to N.J.S.A. 47:1A-1.1. The Council held that the original Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days resulted in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Additionally, the Council ordered the Custodian to provide nine (9) copies of the requested record to the Council for an *in camera* review to determine the validity of the Custodian’s asserted exemption. The original Custodian complied with the Council’s November 19, 2008 Interim Order by providing the Council with all records requested for the *in camera* review within five (5) business days of receiving the Council’s Order.

After conducting the *in camera* review, the Council concluded the following:

- Page 3, response to Item 15(A): redact the first sentence which contains opinion and is exempt as ACD material pursuant to N.J.S.A. 47:1A-1.1.
- Page 3, response to Item 15(B): redact in its entirety because it contains opinion and is exempt as ACD material pursuant to N.J.S.A. 47:1A-1.1.
- The balance of the record contains factual material that is not ACD. However, as a personnel record pursuant to N.J.S.A. 47:1A-10, the entire record is exempt from disclosure except for the individual’s name in Block # 1, salary in Block # 2, position in Block # 5, title in Block # 6 and payroll record in Block # 9.

The Council ordered the Custodian to disclose to the Complainant the portions of the record that disclose the name, title, position, salary, and payroll record of the individual who is the subject of the requested record. Because the current Custodian provided the Complainant with a copy of the requested record in redacted form as ordered by the Council, and provided certified confirmation of compliance to the GRC’s Executive Director within five (5) business days from receipt of the Council’s Order, the

current Custodian has complied with the Council's Interim Order dated September 30, 2009.

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 original Custodian's claimed exemption of advisory, consultative, or deliberative material did not apply to the entirety of the requested record, the majority of said record is exempt from disclosure as a personnel record pursuant to N.J.S.A. 47:1A-10. Additionally, both the original and current Custodians complied with the Council's Interim Orders which either directed the Custodian to provide the requested record to the Council for an *in camera* review, or directed the Custodian to disclose the record to the Complainant with appropriate redactions. Therefore, it is concluded that neither the original nor the current Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the original Custodian's "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 current Custodian provided the Complainant with a copy of the requested record in redacted form as ordered by the Council, and provided certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of the Council's Order, the current Custodian has complied with the Council's Interim Order dated September 30, 2009.
2. Although the original Custodian's claimed exemption of advisory, consultative, or deliberative material did not apply to the entirety of the requested record, the majority of said record is exempt from disclosure as a personnel record pursuant to N.J.S.A. 47:1A-10. Additionally, both the original and current Custodians complied with the Council's Interim Orders which either directed the Custodian to provide the requested record to the Council for an *in camera* review, or directed the Custodian to disclose the record to the Complainant with appropriate redactions. Therefore, it is concluded that neither the original nor the current

Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the original Custodian's "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.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

November 10, 2009



State of New Jersey
GOVERNMENT RECORDS COUNCIL
 101 SOUTH BROAD STREET
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JON S. CORZINE
 Governor

CHARLES A. RICHMAN
 Acting Commissioner

INTERIM ORDER

September 30, 2009 Government Records Council Meeting

Randolph Young
 Complainant

Complaint No. 2007-210

v.

NJ Department of Personnel
 Custodian of Record

At the September 30, 2009 public meeting, the Government Records Council (“Council”) considered the September 23, 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 the table in the Council’s August 11, 2009 Interim Order be modified as follows:

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian’s Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination
1	New Jersey Department of Personnel, Division of Human Resource Management <i>Position Classification Questionnaire</i> for Employee Dennis C. Reddick dated January 12,	Record detailing Dennis C. Reddick’s job responsibilities and salary.	1) Redactions of supervisory status and performance evaluation of public employees were based on the personnel exemption contained in <u>N.J.S.A. 47:1A-10</u>	Page 3, response to Item 15(A): redact the first sentence which contains opinion and is exempt as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Page 3, response to Item 15(B): redact in its



	2006 (3 pages).		2) Initial denial of access to questionnaire was pursuant to <u>N.J.S.A. 47:1A-1.1.</u> for its advisory, consultative or deliberative role in the classification process.	entirety because it contains opinion and is exempt as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1.</u> The balance of the record contains factual material that is not ACD. However, as a personnel record pursuant to <u>N.J.S.A. 47:1A-10,</u> the entire record is exempt from disclosure except for the individual's name in Block #1, salary in Block #2, position in Block #5, title in Block #6 and payroll record in Block #9.
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On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's clarification of its August 11, 2009 Interim Order set forth in the table above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4, to the Executive Director.

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

Clarification

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

**Randolph Young¹
Complainant**

GRC Complaint No. 2007-210

v.

**NJ Department of Personnel²
Custodian of Records³**

Records Relevant to Complaint: Document detailing Dennis Reddick's job responsibilities and salary.⁴

Request Made: February 16, 2007

Response Made: March 2, 2007

Custodian: Warren Barclay

GRC Complaint Filed: September 11, 2007⁵

Background

August 11, 2009

Government Records Council's Interim Order. At the August 11, 2009 public meeting, the Government Records Council ("Council") considered the July 22, 2009 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council therefore found that:

1. The Custodian has complied with the Council's November 19, 2008 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council's Order.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the table below within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4, to the Executive Director.**

¹ Represented by Albert Van-Lang, Esq., Law Offices of Albert Van-Lang (New York, NY).

² Represented by DAG Andrea R. Grundfest, on behalf of the NJ Attorney General.

³ Since this complaint was filed, the name of the NJ Department of Personnel has been changed to the NJ Civil Service Commission.

⁴ The Custodian names this record Position Classification Questionnaire.

⁵ The GRC received the Denial of Access Complaint on said date.

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination ⁶
1	New Jersey Department of Personnel, Division of Human Resource Management <i>Position Classification Questionnaire</i> for Employee Dennis C. Reddick dated January 12, 2006 (3 pages).	Record detailing Dennis C. Reddick's job responsibilities and salary.	1) Redactions of supervisory status and performance evaluation of public employees were based on the personnel exemption contained in <u>N.J.S.A. 47:1A-10</u> 2) Initial denial of access to questionnaire was pursuant to <u>N.J.S.A. 47:1A-1.1</u> for its advisory, consultative or deliberative ("ACD") role in the classification process.	Page 3, response to Item 15(A): redact the first sentence which contains opinion and is exempt as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Page 3, response to Item 15(B): redact in its entirety because it contains opinion and is exempt as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> . The balance of the record contains factual material that is not ACD.

⁶ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

Clarification

Under N.J.S.A. 47:1A-10, a personnel record is not accessible as a government record; however, this same provision lists several elements of a personnel record that must be disclosed:

“...the personnel or pension records in the possession of a public agency...shall not be considered a government record and shall not be made available for public access, except that *an individual’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be a government record...*” (Emphasis added.) N.J.S.A. 47:1A-10.

Of course, these exemptions apply to the Position Classification Questionnaire, which the parties do not dispute is a personnel record. Therefore, the Council’s August 11, 2009 Interim Order is clarified with the following language that is inserted in the “Findings of the *In Camera* Examination” column as the second sentence of the final paragraph:

However, as a personnel record pursuant to N.J.S.A. 47:1A-10, the entire record is exempt from disclosure except for the individual’s name in Block #1, salary in Block #2, position in Block #5, title in Block #6 and payroll record in Block #9.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the table in the Council’s August 11, 2009 Interim Order be modified as follows:

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian’s Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination
1	New Jersey Department of Personnel, Division of Human Resource Management <i>Position Classification Questionnaire</i> for Employee Dennis C.	Record detailing Dennis C. Reddick’s job responsibilities and salary.	1) Redactions of supervisory status and performance evaluation of public employees were based on the personnel exemption contained in <u>N.J.S.A.</u>	Page 3, response to Item 15(A): redact the first sentence which contains opinion and is exempt as ACD material pursuant to <u>N.J.S.A.</u> 47:1A-1.1. Page 3, response

	Reddick dated January 12, 2006 (3 pages).		47:1A-10 2) Initial denial of access to questionnaire was pursuant to <u>N.J.S.A.</u> 47:1A-1.1. for its advisory, consultative or deliberative role in the classification process.	to Item 15(B): redact in its entirety because it contains opinion and is exempt as ACD material pursuant to <u>N.J.S.A.</u> 47:1A-1.1. The balance of the record contains factual material that is not ACD. However, as a personnel record pursuant to <u>N.J.S.A.</u> 47:1A-10, the entire record is exempt from disclosure except for the individual's name in Block #1, salary in Block #2, position in Block #5, title in Block #6 and payroll record in Block #9.
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On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's clarification of its August 11, 2009 Interim Order set forth in the table above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4, to the Executive Director.

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

Approved By: Catherine Starghill, Esq.
Executive Director

September 23, 2009



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GOVERNMENT RECORDS COUNCIL
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JON S. CORZINE
Governor

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INTERIM ORDER

August 11, 2009 Government Records Council Meeting

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Complainant

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New Jersey Department of Personnel
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council ("Council") considered the July 22, 2009 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has complied with the Council's November 19, 2008 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council's Order.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the table below within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4,¹ to the Executive Director.**

¹ "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."



Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination ²
1	New Jersey Department of Personnel, Division of Human Resource Management <i>Position Classification Questionnaire</i> for Employee Dennis C. Reddick dated January 12, 2006 (3 pages).	Record detailing Dennis C. Reddick's job responsibilities and salary.	1) Redactions of supervisory status and performance evaluation of public employees were based on the personnel exemption contained in <u>N.J.S.A. 47:1A-10</u> 2) Initial denial of access to questionnaire was pursuant to <u>N.J.S.A. 47:1A-1.1</u> for its advisory, consultative or deliberative role in the classification process.	Page 3, response to Item 15(A): redact the first sentence which contains opinion and is exempt as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> . Page 3, response to Item 15(B): redact in its entirety because it contains opinion and is exempt as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> . The balance of the record contains factual material that is not ACD.

² **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

Interim Order Rendered by the
Government Records Council
On The 11th Day of August, 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
Government Records Council

Decision Distribution Date: August 13, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
August 11, 2009 Council Meeting**

**Randolph Young¹
Complainant**

GRC Complaint No. 2007-210

v.

**NJ Department of Personnel²
Custodian of Records³**

Records Relevant to Complaint: Document detailing Dennis Reddick's job responsibilities and salary.⁴

Request Made: February 16, 2007

Response Made: March 2, 2007

Custodian: Warren Barclay

GRC Complaint Filed: September 11, 2007⁵

Records Submitted for *In Camera* Examination: New Jersey Department of Personnel, Division of Human Resource Management *Position Classification Questionnaire* consisting of three (3) pages for Employee Dennis C. Reddick, dated January 12, 2006.

Background

November 19, 2008

Government Records Council's Interim Order. At the November 19, 2008 public meeting, the Government Records Council ("Council") considered the November 13, 2008 Executive Director's Findings and Recommendations 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. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

¹ Represented by Albert Van-Lang, Esq., Law Offices of Albert Van-Lang (New York, NY).

² Represented by DAG Andrea R. Grundfest, on behalf of the NJ Attorney General.

³ Since this complaint was filed, the name of the NJ Department of Personnel has been changed to the NJ Civil Service Commission.

⁴ The Custodian names this record Position Classification Questionnaire.

⁵ The GRC received the Denial of Access Complaint on said date.

2. The Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested record to determine the validity of the Custodian's assertion that the record constitutes advisory, consultative, or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see # 2 above), a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. 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 outcome of the *in camera* review.

November 20, 2008

Council's Interim Order ("Order") distributed to the parties.

November 26, 2008

Letter from the Custodian's Counsel to the GRC in response to the Council's Interim Order with the following attachments:

- Nine (9) copies each of the record relevant to the complaint in unredacted form
- The Custodian's certification that the documents provided are the documents requested by the Council for the *in camera* inspection
- A document/redaction index

Analysis

The Council has ordered this *in camera* examination of the submitted record to determine the validity of the Custodian's assertion that the record constitutes advisory, consultative or deliberative ("ACD") material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

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."

⁶ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁷ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

In O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006), the Council stated that “neither the statute nor the courts have defined the terms... ‘advisory, consultative, or deliberative’ in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. 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 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 WL 774446 (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, 492 A.2d 991.

An *in camera* examination was performed on the submitted record to determine if the record contains ACD material exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. The results of this examination are set forth in the following table:

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination⁸
1	New Jersey Department of Personnel, Division of Human Resource Management <i>Position Classification</i>	Record detailing Dennis C. Reddick's job responsibilities and salary.	1) Redactions of supervisory status and performance evaluation of public employees were based on the personnel	Page 3, response to Item 15(A): redact the first sentence which contains opinion and is exempt as ACD material pursuant to <u>N.J.S.A. 47:1A-</u>

⁸ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

	<p><i>Questionnaire</i> for Employee Dennis C. Reddick dated January 12, 2006 (3 pages).</p>		<p>exemption contained in <u>N.J.S.A.</u> 47:1A-10</p> <p>2) Initial denial of access to questionnaire was pursuant to <u>N.J.S.A.</u> 47:1A-1.1. for its advisory, consultative or deliberative role in the classification process.</p>	<p>1.1.</p> <p>Page 3, response to Item 15(B): redact in its entirety because it contains opinion and is exempt as ACD material pursuant to <u>N.J.S.A.</u> 47:1A-1.1.</p> <p>The balance of the record contains factual material that is not ACD.</p>
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Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council’s November 19, 2008 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council’s Order.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4,⁹ to the Executive Director.**

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

Approved By: Catherine Starghill, Esq.
Executive Director

July 22, 2009

⁹ "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."



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

INTERIM ORDER

November 19, 2008 Government Records Council Meeting

Randolph Young
Complainant

Complaint No.2007-210

v.

NJ Department of Personnel
Custodian of Record

At the November 19, 2008 public meeting, the Government Records Council (“Council”) considered the November 13, 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. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. The Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested record to determine the validity of the Custodian’s assertion that the record constitutes advisory, consultative, or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see # 2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the**

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

² The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.



document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

4. 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 outcome of the *in camera* review.

Interim Order Rendered by the
Government Records Council
On The 19th Day of November, 2008

Robin Berg Tabakin, Chair
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: November 20, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 19, 2008 Council Meeting**

**Randolph Young¹
Complainant**

GRC Complaint No. 2007-210

v.

**NJ Department of Personnel²
Custodian of Records**

Records Relevant to Complaint: Document detailing Dennis Reddick's job responsibilities and salary.³

Request Made: February 16, 2007

Response Made: March 2, 2007

Custodian: Warren Barclay

GRC Complaint Filed: September 11, 2007⁴

Background

February 16, 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.

March 2, 2007

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the ninth (9th) business day following receipt of such request. The Custodian states that the requested record relating to Dennis Reddick is entitled Position Classification Questionnaire ("DPF 44"). The Custodian states that this record describes the level and type of supervision performed, the duties of a position with the ranking of the order of difficulty as well as the percentage of time spent engaged in those duties. The Custodian states that this record is considered advisory, consultative or deliberative material and therefore is not a government record pursuant to N.J.S.A. 47:1A-1.1.

September 11, 2007

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

¹ Represented by Albert Van-Lang (no additional information provided).

² Represented by DAG Andrea R. Grundfest, on behalf of the NJ Attorney General.

³ The Custodian names this record Position Classification Questionnaire.

⁴ The GRC received the Denial of Access Complaint on said date.

- Complainant's OPRA request dated February 5, 2007⁵
- Custodian's response to the OPRA request dated March 2, 2007

The Complainant states that the Custodian denied access to the requested record on the basis that said record is not a government record pursuant to N.J.S.A. 47:1A-1.1 because it is advisory, consultative or deliberative material. The Complainant states that the requested record is a record that he signed when he was Mr. Reddick's supervisor at the Irvington Housing Authority. The Complainant contends that because he signed the record, he should be able to gain access to said record.

September 12, 2007

Offer of Mediation sent to both parties.

September 14, 2007

Complainant's signed Agreement to Mediate.

September 18, 2007

Custodian's signed Agreement to Mediate.

September 18, 2007

Complaint referred to mediation.

July 17, 2008

Complaint referred back to the GRC for adjudication.

July 28, 2008

Letter from GRC to Complainant. The GRC provides the Complainant an opportunity to amend his Denial of Access Complaint in the event that some issues were resolved during mediation.⁶

August 5, 2008

Request for the Statement of Information sent to the Custodian.

August 22, 2008

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

- Complainant's OPRA request dated February 16, 2007
- Custodian's response to the OPRA request dated March 2, 2007⁷

The Custodian certifies that he received the Complainant's OPRA request on February 16, 2007 and provided a written response on March 2, 2007 in which the Custodian denied access to the requested record on the basis that said record constituted advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and as such was not a government record subject to public access. The Custodian certifies that he had

⁵ The Complainant submitted his OPRA request on both February 5, 2007 and February 16, 2007. However, the Complainant only challenges the Denial of Access to his February 16, 2007 request.

⁶ The Complainant did not respond to the GRC's letter dated July 28, 2008.

⁷ The Custodian attaches additional records which are not relevant to the adjudication of this complaint.

some difficulty locating the requested record due to the separation of the NJ Department of Personnel Human Resource Management component into State Human Resource Management and Local Human Resource Management units. Additionally, the Custodian certifies that the Irvington Housing Authority file contained a voluminous amount of records.

The Custodian also certifies that Records Retention Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”) provides that the requested record must be retained for three (3) years. The Custodian certifies that no records responsive to the Complainant’s request were destroyed.

The Custodian’s Counsel states that neither OPRA nor the courts have defined the terms “intra-agency” or “advisory, consultative or deliberative material” (“ACD”). As such, Counsel states that the GRC looks to an analogous concept, the deliberative process privilege, for guidance. Counsel asserts that both the ACD exemption and the deliberative process privilege allow a public agency to withhold information that is pre-decisional and deliberative in nature. Counsel contends that deliberative material contains opinions, recommendations, or advice about agency policies. Counsel also states that purely factual information contained on an otherwise deliberative record is not exempt from disclosure. In re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption with Amendments of Death Penalty Regulations, 367 N.J. Super. 61, 73 (App. Div. 2004). Counsel states that the Custodian considered the requested record part of the pre-decisional classification review of Dennis Reddick’s position.

Analysis

Whether the Custodian unlawfully denied access to the requested record?

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 also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

OPRA further provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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.

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.⁸ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

⁸ 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 instant complaint, the Custodian certifies receiving the Complainant's OPRA request on February 16, 2007. The Custodian also certifies providing the Complainant with a written response to the request on March 2, 2007, the ninth (9th) business day following receipt of the request, in which the Custodian denied access to the requested records on the basis that said records are considered advisory, consultative or deliberative material ("ACD") and are not government records pursuant to N.J.S.A. 47:1A-1.1.

Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra.

Additionally, the Custodian's Counsel states that the Custodian considered the requested record part of the pre-decisional classification review of Dennis Reddick's position. Counsel asserts that both the ACD exemption and the deliberative process privilege allow a public agency to withhold information that is pre-decisional and deliberative in nature.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC⁹ in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The court stated that:

"OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers."

The court also stated that:

"[t]he statute also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review."

Further, the court stated that:

"[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the

⁹ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
Randolph Young v. NJ Department of Personnel, 2007-210 – Findings and Recommendations of the Executive Director

appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption."

Therefore, in this instant complaint the Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the records at issue pursuant to Paff, *supra*. As such, the GRC must conduct an *in camera* review of the requested record to determine the validity of the Custodian's assertion that the record constitutes advisory, consultative, or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

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?

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 outcome of the *in camera* review.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. The Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested record to determine the validity of the Custodian's assertion that the record constitutes advisory, consultative, or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver¹⁰ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see # 2 above), a document or redaction index¹¹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the**

¹⁰ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

¹¹ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

4. 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 outcome of the *in camera* review.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

November 13, 2008