



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Acting Commissioner

FINAL DECISION

April 25, 2012 Government Records Council Meeting

David Charles Hinchcliffe  
Complainant

Complaint No. 2007-306

v.

New Jersey Department of Community Affairs,  
Division of Local Government Services  
Custodian of Record

At the April 25, 2012 public meeting, the Government Records Council (“Council”) considered the April 18, 2012 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection and a redaction index on August 14, 2009. Therefore, the Custodian timely complied with the Council’s July 30, 2008 Interim Order, as extended.
2. The *in camera* examination set forth in the table below reveals the Custodian has lawfully denied the Complainant access to the requested records because said records are exempt from disclosure in their entirety as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. N.J.S.A. 47:1A-6. See Education Law Center v. NJ Department of Education, 198 N.J. 274, 298 (2009).
3. Because the results of the *in camera* examination revealed that the Custodian lawfully denied access to the requested records as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and Education Law Center v. NJ Department of Education, 198 N.J. 274, 298 (2009), the Custodian did not knowingly and willfully violate OPRA and unreasonably deny access under the totality of the circumstances.



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 <sup>1</sup>
Document 1	E-mail from George DeOld to Judy Tripodi dated January 16, 2004 at 9:26 am.	The Custodian states that this record is in reference to a Harrison Police Department waiver request recommendation. The e-mail was not provided to the Complainant.	By definition, "...a government record...shall not include inter-agency, or intra-agency advisory, consultative, or deliberative material." <u>N.J.S.A. 47:1A-1.1</u> . The e-mail contains opinions, observations and recommendations from a Division of Local Government Services "Distressed Cities" employee (George DeOld) to his immediate supervisor Judy Tripodi. Further, any internal e-mail is pre-decisional and does not constitute an official action.	The e-mail contains opinions, observations and recommendations and, as such, is exempt from disclosure in its entirety as advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1</u> . See <u>Education Law Center, supra</u> .
Document 2	One (1) page memorandum from George	The Custodian states that this	Pursuant to <u>N.J.S.A. 47:1A-1.1</u> , this internal	The memorandum contains opinions,

<sup>1</sup> **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.

	DeOld to Judy Tripodi dated September 19, 2005.	record is in reference to a Harrison Police Department reorganization. The memo was not provided to the Complainant.	memo is advisory, consultative and deliberative. The memo contains opinions, observations and recommendations from a Division of Local Government Services “Distressed Cities” employee (George DeOld) to his immediate supervisor Judy Tripodi. Further, any internal memo is pre-decisional and does not constitute an official action.	recommendations and observations and, as such, is exempt from disclosure in its entirety as advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1</u> . See <u>Education Law Center, supra</u> .
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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 April, 2012

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: April 30, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
April 25, 2012 Council Meeting**

**David Charles Hinchcliffe<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-306**

v.

**New Jersey Department of Community Affairs,  
Division of Local Government Services<sup>2</sup>  
Custodian of Records**

**Records Submitted for *In Camera* Examination:<sup>3</sup>**

1. E-mail from George DeOld to Judy Tripodi dated January 16, 2004 at 9:26 am.
2. One (1) page memorandum from George DeOld to Judy Tripodi dated September 19, 2005.<sup>4</sup>

**Request Made:** November 6, 2007

**Response Made:** November 13, 2007

**Custodian:** Marc Pfeiffer

**GRC Complaint Filed:** December 10, 2007

**Background**

**July 30, 2008**

Government Records Council's Interim Order. At the July 30, 2008 public meeting, the Government Records Council ("Council") considered the July 23, 2008 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. By a majority vote, the Council adopted the entirety of said findings and recommendations. The Council therefore found that:

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<sup>1</sup> In the Custodian's Statement of Information, the Custodian listed Patrick P. Toscano, Jr., Esq. (Caldwell, NJ) as the Custodian's Counsel; however, there are no submissions on file from the Custodian's Counsel to the GRC.

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

<sup>3</sup> The Complainant's OPRA request sought "[a]ll documents submitted by George DeOld or Richard Richardella regarding the Town of Harrison." The Council's July 30, 2008 Interim Order noted that on December 5, 2007, the Custodian informed the Complainant that no records directly responsive to the request existed because "there are no records directly between Richard Richardella or George DeOld and the Town of Harrison." However, in the Statement of Information, the Custodian identified five (5) internal communications prepared by these individuals, to which the Complainant was denied access because such communications were considered advisory, consultative or deliberative in nature. Three of these communications are dated 2006, 2007 and 2008; the Complainant noted in an e-mail to the GRC dated April 17, 2009 that he is only interested in records from 2004 and 2005.

<sup>4</sup> Other records were submitted by the Custodian for *in camera* examination; however, the scope of the records responsive to the request was narrowed by the Complainant via e-mail to the GRC dated April 17, 2009 to those records examined herein.

1. Because the Custodian's response to the Complainant's OPRA request came on December 5, 2007, four (4) business days after the extended date for the Custodian's response, the Custodian's belated response to Complainant's request is therefore a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. See Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian has asserted that the requested records are exempt from disclosure under OPRA as advisory, consultative, or deliberative material, 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 records to determine the validity of the Custodian's assertion that the records are advisory, consultative, or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver<sup>5</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see #2 above), a document or redaction index<sup>6</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents 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 Custodian's compliance with the Council's Interim Order.

### **July 31, 2008**

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

### **August 5, 2008**

E-mail from the Custodian to the GRC. The Custodian requests a five (5) business day extension of time to comply with the Council's July 30, 2008 Interim Order.

### **August 14, 2008**

Certification of the Custodian in response to the Council's Interim Order with the following attachments:

- Document index
- Nine (9) copies each of the requested unredacted records

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<sup>5</sup> 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.

<sup>6</sup> The document or redaction index should identify the documents and/or each redaction asserted and the lawful basis for the denial.

**August 14, 2008**

E-mail from the GRC to the Custodian. The GRC requests that the Custodian inform the GRC if the records submitted for *in camera* examination were incorporated into a final work product.

**February 20, 2009**

Letter from the GRC to the Director of the Division of Local Government Services. The GRC requests a certification from the Director regarding whether a final report was issued representing a culmination of the weekly and biweekly reports submitted by the Distressed Cities personnel. The GRC also requests the date such a report, if any, was made available to the public.

**March 6, 2009**

Certification from the Director of the Division of Local Government Services. The Director certifies that a report was finalized by the Special Municipal Aid Program staff regarding the Township of Harrison Police Department in December 2008. The Director certifies said report was made available to the public during that same month.

**April 17, 2009**

E-mail from the GRC to the Complainant. The GRC informs the Complainant that the GRC received a certification from the Director of the Division of Local Government Services averring that the records the Complainant requested had subsequently been incorporated into a final report which was made available to the public in December of 2008. The GRC also informs the Complainant that the final report can be viewed at the agency upon making proper arrangements with the Custodian. The GRC requests that the Complainant advise the GRC how the Complainant wishes to proceed with respect to the complaint adjudication.

**April 17, 2009**

E-mail from the Complainant to the GRC. The Complainant states that he is aware of the final report the Director referenced, which was made public in 2008. The Complainant states that he is not interested in the content of the 2008 report because it does not incorporate records from the time period that is of concern to him. The Complainant states that he is seeking records from the years 2004 and 2005.

**Analysis****Whether the Custodian complied with the Council's July 30, 2008 Interim Order?**

At its July 30, 2008 public meeting, the Council determined that because the Custodian has asserted that the requested records are exempt from disclosure under OPRA as advisory, consultative, or deliberative material, 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 records to determine the validity of the Custodian's assertion that the requested records were properly denied.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or no later than August 7, 2008; however, the Custodian sought, and the GRC granted, a five (5) business day extension of time for the Custodian to comply with the Council's Order, thereby extending the due date for compliance with the terms of the Order to August 14, 2008.

The Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection and a redaction index on August 14, 2009. Therefore, the Custodian timely complied with the Council's July 30, 2008 Interim Order, as extended.

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

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA 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.

The Custodian contends that the records submitted for *in camera* examination are exempt from disclosure because they constitute advisory, consultative, or deliberative (“ACD”) material. OPRA excludes from the definition of a government record “inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the “deliberative process privilege.”

In O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006), the Council stated that “neither the statute nor the courts have defined the terms... ‘advisory, consultative, or deliberative’ in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s 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, 298 (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.” (Citations omitted.) *Id.* at 84.

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

“[t]he initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.” In Re Liquidation of Integrity, supra, 165 N.J. at 88, citing McClain, supra, 99 N.J. at 361-62, 492 A.2d 991.

In this complaint, the Complainant requested “all documents submitted by George DeOld or Richard Richardelli regarding the Town of Harrison.” In response to this request, the Custodian identified five (5) records responsive to the Complainant’s request, and submitted the records, labeled “documents 1 through 5,” to the GRC for *in camera* examination on August 14, 2008, pursuant to the Council’s July 30, 2008 Interim Order.

Subsequently, by e-mail dated April 17, 2009, the Complainant narrowed the time frame of the requested records down to those records from the years 2004 and 2005. Only Document 1 and Document 2 of the records the Custodian submitted to the GRC for *in camera* examination constitute a temporal match. Accordingly, an *in camera* examination was performed on those two (2) records. 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> Examination <sup>7</sup>
Document 1	E-mail from George DeOld to Judy Tripodi dated January 16, 2004 at 9:26 am.	The Custodian states that this record is in reference to a Harrison Police Department waiver request recommendation. The e-mail was not provided to the Complainant.	By definition, "...a government record...shall not include inter-agency, or intra-agency advisory, consultative, or deliberative material." <u>N.J.S.A. 47:1A-1.1</u> . The e-mail contains opinions, observations and recommendations from a Division of Local Government Services "Distressed Cities" employee (George DeOld) to his immediate supervisor Judy Tripodi. Further, any internal e-mail is pre-decisional and does not constitute an official action.	The e-mail contains opinions, observations and recommendations and, as such, is exempt from disclosure in its entirety as advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1</u> . See <u>Education Law Center, supra</u> .

<sup>7</sup> **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.

Document 2	One (1) page memorandum from George DeOld to Judy Tripodi dated September 19, 2005.	The Custodian states that this record is in reference to a Harrison Police Department reorganization. The memo was not provided to the Complainant.	Pursuant to <u>N.J.S.A. 47:1A-1.1.</u> , this internal memo is advisory, consultative and deliberative. The memo contains opinions, observations and recommendations from a Division of Local Government Services “Distressed Cities” employee (George DeOld) to his immediate supervisor Judy Tripodi. Further, any internal memo is pre-decisional and does not constitute an official action.	The memorandum contains opinions, recommendations and observations and, as such, is exempt from disclosure in its entirety as advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1.</u> See <u>Education Law Center, supra.</u>
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**Whether the Custodian’s denial of access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that:

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

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

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access

under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

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

Because the results of the *in camera* examination revealed that the Custodian lawfully denied access to the requested records as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and Education Law Center, , the Custodian did not knowingly and willfully violate OPRA and unreasonably deny access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection and a redaction index on August 14, 2009. Therefore, the Custodian timely complied with the Council’s July 30, 2008 Interim Order, as extended.
2. The *in camera* examination set forth in the above table reveals the Custodian has lawfully denied the Complainant access to the requested records because said records are exempt from disclosure in their entirety as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. N.J.S.A. 47:1A-6. See Education Law Center v. NJ Department of Education, 198 N.J. 274, 298 (2009).
3. Because the results of the *in camera* examination revealed that the Custodian lawfully denied access to the requested records as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and Education Law Center v. NJ Department of Education, 198 N.J. 274, 298 (2009), the Custodian did not knowingly and willfully violate OPRA and unreasonably deny access under the totality of the circumstances.

Prepared By: John E. Stewart  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

April 18, 2012<sup>8</sup>

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<sup>8</sup>This complaint was prepared for adjudication on June 23, 2009; however, said complaint was not adjudicated due to the Council's lack of a quorum.  
David Charles Hinchcliffe v. New Jersey Department of Community Affairs, Division of Local Government Services, 2007-306 10  
*In Camera* Findings and Recommendations of the Executive Director



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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

INTERIM ORDER

July 30, 2008 Government Records Council Meeting

David Charles Hinchcliffe  
Complainant

Complaint No. 2007-306

v.

NJ Department of Community Affairs,  
Division of Local Government Services  
Custodian of Record

At the July 30, 2008 public meeting, the Government Records Council (“Council”) considered the July 23, 2008 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. By a majority vote, the Council adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian’s response to the Complainant’s OPRA request came on December 5, 2007, four (4) business days after the extended date for the Custodian’s response, the Custodian’s belated response to Complainant’s request is therefore a “deemed” denial pursuant to N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. See Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian has asserted that the requested records are exempt from disclosure under OPRA as advisory, consultative, or deliberative material, 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 records to determine the validity of the Custodian’s assertion that the records are advisory, consultative, or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #2 above), a document**

<sup>1</sup> 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.



or redaction index<sup>2</sup>, 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 Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 30<sup>th</sup> Day of July, 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 31, 2008**

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

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
July 30, 2008 Council Meeting**

**David Charles Hinchcliffe<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-306**

v.

**New Jersey Department of Community Affairs, Local Government Services<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** All documents submitted by George DeOld or Richard Richardella regarding the Town of Harrison.

**Request Made:** November 6, 2007

**Response Made:** November 13, 2007

**Custodian:** Marc Pfeiffer

**GRC Complaint Filed:** December 10, 2007

**Background**

**November 6, 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.

**November 13, 2007**

Custodian's response to the OPRA request. The Custodian responds in writing<sup>3</sup> to the Complainant's OPRA request on the fifth (5<sup>th</sup>) business day following receipt of such request. Custodian states that due to staff vacations, holidays, and the League of Municipalities meeting, the Custodian will not be able to provide a response to the Complainant's OPRA request until November 29, 2007.

**December 5, 2007**

E-mail from Custodian to Complainant. Custodian states that the Division of Local Government Services ("DLGS") does not have any records that are responsive to the Complainant's request. The Custodian states that there are no records directly between Richard Richardella or George DeOld and the Town of Harrison. The Custodian also states that there are internal communications prepared by these individuals. However, because of the advisory, consultative, or deliberative nature of the records requested, the Custodian asserts that they are not subject to disclosure under OPRA.

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<sup>1</sup> Represented by Patrick P. Toscano, Jr., Esq. (Caldwell, NJ).

<sup>2</sup> No legal representation is listed on record.

<sup>3</sup> Custodian responded to Complainant's OPRA request via e-mail.



**December 10, 2007**

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

- Complainant’s OPRA request dated November 6, 2007
- E-mail from the Custodian to the Complainant dated November 13, 2007
- Signed Offer of Mediation dated December 10, 2007

The Complainant alleges that on November 6, 2007, Complainant made an OPRA request for communications between George DeOld and Richard Richardella concerning the Town of Harrison. Complainant indicates receipt of the December 5, 2007 e-mail wherein he was informed of the alleged privileged nature of the requested records and its exemption from OPRA.

**December 17, 2007**

Offer of Mediation sent to both parties.

**December 20, 2007**

The Custodian declines mediation. [The Complainant agreed on December 10, 2007 to mediate.]

**January 10, 2008**

Request for the Statement of Information sent to the Custodian.

**January 10, 2008**

Custodian’s Statement of Information (“SOF”) with the following attachments:

- Complainant’s OPRA request dated November 6, 2007
- E-mail from the Custodian to the Complainant dated November 13, 2007
- E-mail from Custodian to the Complainant dated December 5, 2007

The Custodian certifies that his search for the requested records included a search of the e-mail and paper files of the staff members involved in the matter, namely George DeOld, Judy Tripodi, and the Director of DLGS. The Custodian states that the records that are responsive to the Complainant’s OPRA request consist of the following:

- 1 E-mail from George DeOld to Judy Tripodi dated January 16, 2004
- 2 Internal memo from George DeOld to Judy Tripodi dated September 19, 2005
- 3 Internal memo from George DeOld to Susan Jacobucci dated March 3, 2006
- 4 Internal memo from George DeOld to Judy Tripodi dated June 18, 2007
- 5 Distressed Cities reports from December 15, 2006 to January 15, 2008.

The Custodian argues that pursuant to N.J.S.A. 47:1A-1.1, the records listed above are advisory, consultative or deliberative in nature. The Custodian further states that OPRA’s definition of a government record excludes material that is advisory, consultative, or deliberative in nature. *Id.* The Custodian certifies that the requested records contain opinions, observation and recommendations from a DLGS Distressed

Cities Program employee, Gorge DeOld, to his immediate supervisor, Judy Tripodi, or to the Director of the DLGS. The Custodian further certifies that the records requested are pre-decisional and do not constitute an official action.

### **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 therefore on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” 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... The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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

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

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. 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. OPRA also mandates that a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. *Id.* Further, the custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. A custodian’s failure to respond in writing to a complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g.<sup>4</sup> and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the complainant’s OPRA request. Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In the case currently before the Council, the Custodian requested an extension of the seven (7) business day deadline on the fifth (5<sup>th</sup>) business day following receipt of the Complainant’s OPRA request. In the Custodian’s November 13, 2007 e-mail to the Complainant, the Custodian indicated that he would not be able to respond to the Complainant’s OPRA request until November 29, 2007. However, the Custodian did not respond on that date as promised. Because the Custodian’s response to the Complainant’s OPRA request came on December 5, 2007, four (4) business days after the extended date for the Custodian’s response, the Custodian’s belated response to Complainant’s request is therefore a deemed denial pursuant to N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. See Kelley, *supra*.

Although the Custodian has identified records responsive to the Complainant’s OPRA request, the Custodian asserts that the records are exempt from disclosure as advisory, consultative, or deliberative (“ACD”) material.

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 GRC<sup>5</sup> 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

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<sup>4</sup> It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

<sup>5</sup> Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).

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 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.”

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

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

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian’s response to the Complainant’s OPRA request came on December 5, 2007, four (4) business days after the extended date for the Custodian’s response, the Custodian’s belated response to Complainant’s

request is therefore a “deemed” denial pursuant to N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. See Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

2. Because the Custodian has asserted that the requested records are exempt from disclosure under OPRA as advisory, consultative, or deliberative material, 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 records to determine the validity of the Custodian’s assertion that the records are advisory, consultative, or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver<sup>6</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #2 above), a document or redaction index<sup>7</sup>, 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 Custodian’s compliance with the Council’s Interim Order.

Prepared By: Sherin Keys, Esq.  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

July 23, 2008

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<sup>6</sup> 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.

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