



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

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

**FINAL DECISION**

**July 30, 2008 Government Records Council Meeting**

Richard J. Iorio  
Complainant

Complaint No. 2007-310

v.

NJ Department of Labor & Workforce Development  
Custodian of Record

At the July 30, 2008 public meeting, the Government Records Council (“Council”) considered the July 23, 2008 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian provided the Complainant with a copy of the memorandum dated April 10, 2007 from Maggie Moran and Hope Cooper to Cabinet Members entitled “Management Salary Program: Fiscal Year 2007” with redactions directed by the GRC in its June 25, 2008 Interim Order, within the extended period of time for compliance required by the GRC, the Custodian has complied with the Council’s June 25, 2008 Interim Order.
2. Although the Custodian violated OPRA by failing to respond in writing to the Complainant’s OPRA request within the statutorily mandated seven (7) business day time period, and failed to bear his burden of proof that access to the memorandum dated April 10, 2007 from Maggie Moran and Hope Cooper to Cabinet members entitled “Management Salary Program: Fiscal Year 2008” was lawfully denied, the Custodian provided the memorandum to the Complainant with redactions directed by the GRC in its June 25, 2008 Interim Order within the extended period of time for compliance required by the GRC, and has borne his burden of proof that access to the remainder of the requested Items was lawfully denied. 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.



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 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: August 1, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Richard J. Iorio<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-310**

v.

**NJ Department of Labor & Workforce Development<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

Copies of:

1. The NJ Department of Labor and Workforce Development (“LWD”) criteria provided to and approved by Hope Cooper, as outlined in Management Salary Program for Fiscal Year 2008 Deliverables, which was to be used to determine the performance awards for LWD employees;
2. The Department-wide standards referred to in the attached Memorandum to File;
3. The name of the individual(s) who conducted the executive level review referred to in the attached Memorandum to File, and the name of the individual(s) who made the decision to modify the recommended salary increase;
4. The dollar value provided to LWD by OMB, to establish the agency’s Fiscal Year 2008 6% pool for merit-based awards and compression remedies;
5. The amount of this Fiscal Year 2008 dollar value expected to be expended during Fiscal Year 2008 for state funded employee merit salary increases and compression remedies;
6. How many LWD employees were evaluated for management salary increases? How many of these individuals had their evaluated/recommended increase reduced after being approved at the Assistant Commissioner or equivalent level?
7. How many Division of Vocational Rehabilitation Services employees were evaluated for management salary increases? How many of these individuals had their evaluated/recommended increase reduced after being approved by Assistant Commissioner Lois Cuccinello?
8. How many Division of Disability Services employees were evaluated for management salary increases? How many of these individuals had their evaluated/recommended increase reduced after being approved by Assistant Commissioner Lois Cuccinello?
9. How many Division of Temporary Disability Insurance employees were evaluated for management salary increases? How many of these individuals had their evaluated/recommended increase reduced after being approved by Assistant Commissioner Lois Cuccinello?

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

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

**Request Made:** October 30, 2007

**Response Made:** November 28, 2007

**Custodian:** Kevin Jarvis<sup>3</sup>

**GRC Complaint Filed:** December 13, 2007

### **Background**

#### **June 25, 2008**

Government Records Council's ("Council") Interim Order. At its June 25, 2008 public meeting, the 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, found that:

1. The Custodian has complied with the Council's April 30, 2008 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council's Order, as extended.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and provide certified confirmation of compliance pursuant to N.J. Court Rules, R. 1:4-4 to the Executive Director.**

#### **July 1, 2008**

Council's Interim Order distributed to the parties.

#### **July 7, 2008**

Custodian's response to the Council's Interim Order. The Custodian requests a five (5) business day extension of time to comply with the Council's Interim Order.

#### **July 7, 2008**

GRC's response to the Custodian's request for an extension of time. Via e-mail, the GRC grants the Custodian a five (5) business day extension of time to July 14, 2008 to comply with the Council's Interim Order.

#### **July 14, 2008**

Custodian's certification of compliance with the Council's June 25, 2008 Interim Order, pursuant to N.J. Court Rule 1:4-4. The Custodian certifies that on July 14, 2008, he provided to the Complainant a copy of the memorandum dated April 10, 2007 from Maggie Moran and Hope Cooper to Cabinet Members entitled "Management Salary Program: Fiscal Year 2008," with redactions directed by the GRC in its June 25, 2008 Interim Order.

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<sup>3</sup> Kevin Jarvis is the Chief of Staff of the NJ Department of Labor and Workforce Development.  
Richard J. Iorio v. NJ Department of Labor, Commissioner's Office, 2007-310 – Supplemental Findings and Recommendations  
of the Executive Director

## Analysis

### **Whether the Custodian complied with the Council's June 25, 2008 Interim Order?**

The Custodian requested an extension of time for compliance within the five (5) business day time period specified by the Council's June 25, 2008 Interim Order. Further, within the extended time for compliance, the Custodian provided certified proof of compliance pursuant to N.J. Court Rule 1: 4-4 with the Council's June 25, 2008 Interim Order on July 14, 2008; *i.e.*, the Custodian certified that on July 14, 2008, the Custodian provided to the Complainant a copy of the memorandum dated April 10, 2007 from Maggie Moran and Hope Cooper to Cabinet Members entitled "Management Salary Program: Fiscal Year 2008," with redactions directed by the GRC in its June 25, 2008 Interim Order.

Therefore, because the Custodian provided the Complainant with a copy of the memorandum dated April 10, 2007 from Maggie Moran and Hope Cooper to Cabinet Members entitled "Management Salary Program: Fiscal Year 2007" with redactions directed by the GRC in its June 25, 2008 Interim Order, within the extended period of time for compliance required by the GRC, the Custodian has complied with the Council's June 25, 2008 Interim Order.

### **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.

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, 107 (App. Div. 1996).

In the matter before the Council, the Custodian failed to respond in writing to the Complainant's OPRA request within the statutorily mandated seven (7) business day time period, resulting in a deemed denial. The Custodian has, therefore, violated N.J.S.A. 47:1A-5.i. See Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Moreover, the Custodian did not meet his burden of proof under N.J.S.A. 47:1A-6 that access to Item No. 1 of the Complainant's OPRA request (the Department of Labor and Workforce Development ("LWD") criteria provided to and approved by Hope Cooper, as outlined in Management Salary Program for Fiscal Year 2008 Deliverables, which was to be used to determine the performance awards for LWD employees) was lawfully denied. Although portions of the memorandum are exempt from disclosure as inter-agency advisory, consultative and/or deliberative material and thus are not a "government record" or "record" as defined by N.J.S.A. 47:1A-1.1, the remainder of the memorandum contains purely factual material which does not reflect deliberative processes. See In Re Liquidation of Integrity Insurance Co., 165 N.J. 75, 84 (2000). However, the Custodian provided a copy of this memorandum to the Complainant with redactions required by the Council in its June 25, 2008 Interim Order, and provided certified proof of compliance to the Executive Director pursuant to N.J.Court Rule 1:4-4.

Moreover, because the Custodian certified that no records responsive to Item No. 2 of the Complainant's OPRA request (the Department-wide standards referred to in the Memorandum to File attached to the Complainant's OPRA request), the Custodian did not unlawfully deny access to this record. Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).

Additionally, the Custodian did not unlawfully deny access to Item No. 4 of the Complainant's OPRA request, because in his November 28, 2007 response to the Complainant's OPRA request, the Custodian stated that this Item represented a request for data rather than a request for an identifiable government record, and that he was therefore under no obligation to respond to the request. The Custodian also stated in his response to the OPRA request that no records responsive to this request existed. However, the Custodian located a responsive record during the preparation of the SOI. The Custodian certified in his SOI that the responsive record, a one-page e-mail dated April 27, 2007 from the Department of the Treasury to LWD indicating the OMB calculated dollar value of LWD's 6% pool to fund FY08 performance awards, was provided to the Complainant with the SOI on February 6, 2008. Therefore, although access to the requested record was untimely, the Custodian has not unlawfully denied access to the requested record.

Finally, the Custodian bore his burden of proof pursuant to N.J.S.A. 47:1A-6 that denial of access to Items No. 3 and 5-9 of the Complainant's OPRA request was authorized by law because these Items sought information, not identifiable government records, and the OPRA request for these Items was invalid. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005). *See also* N.J. Builders Assoc. v. NJ Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), certif. denied, 190 N.J. 394 (2007); Reda v. Tp. of West Milford, GRC Complaint No. 2002-58 (January 2003).

Therefore, although the Custodian violated OPRA by failing to respond in writing to the Complainant's OPRA request within the statutorily mandated seven (7) business day time period, and failed to bear his burden of proof that access to the memorandum dated April 10, 2007 from Maggie Moran and Hope Cooper to Cabinet members entitled "Management Salary Program: Fiscal Year 2008" was lawfully denied, the Custodian has provided the memorandum to the Complainant with redactions directed by the GRC in its June 25, 2008 Interim Order within the extended period of time for compliance required by the GRC, and has borne his burden of proof that access to the remainder of the requested Items was lawfully denied. 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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian provided the Complainant with a copy of the memorandum dated April 10, 2007 from Maggie Moran and Hope Cooper to Cabinet Members entitled "Management Salary Program: Fiscal Year 2007" with redactions directed by the GRC in its June 25, 2008 Interim Order, within the extended period of time for compliance required by the GRC, the Custodian has complied with the Council's June 25, 2008 Interim Order.
2. Although the Custodian violated OPRA by failing to respond in writing to the Complainant's OPRA request within the statutorily mandated seven (7) business day time period, and failed to bear his burden of proof that access to the memorandum dated April 10, 2007 from Maggie Moran and Hope Cooper to Cabinet members entitled "Management Salary Program: Fiscal Year 2008" was lawfully denied, the Custodian provided the memorandum to the Complainant with redactions directed by the GRC in its June 25, 2008 Interim Order within the extended period of time for compliance required by the GRC, and has borne his burden of proof that access to the remainder of the requested Items was lawfully denied. 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.

Prepared By: Karyn Gordon, Esq.  
In House Counsel

Approved By: Catherine Starghill, Esq.  
Executive Director

July 23, 2008





**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

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**INTERIM ORDER**

**June 25, 2008 Government Records Council Meeting**

Richard J. Iorio  
Complainant

Complaint No. 2007-310

v.

NJ Department of Labor & Workforce Development  
Custodian of Record

At the June 25, 2008 public meeting, the Government Records Council (“Council”) considered the June 18, 2008 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has complied with the Council’s April 30, 2008 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council’s Order, as extended.
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the below table within five (5) business days from receipt of this Order and provide certified confirmation of compliance pursuant to N.J. Court Rules, R. 1:4-4 to the Executive Director.**

Number	Record Name/Date	Description of Document And/or Redaction	Custodian’s Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination
1	Memorandum dated April 10, 2007 from Maggie Moran and	Unredacted two (2) page Memorandum dated April 10, 2007 from Maggie Moran	The April 10, 2007 memorandum from Maggie Moran and Hope Cooper is	Redact everything following the words “hard work” at the end of the first



	<p>Hope Cooper to Cabinet Members entitled "Management Salary Program: Fiscal Year 2008."</p>	<p>and Hope Cooper to Cabinet Members entitled "Management Salary Program: Fiscal Year 2008."</p>	<p>shielded from disclosure by the Governor's Executive Privilege. <u>Nero v. Hyland</u>, 76 N.J. 213 (1978). In addition, or in the alternative, the memorandum is inter-agency advisory, consultative and/or deliberative material, and thus is not a "government record" or "record" as those terms are defined by <u>N.J.S.A. 47:1A-1.1</u>. See also <u>Gannett NJ Partners v. County of Middlesex</u>, 379 N.J. Super. 205, 219-20 (App. Div. 2005).</p>	<p>paragraph, pursuant to <u>N.J.S.A. 47:1A-1.1</u> as inter- or intra-agency advisory, consultative or deliberative material.</p>
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Interim Order Rendered by the  
Government Records Council  
On The 25<sup>th</sup> 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 1, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Richard J. Iorio<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-310**

v.

**NJ Department of Labor and Workforce  
Development<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

Copies of:

1. The NJ Department of Labor and Workforce Development (“LWD”) criteria provided to and approved by Hope Cooper, as outlined in Management Salary Program for Fiscal Year 2008 Deliverables, which was to be used to determine the performance awards for LWD employees;
2. The Department-wide standards referred to in the attached Memorandum to File;
3. The name of the individual(s) who conducted the executive level review referred to in the attached Memorandum to File, and the name of the individual(s) who made the decision to modify the recommended salary increase;
4. The dollar value provided to LWD by OMB, to establish the agency’s Fiscal Year 2008 6% pool for merit-based awards and compression remedies;
5. The amount of this Fiscal Year 2008 dollar value expected to be expended during Fiscal Year 2008 for state funded employee merit salary increases and compression remedies;
6. How many LWD employees were evaluated for management salary increases? How many of these individuals had their evaluated/recommended increase reduced after being approved at the Assistant Commissioner or equivalent level?
7. How many Division of Vocational Rehabilitation Services employees were evaluated for management salary increases? How many of these individuals had their evaluated/recommended increase reduced after being approved by Assistant Commissioner Lois Cuccinello?
8. How many Division of Disability Services employees were evaluated for management salary increases? How many of these individuals had their evaluated/recommended increase reduced after being approved by Assistant Commissioner Lois Cuccinello?
9. How many Division of Temporary Disability Insurance employees were evaluated for management salary increases? How many of these individuals had their evaluated/recommended increase reduced after being approved by Assistant Commissioner Lois Cuccinello?

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

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

**Request Made:** October 30, 2007

**Response Made:** November 28, 2007

**Custodian:** Kevin Jarvis<sup>3</sup>

**GRC Complaint Filed:** December 13, 2007

### **Background**

#### **April 30, 2008**

Government Records Council's ("Council") Interim Order. At its April 30, 2008 public meeting, the Council considered the April 23, 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, found that:

1. The Custodian's failure to respond in writing within the statutorily mandated seven (7) business days resulted in a deemed denial of the Complainant's OPRA request. The Custodian has, therefore, violated N.J.S.A. 47:1A-5.i. See Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. The Council should conduct an *in camera* review of the two (2) page memorandum dated April 10, 2007 from Maggie Moran and Hope Cooper to Cabinet Members entitled "Management Salary Program: Fiscal Year 2008" in order to verify if the Custodian's claimed executive privilege and/or advisory, consultative, and deliberative material exemptions are valid pursuant to Paff v. Department of Labor, 379 N.J. Super. 346, 354-355 (App. Div. 2005).
3. **The Custodian must deliver<sup>4</sup> to the Council in a sealed envelope nine copies of the requested unredacted document (see #2 above), a document or redaction index<sup>5</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. Because the Custodian in this matter has certified that no records responsive to the Complainant's OPRA request for the Department-wide standards referred to in the Memorandum to File attached to the Complainant's OPRA request, the Custodian has not unlawfully denied access to this record. Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).

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<sup>3</sup> Kevin Jarvis is the Chief of Staff of the NJ Department of Labor and Workforce Development.

<sup>4</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>5</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

5. In his November 28, 2007 response to the Complainant's OPRA request, the Custodian stated that this Item represented a request for data rather than a request for an identifiable government record, and that he was therefore under no obligation to respond to the request. The Custodian also stated in his response to the OPRA request that no records responsive to this request existed. However, the Custodian located a responsive record during the preparation of the Statement of Information. The Custodian certified in his SOI that the responsive record, a one-page e-mail dated April 27, 2007 from the Department of the Treasury to Labor and Workforce Development indicating the OMB calculated dollar value of Labor and Workforce Development's 6% pool to fund FY08 performance awards, was provided to the Complainant with the Statement of Information on February 6, 2008. Therefore, although access to the requested record was untimely, the Custodian has not unlawfully denied access to the requested record.
6. Because the Complainant's OPRA request at Items No. 3 and 5-9 sought information, not identifiable government records, the OPRA request for these Items is invalid. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005). *See also* N.J. Builders Assoc. v. NJ Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), certif. denied, 190 N.J. 394 (2007); Reda v. Tp. of West Milford, GRC Complaint No. 2002-58 (January 2003). The Custodian, therefore, has borne his burden of proof that the denial of access was authorized by law. N.J.S.A. 47:1A-6.
7. 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.

#### **April 30, 2008**

Council's Interim Order distributed to the parties.

#### **May 5, 2008**

Certification of the Custodian with six (6) copies each of an unredacted two (2) page memorandum dated April 10, 2007 from Maggie Moran and Hope Cooper to Cabinet Members entitled "Management Salary Program: Fiscal Year 2008."

The Custodian certifies that the records are true copies of the document requested by the Council in its April 30, 2008 Interim Order. The Custodian notes that he relies on the Statement of Information, table index, and written statement to the GRC with regard to the Custodian's lawful basis for denying access to the April 10, 2007 memorandum.

## Analysis

### **Whether the records are exempt from disclosure in whole or in part because they are subject to executive privilege and/or because they contain advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1?**

OPRA places the burden on the Custodian to prove that a denial of access to government records is lawful pursuant to N.J.S.A. 47:1A-6.

OPRA provides that government records may be exempted from access by Executive Order of the Governor. N.J.S.A. 47:1A-1:-9.a. Executive Order No. 26 (August 13, 2002), Paragraph 2a, shields from disclosure those documents in the governor's office which are "subject to an executive privilege or grant of confidentiality established or recognized by the Constitution of this state, statute, court rules or judicial case law." It also exempts "[a]ll portions of records, including electronic communications, that contain advisory, consultative or deliberative information or other records protected by a recognized privilege." Para.2b.

New Jersey case law acknowledges the existence of an executive privilege belonging to the governor. In Nero v. Hyland, 76 N.J. 213 (1978), the Supreme Court rejected a request for disclosure of personal background investigatory materials received by the governor from the Attorney General concerning a potential candidate for appointment to the State Lottery Commission. The Court determined that the "governor, as chief executive, must be accorded a qualified power to protect the confidentiality of communications pertaining to the executive function...This executive privilege protects and insulates the sensitive decisional and consultative responsibilities of the governor which can only be discharged freely and effectively under a mantle of privacy and security." Id. at 225.

In reaching this conclusion, the Court relied upon what it characterized as the "constitutionally based executive privilege" accorded the President of the United States described in United States v. Nixon, 418 U.S. 683 (1974). Nero, supra, at 225. The Court quoted Nixon with approval, stating that the executive privilege was "fundamental to the operation of government and inextricably related to the separation of powers..." Ibid. The Court also observed that the privilege ensured those assisting the executive freely explored alternatives in shaping of policies and permitted them to do so "in a way many would be unwilling to express except privately." Id. at 226, quoting 418 U.S. at 708]. Confidentiality is therefore vital not only because it serves to protect government sources of information (*see* State v. Milligan, 71 N.J. 373 (1976)), but also because it enhances the effectiveness of investigative techniques and procedures. More importantly, executive privilege protects and insulates the sensitive decisional and consultative responsibilities of the Governor which can only be discharged freely and effectively under a mantle of privacy and security. Nero, supra, at 225-226.

The executive privilege is presumptive and applies when invoked by the executive. Nixon, 418 U.S. at 708. The privilege applies to documents in their entirety

and covers final and post-decisional materials as well as pre-deliberative ones. In Re Sealed Case, 121 F.3d 729, 745 (D.C.Cir.1997). See Shearn v. Office of the Governor, GRC Complaint No. 2003-53 (February 2004)(Governor’s daily private meeting schedule between his inauguration and August 1, 2002 are exempt from disclosure pursuant to OPRA on the grounds of executive privilege and deliberative process privilege).

Moreover, N.J.S.A. 47:1A-1.1 excludes advisory, consultative or deliberative (“ACD”) materials from the definition of a government record. It is evident that this phrase is intended to exclude from the definition of a government record those 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. Strictly factual segments of an otherwise deliberative document are not exempted from disclosure. In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 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). 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 Custodian provided six (6) unredacted copies of the memorandum dated April 10, 2007 from Maggie Moran and Hope Cooper to Cabinet Members entitled “Management Salary Program: Fiscal Year 2008” on the third (3<sup>rd</sup>) business day following receipt of the Council’s April 30, 2008 Interim Order. The Custodian has, therefore, complied with the Council’s Interim Order in this matter.

An *in camera* inspection was performed on the submitted records to determine if the records were comprised of excludable ACD material either in whole or in part. The results of the *in camera* inspection are set forth in the following table:

Number	Record Name/Date	Description of Document And/or Redaction	Custodian’s Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination
1	Memorandum dated April 10, 2007 from Maggie Moran and Hope Cooper to Cabinet Members entitled “Management Salary Program: Fiscal Year 2008.”	Unredacted two (2) page Memorandum dated April 10, 2007 from Maggie Moran and Hope Cooper to Cabinet Members entitled “Management Salary Program: Fiscal Year 2008.”	The April 10, 2007 memorandum from Maggie Moran and Hope Cooper is shielded from disclosure by the Governor’s Executive Privilege. <u>Nero v. Hyland</u> , 76 N.J. 213 (1978). In addition, or in the alternative, the memorandum is inter-agency advisory, consultative and/or deliberative material, and thus is not a “government record” or “record” as	Redact everything following the words “hard work” at the end of the first paragraph, pursuant to <u>N.J.S.A.</u> 47:1A-1.1 as inter- or intra-agency advisory, consultative or deliberative material.

			<p>those terms are defined by <u>N.J.S.A. 47:1A-1.1</u>. See also <u>Gannett NJ Partners v. County of Middlesex</u>, 379 N.J. Super. 205, 219-20 (App. Div. 2005).</p>	
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**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council’s April 30, 2008 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council’s Order, as extended.
  
2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and provide certified confirmation of compliance pursuant to N.J. Court Rules, R. 1:4-4 to the Executive Director.**

Prepared By:

Karyn Gordon, Esq.  
In House Counsel

Approved By:

Catherine Starghill, Esq.  
Executive Director

June 18, 2008



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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INTERIM ORDER

April 30, 2008 Government Records Council Meeting

Richard Iorio  
Complainant

Complaint No. 2007-310

v.

NJ Department of Labor,  
Commissioner's Office  
Custodian of Record

At the April 30, 2008 public meeting, the Government Records Council ("Council") considered the April 23, 2008 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimous to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian's failure to respond in writing within the statutorily mandated seven (7) business days resulted in a deemed denial of the Complainant's OPRA request. The Custodian has, therefore, violated N.J.S.A. 47:1A-5.i. See Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. The Council should conduct an *in camera* review of the two (2) page memorandum dated April 10, 2007 from Maggie Moran and Hope Cooper to Cabinet Members entitled "Management Salary Program: Fiscal Year 2008" in order to verify if the Custodian's claimed executive privilege and/or ACD exemptions are valid pursuant to Paff v. Department of Labor, 379 N.J. Super. 346, 354-355 (App. Div. 2005).
3. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope six copies of the requested unredacted document (see #2 above), a document 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**

<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.

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



**delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

4. Because the Custodian in this matter has certified that no records responsive to the Complainant's OPRA request for the Department-wide standards referred to in the Memorandum to File attached to the Complainant's OPRA request, the Custodian has not unlawfully denied access to this record. Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).
5. In his November 28, 2007 response to the Complainant's OPRA request, the Custodian stated that this Item represented a request for data rather than a request for an identifiable government record, and that he was therefore under no obligation to respond to the request. The Custodian also stated in his response to the OPRA request that no records responsive to this request existed. However, the Custodian located a responsive record during the preparation of the SOI. The Custodian certified in his SOI that the responsive record, a one-page e-mail dated April 27, 2007 from the Department of the Treasury to LWD indicating the OMB calculated dollar value of LWD's 6% pool to fund FY08 performance awards, was provided to the Complainant with the SOI on February 6, 2008. Therefore, although access to the requested record was untimely, the Custodian has not unlawfully denied access to the requested record.
6. Because the Complainant's OPRA request at Items No. 3 and 5-9 sought information, not identifiable government records, the OPRA request for these Items is invalid. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005). *See also* N.J. Builders Assoc. v. NJ Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), certif. denied, 190 N.J. 394 (2007); Reda v. Tp. of West Milford, GRC Complaint No. 2002-58 (January 2003). The Custodian, therefore, has borne his burden of proof that the denial of access was authorized by law. N.J.S.A. 47:1A-6.
7. 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 April, 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, Vice Chairman & Secretary  
Government Records Council

**Decision Distribution Date: April 30, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Richard J. Iorio<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-310**

v.

**NJ Department of Labor & Workforce Development<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

Copies of:

1. The NJ Department of Labor and Workforce Development (“LWD”) criteria provided to and approved by Hope Cooper, as outlined in Management Salary Program for Fiscal Year 2008 Deliverables, which was to be used to determine the performance awards for LWD employees;
2. The Department-wide standards referred to in the attached Memorandum to File;
3. The name of the individual(s) who conducted the executive level review referred to in the attached Memorandum to File, and the name of the individual(s) who made the decision to modify the recommended salary increase;
4. The dollar value provided to LWD by OMB, to establish the agency’s Fiscal Year 2008 6% pool for merit-based awards and compression remedies;
5. The amount of this Fiscal Year 2008 dollar value expected to be expended during Fiscal Year 2008 for state funded employee merit salary increases and compression remedies;
6. How many LWD employees were evaluated for management salary increases? How many of these individuals had their evaluated/recommended increase reduced after being approved at the Assistant Commissioner or equivalent level?
7. How many Division of Vocational Rehabilitation Services employees were evaluated for management salary increases? How many of these individuals had their evaluated/recommended increase reduced after being approved by Assistant Commissioner Lois Cuccinello?
8. How many Division of Disability Services employees were evaluated for management salary increases? How many of these individuals had their evaluated/recommended increase reduced after being approved by Assistant Commissioner Lois Cuccinello?
9. How many Division of Temporary Disability Insurance employees were evaluated for management salary increases? How many of these individuals had their evaluated/recommended increase reduced after being approved by Assistant Commissioner Lois Cuccinello?

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

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

**Request Made:** October 30, 2007

**Response Made:** November 28, 2007

**Custodian:** Kevin Jarvis<sup>3</sup>

**GRC Complaint Filed:** December 13, 2007

## Background

### **October 30, 2007**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above in an attachment to an official OPRA request form.

### **November 28, 2007**

Custodian's Response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the eighteenth (18th) business day following receipt of such request.

In response to Item No. 1 of the Complainant's OPRA request, the Custodian provides a blank copy of the evaluation form used to rate management/exempt LWD employees. The Custodian notes that this is the document which the LWD provided to, and which was approved by, Hope Cooper.

In response to Item No. 2 of the Complainant's OPRA request, the Custodian states that no government record exists which is responsive to the request. The Custodian cites to the definition of a "government record" at N.J.S.A. 47:1A-1.1.<sup>4</sup>

In response to Item No. 3 of the Complainant's OPRA request, the Custodian states that the name of the individual(s) who conducted the executive level review referred to in the document labeled Memorandum to File, and the name of the individual(s) who made the decision to modify the recommended salary increase are not "government records" as defined in N.J.S.A. 47:1A-1.1 and the LWD cannot respond to the request.

In response to the Complainant's request for certain specified "data" (Items No. 4 through 9), the Custodian states that there is no existing government record which contains the information sought. The Custodian states that the LWD has no obligation under OPRA to respond to requests for data which are not contained in existing government records.

### **December 13, 2007**

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

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<sup>3</sup> Kevin Jarvis is the Chief of Staff of the NJ Department of Labor and Workforce Development.

<sup>4</sup> " 'Government record' or 'record' means 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 in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof..." N.J.S.A. 47:1A-1.1.

Richard J. Iorio v. NJ Department of Labor & Workforce Development, 2007-310 – Findings and Recommendations of the Executive Director

- Complainant's OPRA request dated October 30, 2007
- Document entitled Management Salary Program for Fiscal Year 2008 Deliverables, undated
- Memorandum to File, dated May 23, 2007
- Letter to the Complainant from the Custodian dated November 28, 2007 with attachment<sup>5</sup>
- Printout of NJ Department of Personnel Compensation Compendium FY 2008, from <http://webapps.dop.state.nj.us/Comp/2008/section1/mgmt.htm>, dated December 13, 2007.

The Complainant states that he contests the LWD's response to his OPRA request. The Complainant states that he requested the dollar value provided to LWD by OMB (Item No. 4) to establish the agency's FY 2008 6% pool for merit based awards and compression remedies and the amount of this FY 2008 dollar value expected to be expended during FY 2008 for state funded employee merit salary increases and compression remedies (Item No. 5). The Complainant notes that the salary regulation he attached to the Denial of Access Complaint details the specifics of how the appropriation was to be made for the 6% pool. The Complainant questions how this information could not be available as a government record. The Complainant also states that based upon decisions made by LWD regarding the dollar amount each manager will receive for FY 2008, there must have been some allocation of the pool money to provide the funding for these increased salaries. The Complainant questions how this information could not be available as a government record.

The Complainant states that the Memorandum to File which he attached to both his OPRA request and to the Denial of Access Complaint refers to consistent Department-wide standards that were applied to determine the allocation of budgeted monies for manager salary increases. The Complainant again questions how it could be that there is nothing written detailing the standards that were to be consistently applied. The Complainant states that he finds it incredible that there would not be a record of these standards, which should be required as part of an audit trail on how these monies were allocated. The Complainant requests that the GRC investigate the Custodian's response.

The Complainant noted on the Denial of Access Complaint that he did not agree to mediate this complaint.

**January 15, 2008**

Request for the Statement of Information sent to the Custodian.

**January 18, 2008**

E-mail from David Fish to the GRC. Mr. Fish requests an extension of time to submit the Statement of Information.

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<sup>5</sup> Blank copy of Fiscal Year 2008 Salary Program – Management/Exempt Recommendations, Department of Labor & Workforce Development.  
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**January 18, 2008**

E-mail from the GRC to David Fish. The GRC grants an extension to January 30, 2008, for the Custodian to submit the Statement of Information.

**January 29, 2008**

E-mail from DAG Jonathan Greenberg to the GRC. DAG Greenberg requests an additional five (5) day extension of time to submit the Statement of Information.

**January 30, 2008**

E-mail from the GRC to DAG Greenberg. The GRC grants an additional five (5) day extension of time to February 6, 2008 in order for the Custodian to submit the Statement of Information.

**February 6, 2008**

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

- Complainant’s OPRA request dated October 30, 2008 (with attachments)
- Letter from the Custodian to the Complainant dated November 28, 2007 (with attachments)

The Custodian provided the following document index:

<b>List of All Records responsive to Complainant’s OPRA request</b>	<b>List of Records Retention and Disposition Schedule for each record responsive to the Complainant’s OPRA request</b>	<b>List of all records provided to Complainant in their entirety or with redactions (include the date such records were provided)</b>	<b>If records were disclosed, give a general nature description of the redactions</b>	<b>If records were denied in their entirety, give a general nature description of the record</b>	<b>List the explanation and statutory citation for the denial of access to records in their entirety or with redactions</b>
1) Blank form entitled “FY 2008 Salary Program – Management/ Exempt Recommendations: Department of Labor & Workforce Development (three (3) pages)	- RS# 1404-0000 - (4yrs/archival review)	1) Provided to Complainant on November 28, 2007	N/A		
2) Print-out of	2) N/A	2) Provided	N/A		

<p>“Salary Regulation FY08; Section 1 – Management; Issued: August 29, 2007” from NJ Department of Personnel website (two (2) pages)</p>		<p>to Complainant on November 28, 1007</p>			
<p>3) April 10, 2007 memorandum from Maggie Moran and Hope Cooper to Cabinet Members with subject title “Management Salary Program: Fiscal Year 2008” (two (2) pages)</p>	<p>- RS# 1404-0000 (4 yrs/archival review)</p>	<p>N/A</p>	<p>N/A</p>	<p>Memorandum from the Office of the Governor providing Cabinet officers guidance in how to award performance-based salary increases to department employees serving in a managerial capacity with M and X titles</p>	<p>Memorandum is shielded from disclosure by the Governor’s executive privilege. <u>Nero v. Hyland</u>, 76 N.J. 213 (1978). In addition, or alternatively, the memorandum is inter-agency advisory, consultative and/or deliberative material and thus is not a “government record” or “record” as defined by <u>N.J.S.A. 47:1A-1.1</u>. See also <u>Gannett NJ Partners, LP v. County of Middlesex</u>, 379 N.J.Super. 205, 219-20 (App. Div. 2005).</p>

4) April 27, 2007 e-mail from the Department of the Treasury to LWD indicating the OMB calculated dollar value of LWD's 6% pool to fund FY08 performance awards – one (1) page	<ul style="list-style-type: none"> <li>- RS 1404-0000</li> <li>- (4yrs/archival review)</li> </ul>	The Custodian has reconsidered his previous denial of this record and has now provided it to the Complainant with the Statement of Information <sup>6</sup>			
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The Custodian contends that there is no specifically identifiable “government record” responsive to the Complainant’s request for Item No. 3. The Custodian argues that OPRA does not require agencies to satisfy requests for information, but only requires the disclosure of “‘identifiable’ government records” as that term is defined by N.J.S.A. 47:1A-1.1 (e.g., a particular paper or document that has been made, maintained or kept on file). MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 547-49 (App. Div. 2005). See also Krohn v. Dep’t of Justice, 628 F.2d 195, 197-98 (D.C. Cir. 1980)(distinguishing a request for “data” or selective information” from a request for a disclosable “record” pursuant to the federal Freedom of Information Act (FOIA)). The Custodian further contends that the Appellate Division indicated in MAG, 375 N.J. Super. at 549 that it does not interpret OPRA any differently from the D.C. Circuit’s interpretation of FOIA in Krohn, *supra*.

The Custodian also states that he originally denied the Complainant’s request for Item No. 4 on the ground that the request was for “data” and not for a paper or document that had been made, maintained or kept on file. However, the Custodian states that after further review of his files in preparing the Statement of Information, the Custodian determined that an April 27, 2007 e-mail from Sonia Rivera-Perez of the NJ Department of Treasury to George Krause of the LWD is responsive to the Complainant’s request. The Custodian states that he is providing the Complainant with a copy of that memorandum with the Statement of Information.

The Custodian contends that there is no specifically identifiable “government record” responsive to the Complainant’s request for Item No. 5. The Custodian reiterates his argument that OPRA only requires the disclosure of “‘identifiable’ government records” as that term is defined by N.J.S.A. 47:1A-1.1, and cites to MAG, *supra*. The Custodian also cites Bent v. Twp. of Stafford Police Dep’t, 381 N.J. Super. 30, 38 (App. Div. 2005), in support of his assertion that a government agency is under no obligation to create a record that did not previously exist in order to respond to an OPRA request.

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<sup>6</sup> The Custodian submitted the Statement of Information to the GRC on February 6, 2008.  
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The Custodian contends that the Complainant's requests for data in Items No. 6 to 9 are not requests for government records as defined by N.J.S.A. 47:1A-1.1 and cites to Krohn v. Dep't of Justice, 628 F.2d 195, 197-98 (D.C. Cir. 1980)(distinguishing a request for "data" or "selective information" from a request for a disclosable "record" under the federal Freedom of Information Act (FOIA)). The Custodian repeats his assertion that the Appellate Division indicated in MAG that it does not interpret OPRA any differently from the D.C. Circuit's interpretation of FOIA in Krohn, supra. *In accord*, Gill v. Salem County, GRC Complaint No. 2005-185 (February 2006)(fulfilling a request for a list of individuals paid by the County would have obligated the custodian to create a record); Hillenbrand v. NJ Bd. of Social Work Examiners, GRC Complaint No. 2004-63 (October 2004)(requests for a list of individuals/organizations/groups that received an Amended Verified Complaint as well as for a list of local therapists the Board would approve to provide mental health therapy were not requests for records made, maintained, or kept on file in the course of official business).

The Custodian further contends that fulfilling the Complainant's requests would require the Custodian to search through the Department's personnel files and make tabulations based upon the Complainant's selected criteria. The Complainant argues that OPRA is "not intended as a research tool litigants may use to force government officials to identify and siphon useful information." MAG, supra, 375 N.J. Super. at 546. Requests for data, information and statistics to be researched, "analyzed, collated and compiled" are outside of OPRA's ambit. *Id.* at 548-49; *see also* N.J. Builders Assoc. v. NJ Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), certif. denied, 190 N.J. 394 (2007). Although a requestor is entitled to specifically identifiable government records readily accessible for inspection, copying or examination, it is "incumbent on the requestor to perform any correlations and analysis he may desire." MAG, supra, 375 N.J. Super. at 547.

The Custodian also argues that the document labeled "Memorandum to File" and dated May 23, 2007 on LWD letterhead reflects the LWD-determined FY08 salary increase for the Complainant. The document reads, in pertinent part, "After Executive level review, modified from Assistant Commissioner/Director recommendations to conform with consistent *Department-wide standards*." [Emphasis added]. The Custodian notes that in his November 28, 2007 letter, the Custodian responded that no "government record," as that term is defined in N.J.S.A. 47:1A-1.1, corresponds to the Complainant's request, and continues to maintain that position.

The Custodian, however, states that to the extent that the Complainant's request for "department-wide standards" is distinguishable from his request for "the LWD criteria provided to and approved by Hope Cooper" to determine performance awards – pursuant to which documents were provided to the Complainant, and is also distinguishable from the factors to be considered in determining individual managers' percentage of salary increase as outlined in section 4.b of the document already in the Complainant's possession entitled "Management Salary Program for Fiscal Year 2008 Deliverables," there is no paper or record on file documenting Department-specific standards for awarding salary increases for managerial performance in the Fiscal Year 2008. The Custodian states that the only other document that is in any way responsive to the Complainant's request is a memorandum dated April 10, 2007, from Maggie Moran,

Deputy Chief of Staff, Office of the Governor, and Hope Cooper, Director of Administration, Office of the Governor, to all Cabinet members providing guidance from the Office of the Governor in how to award performance-based salary increases to department employees serving in a managerial capacity with M and X titles. The Custodian states that this guidance was given to all Cabinet officers for application in their respective Departments.

The Custodian contends that he did not originally identify the April 10, 2007 memorandum in his November 28, 2007 response to the Complainant because the Custodian did not initially associate the Complainant's specific request for Department-wide standards with the Governor's April 10, 2007 memorandum, which the Custodian contends applies generally for application in all Departments and does not specifically outline concrete standards but instead provides general guidance or expectations to Cabinet officers to be applied in exercising their discretion in awarding managerial performance. The Custodian further contends that, notwithstanding the unclear language used by the Complainant in his OPRA request, upon further consideration in preparing the Statement of Information, the Custodian now believes that this memorandum is, in fact, responsive to the Complainant's OPRA request.

However, the Custodian argues that the April 10, 2007 memorandum is not subject to public inspection, copying or examination pursuant to the Governor's executive privilege or qualified power to protect the confidentiality of communications reflecting his decisional and consultative responsibilities. Nero v. Hyland, 76 N.J. 213, 225-26 (1978); *see* N.J.S.A. 47:1A-9.b; Executive Order No. 26, ¶ 2(a)(2002)(no record made, maintained, kept on file by the Office of the Governor in the course of its official business which is subject to an executive privilege shall be subject to public inspection, copying or examination pursuant to OPRA).

The Custodian claims that executive privilege applies to the April 10, 1007 memorandum in that the memo provides confidential guidance from the Office of the Governor to Cabinet officers in how the latter should go about awarding performance-based salary increases. In other words, the Custodian contends, the April 10, 1007 memorandum reflects a policy decision from the Office of the Governor that is entitled to a "high degree of protection" and ought not to be disclosed absent the requestor showing a "compelling need" for the information therein. McClain v. College Hosp., 99 N.J. 346, 362-63 (1985); *see also* Loigman v. Kimmelman, 102 N.J. 98, 104 (1986)(a compelling or substantial showing of need is required when a citizen's interest in access is private and not part of an attempt to vindicate the public interest).

The Custodian asserts that the Complainant in this case is unable to show the requisite compelling need for the record. The Custodian further asserts that the Complainant's interest in access to the Governor's confidential guidance is in no way comparable to the interest of the United States government in seeking to compel the production of certain tape recordings and documents relating to private conversations of the President of the United States with his advisors for use in a criminal prosecution in United States v. Nixon, 418 U.S. 683 (1974). The Custodian argues that significantly, the availability of substantially-similar information by other means to that sought by the requestor is an important consideration in balancing the requestor's interest in the

information against the public interest in confidentiality. McClain, *supra*, 99 N.J. at 361-62. The Custodian notes that the Complainant is already in possession of the document entitled “Management Salary Program for Fiscal Year 2008 Deliverables” which lists the factors that can be considered when determining an individual manager’s percentage of increase. The Custodian claims that this document is sufficiently responsive to the Complainant’s request for Department-wide standards. The Custodian finally states that, by application of the executive privilege, no part of the April 10, 2007 memorandum is subject to disclosure under OPRA. In re Sealed Case, 121 F.3d 729, 746 (D.C. Cir. 1997).

Alternatively, the Custodian argues that the April 10, 2007 memorandum is not a “government record” as that term is defined in N.J.S.A. 47:1A-1.1 in that it is inter-agency advisory, consultative and/or deliberative material. The Custodian asserts that the deliberative process privilege, which is incorporated in N.J.S.A. 47:1A-1.1, is “aimed at protecting the quality of government decisions by shielding the communications received by a decision maker from public disclosure.” Gannett NJ Partners, LP v. County of Middlesex, 379 N.J. Super. 205, 219-20 (App. Div. 2005). The Custodian notes that, to be entitled to invoke the deliberative process privilege, it must be shown that the document in question is “predecisional” and is “deliberative in nature, containing opinions, recommendations, or advice about agency policies.” *Id.* at 219.

The Custodian contends that the April 10, 2007 memorandum is pre-decisional because it was “generated before the adoption” of LWD’s individualized determinations of manager salary increases. The Custodian also contends that the memorandum is deliberative in nature inasmuch as it contains recommendations or advice from the Office of the Governor as to how Cabinet members should exercise their discretion in rewarding managerial performance. The Custodian finally contends that, to the extent that the memorandum is responsive to the Complainant’s specific request for Department-wide standards, the memorandum is deliberative in its entirety and does not contain “[p]urely factual material that does not reflect deliberative processes” as required by Gannett. *Id.* at 219. As such, the Custodian claims that no part of the April 10, 2007 memorandum responsive to the Complainant’s specific request is subject to disclosure.

### **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 ...” (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.

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. 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. See Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In the instant complaint, the Custodian responded in writing on the eighteenth (18th) business day following receipt of the Complainant’s OPRA request. The Custodian’s failure to respond in writing within the statutorily mandated seven (7) business days resulted in a deemed denial of the Complainant’s OPRA request. The Custodian has, therefore, violated N.J.S.A. 47:1A-5.i. See Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Item No. 1 - The NJ Department of Labor and Workforce Development (“LWD”) criteria provided to and approved by Hope Cooper, as outlined in Management Salary Program for Fiscal Year 2008 Deliverables, which was to be used to determine the performance awards for LWD employees

In his November 28, 2007 response to the Complainant’s OPRA request, the Custodian provided a blank copy of the evaluation form used to rate management/exempt LWD employees (Item No. 1). The Custodian noted that this is the document which the LWD provided to and which was approved by Hope Cooper.

In the SOI submitted to the GRC on February 8, 2008, the Custodian identified an additional record responsive to this request, a two (2) page memorandum dated April 10,

2007 from Maggie Moran and Hope Cooper to Cabinet Members entitled “Management Salary Program: Fiscal Year 2008.” However, the Custodian contends that this record is exempt from disclosure by the Governor’s executive privilege. Nero v. Hyland, 76 N.J. 213 (1978). The Custodian also argues that the record contains inter-agency advisory, consultative and/or deliberative material and thus is not a “government record” or “record” as those terms are defined by N.J.S.A. 47:1A-1.1. See also Gannett NJ Partners, LP v. County of Middlesex, 379 N.J.Super. 205, 219-20 (App. Div. 2005).

OPRA provides that government records may be exempted from access by Executive Order of the Governor. N.J.S.A. 47:1A-1;-9a. Executive Order No. 26 (August 13, 2002), Paragraph 2a, shields from disclosure those documents in the governor’s office which are “subject to an executive privilege or grant of confidentiality established or recognized by the Constitution of this state, statute, court rules or judicial case law.” It also exempts “[a]ll portions of records, including electronic communications, that contain advisory, consultative or deliberative information or other records protected by a recognized privilege.” Para.2b.

New Jersey case law acknowledges the existence of an executive privilege belonging to the governor. In Nero v. Hyland, 76 N.J. 213 (1978), the Supreme Court rejected a request for disclosure of personal background investigatory materials received by the governor from the Attorney General concerning a potential candidate for appointment to the State Lottery Commission. The Court determined that the “governor, as chief executive, must be accorded a qualified power to protect the confidentiality of communications pertaining to the executive function...This executive privilege protects and insulates the sensitive decisional and consultative responsibilities of the governor which can only be discharged freely and effectively under a mantle of privacy and security.” Id. at 225.

In reaching this conclusion, the Court relied upon what it characterized as the “constitutionally based executive privilege” accorded the President of the United States described in United States v. Nixon, 418 U.S. 683 (1974). Nero, supra, at 225. The Court quoted Nixon with approval, stating that the executive privilege was “fundamental to the operation of government and inextricable related to the separation of powers...” Ibid. The Court also observed that the privilege ensured those assisting the executive freely explored alternatives in shaping of policies and permitted them to do so “in a way many would be unwilling to express except privately.” [Id. at 226, quoting 418 U.S. at 708]. Confidentiality is therefore vital not only because it serves to protect government sources of information (*see* State v. Milligan, 71 N.J. 373 (1976)), but also because it enhances the effectiveness of investigative techniques and procedures. More importantly, executive privilege protects and insulates the sensitive decisional and consultative responsibilities of the Governor which can only be discharged freely and effectively under a mantle of privacy and security. Nero, supra, at 225-226.

The executive privilege is presumptive and applies when invoked by the executive. Nixon, 418 U.S. at 708. The privilege applies to documents in their entirety and covers final and post-decisional materials as well as pre-deliberative ones. In Re Sealed Case, 121 F.3d 729, 745 (D.C.Cir.1997). See Shearn v. Office of the Governor, GRC Complaint No. 2003-53 (February 2004)(Governor’s daily private meeting schedule



between his inauguration and August 1, 2002 are exempt from disclosure pursuant to OPRA on the grounds of executive privilege and deliberative process privilege).

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.” That privilege has long been recognized by federal courts. *See Kaiser Alum. & Chem. Corp. v. United States*, 157 F. Supp. 939 (1958); *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 150 (1975). It has also been codified in the federal Freedom of Information Act (“FOIA”). 5 U.S.C. §552(b)(5). Most recently, the New Jersey Supreme Court adopted the privilege. *In re Liquidation of Integrity Insurance Co.*, 165 N.J. 75 (2000).

The judiciary set forth the legal standard for applying the deliberative process privilege as follows:

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

In 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 ‘intra-agency’ or ‘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. Strictly factual segments of an otherwise deliberative document are not exempted from disclosure. In re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, *supra* at 73 (App. Div. 2004)."

Thus, the Council should conduct an *in camera* review of the two (2) page memorandum dated April 10, 2007 from Maggie Moran and Hope Cooper to Cabinet Members entitled "Management Salary Program: Fiscal Year 2008" in order to verify if the Custodian's claimed executive privilege and/or ACD exemptions are valid pursuant to Paff v. Department of Labor, 379 N.J. Super. 346, 354-355 (App. Div. 2005).

Item No. 2 - The Department-wide standards referred to in the Memorandum to File attached to the Complainant's OPRA request

The Custodian has certified in the SOI that he responded to the Complainant's OPRA request on November 28, 2007 stating that no government record exists which is responsive to Item No. 2 of the request and citing to the definition of a "government record" at N.J.S.A. 47:1A-1.

Where a Custodian has certified that records responsive to a request do not exist, no unlawful denial of access to records has occurred. Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005). Therefore, because the Custodian in this matter has certified that no records responsive to the Complainant's OPRA request for the Department-wide standards referred to in the Memorandum to File attached to the Complainant's OPRA request, the Custodian has not unlawfully denied access to this record.

Item No. 4 - The dollar value provided to LWD by OMB, to establish the agency's Fiscal Year 2008 6% pool for merit-based awards and compression remedies.

In his November 28, 2007 response to the Complainant's OPRA request, the Custodian stated that this Item represented a request for data rather than a request for an identifiable government record, and that he was therefore under no obligation to respond to the request. The Custodian also stated in his response to the OPRA request that no records responsive to this request existed. However, the Custodian located a responsive record during the preparation of the SOI. The Custodian certified in his SOI that the responsive record, a one-page e-mail dated April 27, 2007 from the Department of the Treasury to LWD indicating the OMB calculated dollar value of LWD's 6% pool to fund FY08 performance awards, was provided to the Complainant with the SOI on February 6, 2008. Therefore, although access to the requested record was untimely, the Custodian has not unlawfully denied access to the requested record.

Item No. 3 - The name of the individual(s) who conducted the executive level review referred to in the attached Memorandum to File, and the name of the individual(s) who made the decision to modify the recommended salary increase;

Item No. 5 - The amount of this Fiscal Year 2008 dollar value expected to be expended during Fiscal Year 2008 for state funded employee merit salary increases and compression remedies;

Item No. 6 - How many LWD employees were evaluated for management salary increases? How many of these individuals had their evaluated/recommended increase reduced after being approved at the Assistant Commissioner or equivalent level?

Item No. 7 - How many Division of Vocational Rehabilitation Services employees were evaluated for management salary increases? How many of these individuals had their evaluated/recommended increase reduced after being approved by Assistant Commissioner Lois Cuccinello?

Item No. 8 - How many Division of Disability Services employees were evaluated for management salary increases? How many of these individuals had their evaluated/recommended increase reduced after being approved by Assistant Commissioner Lois Cuccinello?

Item No. 9 - How many Division of Temporary Disability Insurance employees were evaluated for management salary increases? How many of these individuals had their evaluated/recommended increase reduced after being approved by Assistant Commissioner Lois Cuccinello?

The Custodian contends that the Complainant's requests for Item No. 3 and 5 to 9 are not requests for government records as defined by N.J.S.A. 47:1A-1.1 and that there is no specifically identifiable "government record" responsive to the Complainant's request for these Items. The Custodian argues that OPRA does not require agencies to satisfy requests for information, but only requires the disclosure of "identifiable government records" as that term is defined by N.J.S.A. 47:1A-1.1 (e.g., a particular paper or document that has been made, maintained or kept on file). MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 547-49 (App. Div. 2005). See also Krohn v. Dep't of Justice, 628 F.2d 195, 197-98 (D.C. Cir. 1980)(distinguishing a request for "data" or selective information" from a request for a disclosable "record" pursuant to the federal Freedom of Information Act (FOIA)). The Custodian further contends that the Appellate Division indicated in MAG, 375 N.J. Super. at 549 that it does not interpret OPRA any differently from the D.C. Circuit's interpretation of FOIA in Krohn v. Dep't of Justice, 628 F.2d 195, 197-98 (D.C. Cir. 1980).

The Custodian further contends that fulfilling the Complainant's requests would require the Custodian to search through the Department's personnel files and make tabulations based upon the Complainant's selected criteria. The Complainant argues that OPRA is "not intended as a research tool litigants may use to force government officials to identify and siphon useful information." MAG, *supra*, 375 N.J. Super. at 546. Requests for data, information and statistics to be researched, "analyzed, collated and compiled" are outside of OPRA's ambit. *Id.* at 548-49; *see also* N.J. Builders Assoc. v. NJ Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), certif. denied, 190 N.J. 394 (2007). Although a requestor is entitled to specifically identifiable government records readily accessible for inspection, copying or examination, it is "incumbent on the

requestor to perform any correlations and analysis he may desire.” MAG, supra, 375 N.J. Super. at 547. The Custodian also cites Bent v. Twp. of Stafford Police Dep’t, 381 N.J. Super. 30, 38 (App. Div. 2005), in support of his assertion that a government agency is under no obligation to create a record that did not previously exist in order to respond to an OPRA request and Gill v. Salem County, GRC Complaint No. 2005-185 (February 2006)(fulfilling a request for a list of individuals paid by the County would have obligated the custodian to create a record); Hillenbrand v. NJ Bd. of Social Work Examiners, GRC Complaint No. 2004-63 (October 2004)(requests for a list of individuals/organizations/groups that received an Amended Verified Complaint as well as for a list of local therapists the Board would approve to provide mental health therapy were not requests for records made, maintained, or kept on file in the course of official business).

As the Appellate Division determined in MAG, supra:

Under OPRA, agencies are required to disclose only "identifiable" governmental records not otherwise exempt. Wholesale requests for general information to be analyzed, collated and compiled by the responding government entity are not encompassed therein. In short, OPRA does not countenance open-ended searches of an agency's files. ... Most significantly, [MAG's] request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted. Simply put, the Division was asked to do the very research and investigation MAG needed to do .... MAG's request was not a proper one for specific documents within OPRA's reach, but rather a broad-based demand for research and analysis, decidedly outside the statutory ambit. MAG, supra, 375 N.J. Super. at 550.

In the matter before the Council, the Complainant requested names of individuals, dollar value amounts, and numbers of employees in certain divisions who were evaluated for management salary increases as well as the number of employees whose recommended salary increases were reduced after approval by an Assistant Commissioner (Item Nos. 3, 5-9). The Complainant's OPRA request for these Items, therefore, seeks information or data, not identifiable government records. In order to fulfill the Complainant's request, the Custodian would be required to conduct research and analyze all available records to determine if any of them contain the information sought.

"OPRA does not require record custodians to conduct research among its records for a requestor and correlate data from various government records in the custodian's

possession." Reda v. Tp. of West Milford, GRC Complaint No. 2002-58 (January 2003). There, an individual sought information regarding a municipality's liability settlements but did not request any specific record. *Ibid.* In rejecting the request, the Council noted that OPRA only allows requests for records, not requests for information, and therefore, it is "incumbent on the requestor to perform any correlations and analysis he may desire." *Ibid.*

Because the Complainant's OPRA request at Items No. 3 and 5-9 sought information, not identifiable government records, the OPRA request for these Items is invalid. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005). *See also* N.J. Builders Assoc. v. NJ Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), certif. denied, 190 N.J. 394 (2007); Reda v. Tp. of West Milford, GRC Complaint No. 2002-58 (January 2003). The Custodian, therefore, has borne his burden of proof that the denial of access was authorized by law. N.J.S.A. 47:1A-6.

**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. The Custodian's failure to respond in writing within the statutorily mandated seven (7) business days resulted in a deemed denial of the Complainant's OPRA request. The Custodian has, therefore, violated N.J.S.A. 47:1A-5.i. *See* Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. The Council should conduct an *in camera* review of the two (2) page memorandum dated April 10, 2007 from Maggie Moran and Hope Cooper to Cabinet Members entitled "Management Salary Program: Fiscal Year 2008" in order to verify if the Custodian's claimed executive privilege and/or advisory, consultative, and deliberative material exemptions are valid pursuant to Paff v. Department of Labor, 379 N.J. Super. 346, 354-355 (App. Div. 2005).
3. **The Custodian must deliver<sup>7</sup> to the Council in a sealed envelope nine copies of the requested unredacted document (see #2 above), a document**

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<sup>7</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>8</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. Because the Custodian in this matter has certified that no records responsive to the Complainant's OPRA request for the Department-wide standards referred to in the Memorandum to File attached to the Complainant's OPRA request, the Custodian has not unlawfully denied access to this record. Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).
5. In his November 28, 2007 response to the Complainant's OPRA request, the Custodian stated that this Item represented a request for data rather than a request for an identifiable government record, and that he was therefore under no obligation to respond to the request. The Custodian also stated in his response to the OPRA request that no records responsive to this request existed. However, the Custodian located a responsive record during the preparation of the Statement of Information. The Custodian certified in his SOI that the responsive record, a one-page e-mail dated April 27, 2007 from the Department of the Treasury to Labor and Workforce Develop indicating the OMB calculated dollar value of Labor and Workforce Develop's 6% pool to fund FY08 performance awards, was provided to the Complainant with the Statement of Information on February 6, 2008. Therefore, although access to the requested record was untimely, the Custodian has not unlawfully denied access to the requested record.
6. Because the Complainant's OPRA request at Items No. 3 and 5-9 sought information, not identifiable government records, the OPRA request for these Items is invalid. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005). *See also* N.J. Builders Assoc. v. NJ Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), certif. denied, 190 N.J. 394 (2007); Reda v. Tp. of West Milford, GRC Complaint No. 2002-58 (January 2003). The Custodian, therefore, has borne his burden of proof that the denial of access was authorized by law. N.J.S.A. 47:1A-6.
7. 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.

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<sup>8</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

Prepared By:

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In House Counsel

Approved By:

Catherine Starghill, Esq.  
Executive Director

April 23, 2008