



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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

101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

Toll Free: 866-850-0511
Fax: 609-633-6337
E-mail: grc@dca.state.nj.us
Web Address:
www.nj.gov/grc

FINAL DECISION

June 25, 2008 Government Records Council Meeting

Richard G. Rader
Complainant

Complaint No. 2007-239

v.

Township of Willingboro (Burlington)
Custodian of Record

At the June 25, 2008 public meeting, the Government Records Council (“Council”) considered the June 18, 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. While seeking legal advice on how to appropriately respond to a records request is reasonable, pursuant to Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006), it is not a lawful reason for delaying a response to an OPRA request because the Custodian should have notified the Complainant in writing that an extension of the time period to respond was necessary. As such, the Custodian’s failure to provide a written response to the Complainant’s 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 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 unapproved, draft executive session meeting minutes of the Township Council dated October 24, 2006 constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Dina Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). Accordingly, the Custodian has borne her burden of proving a lawful denial of access to the draft minutes pursuant to N.J.S.A. 47:1A-6 because she certified that the requested draft minutes had not been approved by the governing body at the time of the Complainant’s request. However, the Custodian provided the Complainant with a copy of said minutes via letter dated November 12,



2007 as said minutes were approved by the governing body on November 7, 2007.

3. The Custodian's written response to the Complainant dated September 19, 2007 is insufficient pursuant to N.J.S.A. 47:1A-5.g. because the Custodian failed to provide any legal basis for the denial of access to the Township Council's meeting minutes dated October 24, 2006 and November 8, 2006.
4. The Custodian's search for records responsive to the Complainant's request for "other Council action" appointing the Acting Manager was insufficient pursuant to Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007) and Schneble v. NJ Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008).
5. The matter of whether the Council's method of the Township Manager's termination is in violation of N.J.S.A. 40:69A-93 or whether the Council violated OPMA for any reason does not fall under the authority of the GRC and is not governed by OPRA pursuant to N.J.S.A. 47:1A-7.b., Allegretta v. Borough of Fairview, GRC Complaint No. 2005-132 (December 2006) and Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (March 2007).
6. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., provided an insufficient response to the Complainant's request pursuant to N.J.S.A. 47:1A-5.g. and conducted an insufficient search in response to the Complainant's request, the Custodian provided the Complainant with all records responsive to the request even when such disclosure was not required (because the requested executive session minutes were not approved by the governing body at the time of the request). Therefore, 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, insufficient response and insufficient search appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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

Final Decision Rendered by the
Government Records Council

On The 25th Day of June, 2008

Robin Berg Tabakin, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: July 2, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Richard G. Rader¹
Complainant**

GRC Complaint No. 2007-239

v.

**Township of Willingboro (Burlington)²
Custodian of Records**

Records Relevant to Complaint:

1. Township Council's executive session minutes dated October 24, 2006
2. Ordinance, resolution or other Township Council action appointing an Acting Township Manager on or about October 24, 2006

Request Made: August 20, 2007

Response Made: September 19, 2007 and November 12, 2007

Custodian: Marie Annese

GRC Complaint Filed: September 18, 2007

Background

August 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.

September 18, 2007

Denial of Access Complaint filed with the Government Records Council ("GRC") with the Complainant's OPRA request dated August 20, 2007 attached.³ The Complainant states that on August 20, 2007 he submitted his OPRA request on the Township's OPRA request form. The Complainant states that to date he has not received a response to his request.

The Complainant asserts that the requested executive session minutes may not exist because the Township Clerk was excluded from the portion of the meeting when the Township Council discussed the employment status of the Township Manager. The

¹ No legal representation listed on record.

² Represented by Cristal Holmes-Bowie, Esq., of Law Office of Michael A. Armstrong (Willingboro, NJ).

³ The Complainant included additional records with his Denial of Access Complaint; however, said records are not relevant to the adjudication of this complaint.

Complainant contends that the Township Council discussed the Township Manager's employment during closed session because the only action the Council took when the public meeting resumed was terminating the Township Manager. The Complainant alleges that the Council's method of termination is in violation of N.J.S.A. 40:69A-93 and that the portion of the closed session meeting during which said discussion took place is a violation of N.J.S.A. 10:4-12b(8) because the Township Council failed to notify the Manager of such discussion. As such, the Complainant claims that the public's interest in unlawful actions by the Township Council outweighs any privacy rights or other privilege that would support withholding the closed session minutes. However, the Complainant also contends that if the requested closed session minutes exist, the Township Council may have violated OPRA and the Open Public Meetings Act ("OPMA") by excluding the Clerk from a portion of the meeting.

Additionally, regarding item # 2 of the Complainant's OPRA request, the Complainant states that the last action the Township Council took at its October 24, 2006 meeting was terminating the Township Manager. The Complainant states that the minutes of the next public meeting, dated November 8, 2006, list Joanne Diggs as Acting Manager. The Complainant states that his request seeks the records which indicate that the Township Council took action to appoint Ms. Diggs as Acting Township Manager. The Complainant states that N.J.S.A. 40:69A-92 provides that the Manager must be appointed by the Council. The Complainant also states that N.J.S.A. 40:69A-94 provides that "the council may by resolution appoint an officer of the municipality to perform the duties of the manager."

September 19, 2007

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the twenty first (21st) business day following receipt of such request. The Custodian states that access to the requested executive session minutes is denied because said minutes have not yet been released by the Township Council. Additionally, the Custodian states that Mayor Ramsey and Councilman Stephenson announced the appointment of Joanne Diggs as Interim/Acting Manager at a Department Director's meeting on Wednesday October 25, 2006 at 4:00 pm.

September 21, 2007

Complainant's amended Denial of Access Complaint. The Complainant states that he spoke to the Custodian on September 19, 2007 and that during said conversation the Custodian informed him that she would not release the requested executive session minutes but failed to give a reason. In response to item # 2 of the Complainant's request, the Complainant states that the Custodian provided him with a copy of a calendar page that contains a notation that the Department Director's meeting was scheduled for October 25, 2006 at 4:00 pm. The Complainant states that the Custodian advised him that Mayor Ramsey announced Joanne Diggs as the Acting Manager at said meeting. The Complainant states that he asked the Custodian to put said responses in writing because he deemed said responses inadequate. The Complainant states that he received the Custodian's written response on September 20, 2007. Additionally, the Complainant states that the Custodian informed him that the delay in responding to his OPRA request was because the Custodian had forwarded said request to the Township Solicitor.

Additionally, the Complainant states that he is enclosing a page from the Council's October 24, 2006 public meeting. The Complainant asserts that the enabling resolution does not meet the standards regarding the degree of specificity of what is to be discussed. The Complainant also contends that the vague time frame for the eventual disclosure of deliberations presumes that there is a record of what took place. The Complainant suggests that an *in camera* review of the minutes will show that there is no such record.

October 10, 2007

Offer of Mediation sent to both parties.

October 16, 2007

Custodian's signed Agreement to Mediate. (The Complainant did not respond to the Offer of Mediation.)

October 25, 2007

Request for the Statement of Information sent to the Custodian.

October 30, 2007

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

- Copy of Paff v. Franklin Township Redevelopment Agency, et al., Law Division 2005 (an unreported opinion decided June 10, 2005)
- Copy of Township Manager's calendar for the dates of October 23-25, 2006
- Resolution No. 2006-125 dated October 24, 2006
- Township Council meeting minutes dated October 24, 2006
- Township Council meeting minutes dated November 8, 2006
- Complainant's OPRA request dated August 20, 2007
- Custodian's response to the request dated September 19, 2007

The Custodian certifies that she received the Complainant's OPRA request on August 20, 2007 and that upon receipt of said request, the Custodian located and copied the Township Council's meeting minutes dated October 24, 2006 and November 8, 2006 which refer to the termination of the Township Manager and appointment of Acting Manager, the resolution authorizing an executive session on October 24, 2006 and the Township Manager's calendar indicating a departmental meeting on October 25, 2006. The Custodian certifies that she notified the Complainant, via letter dated September 19, 2007, that the requested closed session meeting minutes had not yet been approved by the Council. The Custodian also certifies that she informed the Complainant in said letter that two (2) Council members announced the Acting Manager at a department meeting on October 25, 2006. The Custodian certifies that she provided the Complainant with all approved and adopted records regarding the Council's actions to appoint the Acting Manager.⁴ Additionally, the Custodian certifies that no records responsive to the Complainant's request were destroyed.

⁴ Meeting minutes dated October 24, 2006, meeting minutes dated November 8, 2006, Resolution No. 2006-125 and calendar dated October 23-25, 2006.

The Custodian asserts that she complied with OPRA by informing the Complainant in writing that she could not provide the requested meeting minutes because said minutes had not been approved by the governing body. The Custodian certifies that to date that the Township Council has not approved any executive session minutes. The Custodian contends that until such time that the executive session minutes are approved, said minutes are draft minutes which are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 as advisory, consultative or deliberative material. *See Paff v. Franklin Township Redevelopment Agency, et al.*, Law Division 2005 (an unreported opinion decided June 10, 2005). The Custodian certifies that the requested minutes are scheduled to be approved by the Council on November 7, 2007 and at such time the Custodian will make said minutes available to the Complainant.

Further, the Custodian certifies that a memorandum from Mayor Ramsey to Township Department heads dated October 25, 2006 is responsive to the Complainant's request, but it was withheld from disclosure because the Custodian did not have a copy of said memorandum at the time she responded to the Complainant's OPRA request.

November 5, 2007

The Complainant's response to the Custodian's SOI. The Complainant objects to the portion of the Custodian's SOI which states that "the Custodian provided...the Open session minutes of October 24, 2006...and subsequently the minutes of the next Open meeting November 8, 2006..." The Complainant states that the only records he received from the Custodian were the Custodian's response letter dated September 19, 2007 and a photocopy of a page from her calendar. The Complainant states that he made copies of the minutes listed above from the Willingboro Township Library's collection of Council meeting minutes. The Complainant states that the minutes he received from the Library contain the word "open" in the margin and the sentence "Council reconvened in open session at 10 PM" is circled. The Complainant states that the Township's copy does not contain such marks.

Additionally, the Complainant states that the Custodian identifies a memorandum from Mayor Ramsey to Township Department Heads dated October 25, 2006 as a record responsive to his request which was not provided because the Custodian did not have a copy of said memo at the time of her response to the request. The Complainant asserts that this statement implies that the Custodian currently has a copy of said memo and has not provided any additional reasons for denying access to said record.

The Complainant also objects to the Custodian's statement that the Custodian informed the Complainant via letter dated September 19, 2007 that the October 24, 2006 executive session minutes had not been approved and adopted by the Council. The Complainant states that the words "approved" or "adopted" were not used in the Custodian's response.

Further, the Complainant contends that the records provided in response to item # 2 of his request are not responsive to said request. The Complainant asserts that a Council action must be taken to make the appointment of Township Manager valid.

The Complainant also asserts that the Custodian's reliance on Paff, *supra*, to support the Custodian's position that the draft executive session minutes are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 is misplaced. The Complainant states that in Paff, the court stated that "the minutes of a prior meeting (of an agency that normally meets once a month) can be considered and approved within about one month..." The Complainant asserts that this statement implies that the frequency of a public body's meetings is tied into the time frame considered appropriate for the approval of minutes to satisfy OPMA's requirement that "each public body shall keep reasonable comprehensible minutes of all its meetings...which shall be promptly available to the public." The Complainant states that the Willingboro Township Council normally meets three (3) times a month and that more than nine (9) months elapsed between the October 24, 2006 meeting and the date of Complainant's request.

Additionally, the Complainant contends that the GRC should conduct an *in camera* review of the executive session minutes to determine whether said minutes meet the comprehensibility and other requirements of OPMA. The Complainant questions how one (1) page constitutes a reasonably comprehensible record of closed session discussions lasting approximately two (2) hours.

November 12, 2007

Letter from Custodian to Complainant. The Custodian states that the October 24, 2006 closed session minutes were approved at the Township Council's November 7, 2007 meeting and are attached. The Custodian states that also attached is the Mayor's memo to the Department heads dated October 25, 2006 which the Custodian states she "could not put [her] hands on originally."

May 6, 2008

Letter from GRC to Custodian. The GRC asks the Custodian to certify as to the specific lawful basis for the initial denial of access to the one (1) page memorandum from Mayor Ramsey to Township Department heads dated October 25, 2006.

May 16, 2008

Letter from Custodian's Counsel to GRC. Counsel asserts that public records are records which are required by law to be made, maintained or kept on file by a public body pursuant to Daily Journal v. Police Department of City of Vineland, 351 N.J. Super. 100, 797 A.2d 186 (2002). Counsel contends that the memorandum from Mayor Ramsey to Township Department heads dated October 25, 2006 does not appear to be the type of record required by law to be maintained on file by the Custodian. Additionally, Counsel asserts that said memo may also be considered exempt as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. Further, Counsel states that the Complainant's request was not clear in that it did not specify what kind of "other Council action" records he sought. Counsel states that because no resolutions, ordinances, or other minutes existed in response to the Complainant's request, the Custodian provided the Complainant with the only other record that reflected the Acting Manager's appointment.

May 16, 2008

Custodian's certification. The Custodian certifies that she received the Complainant's OPRA request on August 20, 2007 for any ordinance, resolution or other Council action appointing an Acting Manager on or about October 24, 2006. The Custodian certifies that official Council action is reflected in minutes, resolutions or ordinances and at the time of her response to the Complainant no resolutions or ordinances existed in response to the request. The Custodian certifies that in an attempt to investigate "other Council action" she provided the Complainant with a copy of the Manager's calendar for the week of October 24, 2006. The Custodian also certifies that she discussed this matter with the Township Manager's Secretary who recalled that a memorandum came out of her office from the Mayor scheduling a meeting with Department heads announcing the Acting Manager's appointment. The Custodian certifies that the Township Manager's Secretary provided the Custodian a copy of said memo so that the Custodian could provide such to the Complainant. The Custodian certifies that she cannot recall whether she knew about or ever received said memo prior to the Township Manager's Secretary bringing such to her attention.

May 21, 2008

Letter from GRC to Custodian. The GRC states that the Custodian certified in her SOI dated October 30, 2007 that she provided a copy of the Township Council's open session minutes dated October 24, 2006 and November 8, 2006 to the Complainant on September 19, 2007. The GRC also states that the Custodian's certification dated May 16, 2008 makes no mention of providing the Complainant with copies of meeting minutes. Additionally, the GRC states that the Complainant asserted in his letter to the GRC dated November 5, 2007 that the only document the Custodian provided in response to his request was a photocopy of a page from a calendar. The GRC requests that the Custodian certify as to whether or not she provided the Complainant with a copy of the Township Council's open session minutes dated October 24, 2006 and November 8, 2006 on September 19, 2007. The GRC also requests that the Custodian certify as to whether or not all records responsive to the Complainant's request have been provided to the Complainant.

May 28, 2008

Custodian's certification received by the GRC. The Custodian certifies that on September 19, 2007 she provided the Complainant a copy of the Manager's calendar dated October 25, 2006 by hand in person. The Custodian certifies that via letter dated September 19, 2007 she notified the Complainant that the requested executive session minutes would not be released and that Mayor Ramsey and Councilman Stephenson announced the Acting Manager's appointment on October 25, 2006. The Custodian also certifies that via letter dated November 12, 2007 she provided the Complainant with a copy of the requested executive session minutes. Additionally, the Custodian certifies that her first certification (in her SOI) was in error and she did not provide the Complainant with minutes dated October 24, 2006 or November 8, 2006, nor were said minutes requested. The Custodian certifies that said minutes were included in the package sent to the GRC (the Custodian's SOI) which was also sent to the Complainant.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ... *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 states 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 therefor ...” 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* provided that the record is currently available and not in storage or archived. 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, the custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁵ The custodian’s failure to respond in writing to the 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. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In this instant complaint, the Custodian certifies receiving the Complainant’s OPRA request on August 20, 2007. The Custodian also certifies that she provided the Complainant with a written response to his request on September 19, 2007, approximately twenty one (21) business days following the Custodian’s receipt of said request, in which the Custodian denied access to the requested closed session minutes because said minutes had not yet been approved by the governing body and informed the Complainant that two (2) Council members announced the Acting Manager at a Department meeting on October 25, 2006. The Complainant states that the Custodian verbally informed him on September 19, 2007 that the delay in responding to his OPRA request was because the Custodian had forwarded said complaint to the Township Solicitor.

In Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006), the Custodian failed to grant access, deny access, seek clarification, or request an extension of time within the statutorily mandated seven (7) business days because the Custodian was seeking legal advice from his attorney regarding the OPRA request subject of the complaint. The Council held that:

“[w]hile seeking legal advice on how to appropriately respond to a records request is reasonable, it is not a lawful reason for delaying a response to an OPRA records request because the Custodian should have obtained a written agreement from the Complainant extending the time period to respond. Therefore, the Custodian violated N.J.S.A. 47:1A-6 by not providing a lawful basis for the denial of access to the request...[Additionally] the Custodian violated N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. by failing to provide the Complainant with a written

⁵ 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.

response within the statutorily mandated seven (7) business days therefore creating a “deemed” denial.” *Id.*

Therefore, in the complaint at issue here, while seeking legal advice on how to appropriately respond to a records request is reasonable, pursuant to Paff, *supra*, it is not a lawful reason for delaying a response to an OPRA request because the Custodian should have notified the Complainant in writing that an extension of the time period to respond was necessary. As such, the Custodian’s failure to provide a written response to the Complainant’s 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 pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley, *supra*.

Complainant’s Request for Executive Session Minutes Dated October 24, 2006

In the Custodian’s written response to the Complainant’s request dated September 19, 2007, the Custodian denied access to the requested closed session minutes dated October 24, 2006 because said minutes had not yet been approved by the Township Council. However, the Custodian provided the Complainant with the requested executive session minutes via letter dated November 12, 2007 because said minutes were approved at the Township Council’s November 7, 2007 meeting.

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

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

The courts have consistently held that draft records of a public agency fall within the deliberative process privilege. See U.S. v. Farley, 11 F.3d 1385 (7th Cir. 1993); Pies v. U.S. Internal Rev. Serv., 668 F.2d 1350 (D.C. Cir. 1981); N.Y.C. Managerial Employee Ass’n, v. Dinkins, 807 F.Supp., 955 (S.D.N.Y. 1992); Archer v. Cirrincione,

722 F. Supp. 1118 (S.D. N.Y. 1989); Coalition to Save Horsebarn Hill v. Freedom of Info. Comm., 73 Conn.App. 89, 806 A.2d 1130 (Conn. App. Ct. 2002); pet. for cert. den. 262 Conn. 932, 815 A.2d 132 (2003). As explained in Coalition, the entire draft document is deliberative because in draft form, it “reflect[s] that aspect of the agency’s function that precedes formal and informed decision making.” *Id.* at 95, quoting Wilson v. Freedom of Info. Comm., 181 Conn. 324, 332-33, 435 A.2d 353 (1980). The New Jersey Appellate Division also has reached this conclusion with regard to draft documents. In the unreported section of In re Readoption, *supra*, the court reviewed an OPRA request to the Department of Corrections (“DOC”) for draft regulations and draft statutory revisions. The court stated that these drafts were “all clearly pre-decisional and reflective of the deliberative process.” *Id.* at 18. It further held:

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

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

Although draft minutes always fall under OPRA’s exemption for deliberative material, the Appellate Division has suggested that the confidentiality accorded to deliberative records may be overcome if the requestor asserts and is able to demonstrate an overriding need for the record in question. *See In re Readoption*, *supra*, 367 N.J.Super. at 73. Resolution of such a claim, if raised by the requestor, will depend upon the particular circumstances of the case in question.

Additionally, in O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006), the Council held that “the Board Secretary’s handwritten notes taken during the June 22, 2004 executive session [to assist her in preparing formal minutes to be approved by the Board at a later date] were exempt from disclosure under the ‘inter-agency, intra-agency advisory, consultative, or deliberative’ privilege pursuant to N.J.S.A. 47:1A-1.1.”

Also, the GRC has previously ruled on the issue of whether draft meeting minutes are exempt from disclosure pursuant to OPRA. In Dina Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), the Council held that “...the Custodian has not unlawfully denied access to the requested meeting minutes as the Custodian certifies that at the time of the request said minutes had not been approved by the governing body and as such, they constitute inter-agency, intra-agency advisory,

consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.”

Further, the Custodian cites Paff v. Franklin Township Redevelopment Agency, et al., Law Division 2005 (an unreported opinion decided June 10, 2005) in support of her denial of access to the unapproved meeting minutes. However, a Law Division decision is not binding on the GRC.

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

Therefore, the unapproved, draft executive session meeting minutes of the Township Council dated October 24, 2006 constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg, supra. Accordingly, the Custodian has borne her burden of proving a lawful denial of access to the draft minutes pursuant to N.J.S.A. 47:1A-6 because she certified that the requested draft minutes had not been approved by the governing body at the time of the Complainant’s request. However, the Custodian provided the Complainant with a copy of said minutes via letter dated November 12, 2007 as said minutes were approved by the governing body on November 7, 2007.

Complainant’s Request for Ordinance, Resolution or Other Township Council Action Appointing an Acting Township Manager on or about October 24, 2006

The Custodian certified that official Council action is reflected in minutes, resolutions or ordinances and that at the time of her response to the Complainant no resolutions or ordinances existed in response to the request. The Custodian also certified that she provided the Complainant with the Township Council’s open session meeting minutes dated October 24, 2006 and November 8, 2006 on September 19, 2007. The Complainant, however, refutes the Custodian’s certification in a letter to the GRC dated November 5, 2007 and asserts that the Custodian did not provide a copy of said minutes. The Complainant states that he received copies of said minutes from the Willingboro Township Library. In the Custodian’s certification dated May 28, 2008, the Custodian certifies that her initial certification in her SOI indicating that she provided the Complainant with a copy of meeting minutes on September 19, 2007 was in error. The Custodian certifies that the Complainant was not provided with a copy of the meeting minutes dated October 24, 2006 and November 8, 2006 until October 30, 2007 when he received a copy of the Custodian’s SOI which included copies of said minutes.

N.J.S.A. 47:1A-5.g. states that if a custodian is “unable to comply with a request for access, then the Custodian shall indicate the specific basis” for noncompliance. In

this matter, the Custodian listed the Township Council's meeting minutes dated October 24, 2006 and November 8, 2006 as records responsive to the request in her SOI but failed to mention said records or why said records would not be provided in the Custodian's written response to the Complainant's request dated September 19, 2007.

Therefore, the Custodian's written response to the Complainant dated September 19, 2007 is insufficient pursuant to N.J.S.A. 47:1A-5.g. because the Custodian failed to provide any legal basis for the denial of access to the Township Council's meeting minutes dated October 24, 2006 and November 8, 2006.

Additionally, the Custodian, in her search for "other Council action" appointing the Acting Manager, went so far as to copy a page from the Manager's calendar for the date of October 24, 2006 which identifies a meeting in which the Mayor announced the Acting Manager's appointment. The Custodian certified that she consulted with the Township Manager's Secretary who recalled that a memorandum came out of her office from the Mayor scheduling a meeting with Department heads announcing the Acting Manager's appointment. However, the Custodian made no mention of said memo until the Custodian's submission of her SOI on October 30, 2007. Additionally, the Custodian did not provide a copy of said memo to the Complainant until November 12, 2007.

In Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), the Council held that pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), a custodian is obligated to search his or her files to find identifiable government records listed in a requestor's OPRA request. The Complainant in Donato requested all motor vehicle accident reports from September 5, 2005 to September 15, 2005. The Custodian sought clarification of said request on the basis that it was not specific enough. The Council stated that:

"[p]ursuant to Mag, the Custodian is obligated to *search* her files to *find* the identifiable government records listed in the Complainant's OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to *research* her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word *search* is defined as 'to go or look through carefully in order to find something missing or lost.'^[5] The word *research*, on the other hand, means 'a close and careful study to find new facts or information.'^[6]"

Additionally, the court in MAG, *supra*, held that:

"[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, *OPRA simply operates to make*

^[5] "Search." Dictionary.com Unabridged (v 1.1) Based on the Random House Unabridged Dictionary. Random House, Inc. 2006.

^[6] "Research." Kerneman English Multilingual Dictionary (Beta Version), 2000-2006 K Dictionaries Ltd. Richard G. Rader v. Township of Willingboro (Burlington), 2007-239 – Findings and Recommendations of the Executive Director 12

identifiable government records 'readily accessible for inspection, copying, or examination.' N.J.S.A. 47:1A-1." (Emphasis added).

Further, in Schneble v. NJ Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008), the Custodian initially denied the Complainant's OPRA request on the basis that no records responsive to the request exist. However, the Complainant submitted e-mails with his Denial of Access Complaint that were responsive to his request. Upon receipt of said e-mails, the Custodian searched her files again and located records responsive to the Complainant's request. The Custodian certified that her failure to produce records responsive was a result of an inadequate search because she believed the records were maintained by another State agency. The Council held that:

"[b]ecause the certifications provided by the Custodian and Ms. Smith state that they performed an inadequate initial search based on the assumption that a [Job Analysis Questionnaire] is a [Department of Personnel] record, and that a proper search yielded other records responsive to the Complainant's August 30, 2007 request, the Custodian unlawfully denied access to the requested records in his September 10, 2007 response to the Complainant's OPRA request. The Custodian has failed to bear his burden of proof that the denial of access to the requested records was authorized by law pursuant to N.J.S.A. 47:1A-6."

In the instant matter, the Complainant requested any ordinance, resolution or other Council action appointing an Acting Manager on or about October 24, 2006. Ordinances and resolutions are clearly identifiable government records pursuant to MAG, supra in this particular case because the Complainant provided a date for such records. The Custodian certified that official Council action is reflected in minutes, resolutions or ordinances; however, in an attempt to investigate "other Council action," the Custodian provided the Complainant with a copy of the Manager's calendar for the week of October 24, 2006, the specific date the Complainant provided in his request. Thus, the Custodian **searched** Township files to locate said record. If the Custodian searched the Township's files, specifically the Township Manager's files, and located the Manager's calendar which indicates a meeting in which the Mayor announced the Acting Manager's appointment, it is not unreasonable for the Custodian to also have searched the Manager's files to locate the Mayor's memorandum which set up said meeting.

Therefore, the Custodian's search for records responsive to the Complainant's request for "other Council action" appointing the Acting Manager was insufficient pursuant to Donato, supra, and Schneble, supra.

Additionally, the Custodian's Counsel asserts that public records are records which are required by law to be made, maintained or kept on file by a public body pursuant to Daily Journal v. Police Department of City of Vineland, 351 N.J. Super. 100, 797 A.2d 186 (2002). Counsel contends that the memorandum from Mayor Ramsey to Township Department heads dated October 25, 2007 does not appear to be the type of record required by law to be maintained on file by the Custodian. However, a Law Division decision is not binding on the GRC. More importantly, OPRA defines a

government record as any record made, maintained, kept on file or received. N.J.S.A. 47:1A-1.1. Thus, said memo is a government record.

Also, Counsel asserts that said memo may also be considered exempt as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. The issue of whether said memo is considered advisory, consultative or deliberative material is moot because the Custodian released said memo to the Complainant on November 12, 2007.

Whether the Government Records Council has authority over the Open Public Meetings Act or other State statutes?

OPRA provides that:

“[t]he Government Records Council shall:

- establish an informal mediation program to facilitate the resolution of disputes regarding access to government records;
- receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian;
- issue advisory opinions, on its own initiative, as to whether a particular type of record is a government record which is accessible to the public;
- prepare guidelines and an informational pamphlet for use by records custodians in complying with the law governing access to public records;
- prepare an informational pamphlet explaining the public's right of access to government records and the methods for resolving disputes regarding access, which records custodians shall make available to persons requesting access to a government record;
- prepare lists for use by records custodians of the types of records in the possession of public agencies which are government records;
- make training opportunities available for records custodians and other public officers and employees which explain the law governing access to public records; and
- operate an informational website and a toll-free helpline staffed by knowledgeable employees of the council during regular business hours which shall enable any person, including records custodians, to call for information regarding the law governing access to public records and allow any person to request mediation or to file a complaint with the council when access has been denied...” N.J.S.A. 47:1A-7.b.

The Complainant alleges that the Council’s method of the Township Manager’s termination is in violation of N.J.S.A. 40:69A-93 and that the portion of the closed session meeting during which said discussion took place is a violation of N.J.S.A. 10:4-12b(8) because the Township Council failed to notify the Manager of such discussion. The Complainant also contends that if the requested closed session minutes exist, the Township Council may have violated OPRA and the Open Public Meetings Act (“OPMA”) by excluding the Clerk from a portion of the meeting. Additionally, the Complainant contends that the GRC should conduct an *in camera* review of the executive

session minutes to determine whether said minutes meet the comprehensibility and other requirements of OPMA. The Complainant questions how one (1) page constitutes a reasonably comprehensible record of closed session discussions lasting approximately two (2) hours.

In Allegretta v. Borough of Fairview, GRC Complaint No. 2005-132 (December 2006), the Council held that, “[b]ased on N.J.S.A. 47:1A-7.b., the GRC does not have authority to adjudicate whether a Custodian has complied with OPMA or any statute other than OPRA.” See also Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (March 2007).

Thus, the same ruling applies in this instant complaint. The matter of whether the Council’s method of the Township Manager’s termination is in violation of N.J.S.A. 40:69A-93 or whether the Council violated OPMA for any reason does not fall under the authority of the GRC and is not governed by OPRA pursuant to N.J.S.A. 47:1A-7.b., Allegretta, supra, and Donato, supra.

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

OPRA states that:

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

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

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

The Custodian in this instant matter failed to provide the Complainant with a written response to his OPRA request within the statutorily mandated seven (7) business days resulting in a “deemed” denial of the request. When the Custodian did provide a written response to the request, twenty one (21) business days following receipt of said request, the Custodian provided access to a copy of the Township Manager’s calendar indicating a meeting in which the Mayor announced the appointment of the Acting Manager. The Custodian’s response was insufficient because the Custodian failed to provide the legal basis for the denial of access to the Township Council’s open session meeting minutes dated October 24, 2006 and November 8, 2006 which the Custodian listed in her SOI as records responsive to the Complainant’s request. However, in the

same written response, the Custodian lawfully denied access to the requested executive session minutes dated October 24, 2006 because said minutes had not been approved by the governing body. The Custodian provided the Complainant with a copy of said minutes via letter dated November 12, 2007 once said minutes were approved by the governing body even though the Custodian was not required to do so pursuant to OPRA.

Additionally, the Custodian's search for records responsive to the Complainant's request for "other Council action" appointing the Acting Manager was insufficient. However, the Custodian did eventually provide the Complainant with a copy of the Mayor's memo which she located after her initial response to the Complainant's request.

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).

Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., provided an insufficient response to the Complainant's request pursuant to N.J.S.A. 47:1A-5.g. and conducted an insufficient search in response to the Complainant's request, the Custodian provided the Complainant with all records responsive to the request even when such disclosure was not required (because the requested executive session minutes were not approved by the governing body at the time of the request). Therefore, 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, insufficient response and insufficient search appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. While seeking legal advice on how to appropriately respond to a records request is reasonable, pursuant to Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), it is not a lawful reason for delaying a response to an OPRA request because the Custodian should have notified the Complainant in writing that an extension of the time period to respond was necessary. As such, the Custodian's failure to provide a written

response to the Complainant's 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 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 unapproved, draft executive session meeting minutes of the Township Council dated October 24, 2006 constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Dina Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). Accordingly, the Custodian has borne her burden of proving a lawful denial of access to the draft minutes pursuant to N.J.S.A. 47:1A-6 because she certified that the requested draft minutes had not been approved by the governing body at the time of the Complainant's request. However, the Custodian provided the Complainant with a copy of said minutes via letter dated November 12, 2007 as said minutes were approved by the governing body on November 7, 2007.
3. The Custodian's written response to the Complainant dated September 19, 2007 is insufficient pursuant to N.J.S.A. 47:1A-5.g. because the Custodian failed to provide any legal basis for the denial of access to the Township Council's meeting minutes dated October 24, 2006 and November 8, 2006.
4. The Custodian's search for records responsive to the Complainant's request for "other Council action" appointing the Acting Manager was insufficient pursuant to Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007) and Schneble v. NJ Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008).
5. The matter of whether the Council's method of the Township Manager's termination is in violation of N.J.S.A. 40:69A-93 or whether the Council violated OPMA for any reason does not fall under the authority of the GRC and is not governed by OPRA pursuant to N.J.S.A. 47:1A-7.b., Allegretta v. Borough of Fairview, GRC Complaint No. 2005-132 (December 2006) and Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (March 2007).
6. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., provided an insufficient response to the Complainant's request pursuant to N.J.S.A. 47:1A-5.g. and conducted an insufficient search in response to the Complainant's request, the Custodian provided the Complainant with all records responsive to the request even when such disclosure was not required (because the requested executive session minutes were not approved by the governing body at the time of the request). Therefore, 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,

insufficient response and insufficient search appears negligent and heedless since she 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

June 18, 2008