



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

**JON S. CORZINE**  
*Governor*

**JOSEPH V. DORIA, JR.**  
*Commissioner*

**FINAL DECISION**

**March 25, 2009 Government Records Council Meeting**

Judd Shanker  
Complainant

Complaint No. 2007-245

v.

Borough of Cliffside Park (Bergen)  
Custodian of Record

At the March 25, 2009 public meeting, the Government Records Council (“Council”) considered the March 18, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Counsel’s response was insufficient because he failed to specifically state that the requested record did not exist at the time of the Complainant’s September 11, 2007 OPRA request pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Township of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008).
2. The Custodian certified in the Statement of Information that no report which was responsive existed at the time of the Complainant’s September 11, 2007 OPRA request because the report was not provided to the Borough until October 16, 2007 and there is no credible evidence in the record to refute the Custodian’s certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., there was no unlawful denial of access pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although Counsel’s response denying access to the requested report on the first (1<sup>st</sup>) business day following receipt of the OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Township of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008), Counsel did later certify that no record responsive existed at the time of the Complainant’s request or subsequent filing of this complaint. Therefore, it is concluded that Counsel’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, Counsel's insufficient response 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 25<sup>th</sup> Day of March, 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: March 30, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
March 25, 2009 Council Meeting**

**Judd Shanker<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-245**

v.

**Borough of Cliffside Park (Bergen)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copy of the report filed by Michels & Waldron under public Resolution No. 61 dated March 20, 2007.

**Request Made:** September 11, 2007

**Response Made:** September 12, 2007

**Custodian:** Martin Gobbo<sup>3</sup>

**GRC Complaint Filed:** October 11, 2007<sup>4</sup>

**Background**

**September 11, 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 12, 2007**

Custodian Counsel's response to the OPRA request. Counsel responds in writing to the Complainant's OPRA request on the first (1<sup>st</sup>) business day following receipt of such request. Counsel states that access to the requested report is denied pursuant to N.J.S.A. 47:1A-9, which states that OPRA shall not erode any exemption of a public record pursuant to any other statute. Counsel states that the relevant provision, N.J.S.A. 10:4-12 of the Open Public Meetings Act ("OPMA"), prohibits the disclosure of information relating to any pending or anticipated litigation or contract negotiations which the Borough may become a party.

Additionally, Counsel states that the requested record is protected by attorney-client privilege. Counsel avers that New Jersey case law has consistently held that attorney-client privilege is valid grounds for an authorized denial of access to public records.

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

<sup>2</sup> Represented by Christos J. Diktas, Esq., of Diktas, Schandler, Gilden P.C. (Cliffside Park, NJ).

<sup>3</sup> The original Custodian of Record is Brian McGuirt.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

**October 11, 2007**

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

- Complainant’s OPRA request dated September 11, 2007.
- Letter from the Custodian’s Counsel to the Complainant dated September 12, 2007.<sup>5</sup>

The Complainant states that he submitted an OPRA request to the Borough on September 11, 2007. The Complainant states that he received a written response from the Custodian’s Counsel on September 12, 2007 denying access to the requested report as attorney-client privileged and related to anticipated litigation pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9 and N.J.S.A. 10:4-12.

The Complainant argues that he does not understand how a report resulting from a public resolution and created by a consulting engineer for the Cliffside Park Building Department could be protected by attorney-client privilege or be related to anticipated litigation. The Complainant contends that the Custodian Counsel’s denial of access to the requested report is an unwarranted delay of access.

**October 16, 2007**

Offer of Mediation sent to both parties.

**October 17, 2007**

The Complainant agrees to mediate this complaint. The Custodian also agrees to mediate this complaint.

**October 18, 2007**

Complaint referred to mediation.

**December 24, 2008**

Complaint referred back from mediation.

**January 12, 2009**

Request for the Statement of Information sent to the Custodian.

**January 15, 2009**

E-mail from the Custodian’s Counsel to the GRC. Counsel acknowledges receipt of the GRC’s request for a Statement of Information. Counsel asserts that he thought this complaint had been settled in mediation.

Counsel requests that the GRC advise whether this complaint has remained open.<sup>6</sup> Counsel requests that if the complaint is indeed still undergoing the adjudicatory process,

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<sup>5</sup> Complainant included other documents which are irrelevant to the adjudication of this complaint.

<sup>6</sup> Counsel also asks if the GRC has not accepted the October 22, 2007 request of Winston Towers 300 Association, Inc. to intervene in the matter; however, since the request was made after the complaint was referred to mediation, the GRC was not in a position to accept or decline the request.

than an extension until January 27, 2009 will be needed to provide the Statement of Information.

**January 20, 2009**

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

- Complainant's OPRA request dated September 11, 2007.
- Letter from the Custodian to the Complainant dated September 12, 2007.
- Report filed by Michels & Waldron Associates, LLC dated October 16, 2007.<sup>7</sup>

The Custodian certifies that no search for the requested records was necessary because the report sought by the Complainant was not provided to the Borough until October 16, 2007 and did not exist at the time of the Complainant's September 11, 2007 OPRA request.<sup>8</sup>

Counsel certifies that the record requested by the Complainant in his September 11, 2007 OPRA request had not yet been produced to the Borough by Michels & Waldron at the time of the request. Further, Counsel certifies that he responded in writing to the Complainant's OPRA request on September 12, 2007, stating that access to the record was denied due to the litigation which had been prompted by the events leading up to the commission of the requested report. Counsel certifies that following the completion of litigation, the Complainant was provided with a copy of the requested record on November 11, 2008.

Counsel argues that the requested record is exempt pursuant to N.J.S.A. 47:A1-9 and N.J.S.A. 10:4-12.b. of OPMA. Counsel argues that in O'Shea v. West Milford Board of Education, 391 N.J. Super. 534, 540 (App. Div. 2007), the Court held that "OPRA must be considered in light of [OPMA], pursuant to which the agency is permitted to go into executive session." Counsel states that among the many issues that may be considered during closed session are pending or anticipated litigation or contract negotiations to which the public agency may become a party. Counsel states that "OPRA dovetails with OPMA by exempting documents on these subjects from disclosure as public records." O'Shea, supra, citing N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-9.

Counsel contends that the requested report was created pursuant to litigation between the Complainant and Winston Towers 300 Condominium Association and between Winston Towers 300 and the Borough regarding corrective plans to an exhaust system located in the Complainant's condominium building, which validates Counsel's denial of access as authorized by law.

Further, Counsel argues that the report is inter-agency or intra-agency advisory, consultative, or deliberative ("ACD") material because it was created to assist the Borough in determining whether the corrective measures proposed for the exhaust system complied with applicable codes and other laws. Counsel cites to Gannett New Jersey

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<sup>7</sup> Additional documentation attached to the SOI is irrelevant to the adjudication of this complaint.

<sup>8</sup> Counsel's assertion that no record responsive was possessed by the Borough at the time of the Complainant's request is inapposite to Counsel's initial written response on September 12, 2007 denying access to the requested record pursuant to N.J.S.A. 47:1A-9 and N.J.S.A. 10:4-12 of OPMA.

Partners, LP v. County of Middlesex, 379 N.J. Super. 205, 219 (App. Div. 2005)(holding that documents generated before the agency adopts a policy or decision and containing opinions or recommendations about policies is exempt from disclosure pursuant to the ACD exemption in OPRA) and Fisher v. Division of Law, 400 N.J. Super. 61, 75 (App. Div. 2008).

Additionally, Counsel asserts that the requested record is protected from disclosure as attorney work product, a privilege found in Court Rule 4:10-2.c. and made applicable for OPRA purposes pursuant to N.J.S.A. 47:1A-9. Counsel avers that Court Rule 4:10-2.c. protects from disclosure mental impressions, conclusions, opinions or legal theories of either an attorney or other representative of a party concerning litigation, whether on-going or in anticipation of, by or for a party's representative. Counsel contends that Michels & Waldron was clearly a representative of the Borough by providing their conclusions and opinions regarding the corrective plans under consideration by the Borough. Counsel also argues that given the role the Complainant has played in previous litigation with Winston Towers 300, it is possible that the report and the Borough's response to the report could be the subject of new litigation: hence attorney work product privilege applies.

Finally, Counsel reiterates that the Complainant received a copy of the requested report on November 11, 2008, by which time the litigation involving the Borough had been resolved.

### Analysis

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

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 also provides that:

“[t]he provisions of this act ... *shall not abrogate or erode* any executive or legislative privilege or *grant of confidentiality* heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality *may duly be claimed to restrict public access* to a public record or government record.” (Emphasis added.) N.J.S.A. 47:1A-9.b.

The Open Public Meetings Act provides that:

“[a] public body may exclude the public only from that portion of a meeting at which the public body discusses...any pending or anticipated litigation or contract negotiation other than in subsection b. (4) herein in which the public body is, or may become a party. Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.” N.J.S.A. 10:4-12.b.

Court Rule 4:10-2.c. provides that the Court:

“*shall protect* against disclosure of the *mental impressions, conclusions, opinions, or legal theories* of an attorney or other *representative* of a party concerning the *litigation.*” (Emphasis added.)

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.

In this complaint, the Complainant asserts that Counsel’s denial of access to the requested report is not authorized by OPRA. Conversely, the Custodian avers that the report was not provided to the Borough from Michels & Waldron until October 16, 2007, after the submission of the Complainant’s OPRA request to the Borough and subsequent filing of this Denial of Access complaint with the GRC.

OPRA requires that if a custodian of record is unable to comply with a request for access to government records, “the custodian shall indicate the *specific basis* thereof.” (Emphasis added) N.J.S.A. 47:1A-5.g.

In the instant complaint, Counsel responded in writing on the first business day after receipt of the Complainant’s September 11, 2007 OPRA request stating that the requested report was exempt from disclosure pursuant to N.J.S.A. 47:1A-9 and N.J.S.A. 10:4-12, and as attorney-client privileged material. Counsel added in the SOI that the record was exempt from disclosure as ACD and protected from disclosure pursuant to Court Rule 4:10-2.c. However, Counsel also certifies in the SOI that the requested report was not provided to the Borough until October 16, 2007, after the Complainant’s request and subsequent Denial of Access Complaint, therefore, no records responsive to this request existed at the time of the request.

In O’Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008), the GRC determined that 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 the inability to comply. In that complaint, the Council applied N.J.S.A. 47:1A-5.g. to the Custodian’s failure to address the Complainant’s choice of mode of delivery and held that “the Custodian’s response is insufficient because she failed to specifically address the Complainant’s preference for receipt of records.”

The GRC also applied N.J.S.A. 47:1A-5.g. to a Custodian’s failure to provide an adequate response when denying access to a request for government records or failure to respond to each request individually. See Paff v. Township of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008)(holding that the Custodian’s response was insufficient because she failed to specifically state that the requested executive session minutes were not yet approved by the governing body at the time of the Complainant’s request pursuant to N.J.S.A. 47:1A-5.g.) and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008)(holding that the Custodian’s response was legally insufficient because he failed to respond to each request item individually).

Therefore, based on the application of N.J.S.A. 47:1A-5.g., Counsel’s response was insufficient because he failed to specifically state that the requested record did not exist at the time of the Complainant’s September 11, 2007 OPRA request pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Township of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008).

However, in Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian certified that no records responsive to the Complainant’s request existed. The GRC determined that, because the Custodian certified that no records responsive to the request existed, there was no unlawful denial of access to the requested records.



Similarly, in this complaint, the Custodian certified in the SOI that no report which was responsive existed at the time of the Complainant's September 11, 2007 OPRA request because the report was not provided to the Borough until October 16, 2007, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., there was no unlawful denial of access pursuant to Pusterhofer, supra.

Additionally, because the requested report did not exist at the time of the Complainant's September 11, 2007 OPRA request, the issue of whether Counsel's cited exemptions apply to the requested report pursuant to OPRA is moot.

**Whether the Counsel's failure to bear his burden of proof rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86 (App. Div. 1996) at 107).

Although Counsel's response denying access to the requested report on the first (1<sup>st</sup>) business day following receipt of the OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g. and Paff, supra, the Counsel did later certify that no record responsive existed at the time of the Complainant's request or subsequent filing of this complaint. Therefore, it is concluded that Counsel'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, Counsel's insufficient response 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. Counsel's response was insufficient because he failed to specifically state that the requested record did not exist at the time of the Complainant's September 11, 2007 OPRA request pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Township of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008).
2. The Custodian certified in the Statement of Information that no report which was responsive existed at the time of the Complainant's September 11, 2007 OPRA request because the report was not provided to the Borough until October 16, 2007 and there is no credible evidence in the record to refute the Custodian's certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., there was no unlawful denial of access pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although Counsel's response denying access to the requested report on the first (1<sup>st</sup>) business day following receipt of the OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Township of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008), Counsel did later certify that no record responsive existed at the time of the Complainant's request or subsequent filing of this complaint. Therefore, it is concluded that Counsel'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, Counsel's insufficient response appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

March 18, 2009