



**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**

Larry A. Kohn  
Complainant

Complaint No. 2007-319

v.

Township of Livingston (Essex)  
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. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s failure to respond in writing to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the complainant’s OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. The unapproved draft site and floor plans constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant to the definition of a government record and are exempt from disclosure under N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006).
3. The requested floor plans are exempt from disclosure for containing security information or procedures for any building facility which, if disclosed, would jeopardize security of the building or facility or persons therein pursuant to N.J.S.A. 47:1A-1.1. and Cardillo v. City of Hoboken (Zoning Office), GRC Complaint No. 2005-158 (December 2006).
4. Although the Custodian’s failure to respond in writing within the statutorily mandated seven (7) business day time frame resulted in a deemed denial of access to the requested record, the Custodian’s denial of access to the requested plans was supported by law. Therefore, it is concluded that the



Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's deemed denial does appear to be negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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

Final Decision Rendered by the  
Government Records Council  
On The 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 4, 2008**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Larry A. Kohn<sup>1</sup>  
Complainant**

**GRC Complaint No. 2007-319**

v.

**Township of Livingston (Essex)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Site and floor plans for the new municipal complex.

**Request Made:** November 28, 2007

**Response Made:** December 11, 2007

**Custodian:** Glenn R. Turteltaub

**GRC Complaint Filed:** December 17, 2007

**Background**

**November 28, 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.

**December 11, 2007**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the ninth (9<sup>th</sup>) business day following receipt of such request. The Custodian states that access to the requested records is denied because the plans are advisory, consultative or deliberative ("ACD") material and are exempt from public access pursuant to N.J.S.A. 47:1A-1.1.

**December 17, 2007**

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

- Plan of the first floor dated June 1, 2005.
- Township of Livingston meeting minutes dated July 16, 2007.
- Letter from the Complainant to the Mayor and Council of the Township of Livingston dated August 1, 2007.
- Township of Livingston meeting minutes dated September 4, 2007.
- Complainant's OPRA request dated November 28, 2007.

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

<sup>2</sup> Represented by Sharon L. Weiner, Esq., of Scarinci and Hollenbeck, LLC (Lyndhurst, NJ).  
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- Letter from the Custodian to the Complainant dated December 11, 2007.

The Complainant states that he submitted an OPRA request to the Custodian on November 28, 2007. The Complainant states that the Custodian responded in writing nine (9) business days after receipt of the request asserting that access to the requested records was denied pursuant to N.J.S.A. 47:1A-1.1.

The Complainant asserts that he does not believe the requested records are exempt from public access as ACD material. The Complainant contends that the requested plans are factual in nature and represent decisions that have been finalized and released to the public.

The Complainant further contends that the requested plans are part of a bid specification that is public. The Complainant asserts that if any contractor can obtain the bid specification containing the requested plans, then any member of the public should be able to receive the same information through an OPRA request.

The Complainant states that the bid specifications containing the requested plans have resulted in two separate bids that have been rejected in both cases. The Complainant attaches Township of Livingston meeting minutes from September 4, 2007 and states that Item 13.i) R-07-192 is a resolution rejecting the bids. The Complainant asserts that this resolution is proof that the requested plans are public records.

The Complainant further asserts that because the bid specifications containing the requested plans were available to the public prior to the Complainant's November 28, 2007 OPRA request, there would be no opportunity to provide an advantage to competitors or bidders. The Complainant further asserts that the Township previously made the plans public at a presentation at a July 16, 2007 Council meeting which was open to the public. The Complainant includes a copy of the minutes as evidence.

The Complainant finally questions why the Custodian cannot release the requested plans if the Custodian had already provided the requested plans to the Complainant on a prior date. The Complainant attaches a copy of the plan for the first floor dated June 1, 2005 along with a correspondence dated August 1, 2005 to the Mayor and Council confirming that the Complainant had the requested plans.

The Complainant did not agree to mediate this complaint.

**January 15, 2008**

Request for the Statement of Information sent to the Custodian.

**January 23, 2008**

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

- Complainant's OPRA request dated November 28, 2007.
- Letter from the Custodian to the Complainant dated December 12, 2007.

The Custodian certifies that he provided the Complainant's OPRA request to the Township Manager and Township Attorney. The Custodian states that the Township Manager advised the Custodian's assistant, Renee Resky, that the plans were not accessible to the public at that time. The Custodian further states that the Township Attorney confirmed the Township Manager's advice. The Custodian states that he responded in writing on December 11, 2007 denying access to the requested records.

The Custodian contends that he denied access to the requested plans at the time of the Complainant's request based on two factors:

1. The requested plans were not a government record subject to OPRA because the plans were not "made, maintained or kept on file in the course of its official business" by the Township of Livingston. The Custodian asserts that the requested plans were produced and maintained by the architectural firm Gibson Tarquini Group and its construction manager because the requested plans were not finalized or presented to the Township, thus were not kept on file during the course of the Township's business.
2. The requested plans were ACD material, therefore not subject to OPRA, because the Council had not accepted the plans until December 17, 2007, over two weeks after the Complainant's OPRA request was made. The Custodian asserts that the requested plans were reworked and revised several times during the period of time between the Complainant's November 28, 2007 request and the Council's acceptance of the plans on December 17, 2007.

The Custodian states that the Township's position is that the requested plans are ACD material pursuant to N.J.S.A. 47:1A-1.1. The Custodian states that in the Council's March 11, 2004 Interim Order in Gober v. City of Burlington, GRC Complaint No. 2003-139 (April 2004), the GRC held that public access to inter-agency and intra-agency records provided by a custodian are subject to redactions of material considered to be ACD.<sup>3</sup> The Custodian asserts that in this case now before the Council, the Custodian did not have the option of redacting portions of the requested plans which are ACD because the entire set of plans was subject to revision.

The Custodian contends that the Complainant failed to indicate in the Denial of Access Complaint that the Complainant was invited and served on a citizen's committee that worked with the architect to design the complex. The Custodian also contends that an initial presentation was made to the public in June 2005, which was the basis for the Complainant's August 1, 2005 letter to Mayor and Council.

The Custodian further argues that the Complainant erred in his assertion that the plans should be made public because they were released to contactors bidding on the project. The Custodian states that according to state statute, a government entity may negotiate with unsuccessful bidders after the entity has rejected a bid twice. The Custodian states that the requested plans were released to those contractors whose Round One bids on September 4, 2007 and Round Two bids on October 15, 2007 were rejected. The Custodian asserts that these contractors were invited by the Project Manager to

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<sup>3</sup>The Complainant in that case was granted access to redacted records.  
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negotiate contract terms. The Custodian asserts that the Township's Construction Manager and Project Architect made revisions to the requested plans during this phase, which continued through early December. The Custodian further states that on December 3, 2007, the Council discussed a memo for alterations to the plans dated November 30, 2007.<sup>4</sup> The Custodian finally states that the requested plans were presented to the Council on December 17, 2007 and the following action was taken:

1. The Council discussed Memo 107, dated December 14, 2007, which included a report of project architects Gibson Tarquini which approves the proposed revisions to the plans to bring the project within the proposed budget.
2. The Town Manager made a presentation to the public on the proposed layout of the new municipal complex.<sup>5</sup>
3. The Council accepted the plans for the project and awarded a contract for construction of the new municipal complex.

The Custodian asserts that the plans were no longer ACD material upon the awarding of a contract on December 17, 2007.

The Custodian finally asserts that he was under no obligation to fulfill the Complainant's November 28, 2007 OPRA request after December 17, 2007 because the request was already denied on December 11, 2007 and therefore closed. The Custodian states that should the Complainant file a new request for the plans relating to the municipal complex then the Custodian would disclose the requested records.

### **February 5, 2008**

The Complainant's response to the Custodian's SOI.<sup>6</sup> The Complainant asserts that the Custodian's assertion of ACD is not applicable in this specific OPRA request. The Complainant contends that even if the ACD exemption did apply the Township's rights to claim ACD would have been waived based on a number of occasions in which the Township made the requested plans public. The Complainant also contends that the Township allowed the Complainant to review the initial plans in January of 2007 and displayed the plans in Town Hall for weeks. The Complainant asserts that the Custodian fails to comment on the July 16, 2007 public presentation of the requested plans. The Complainant asserts that his request for the plans, which have remained unchanged from July 16, 2007 to December 17, 2007, were presented at that meeting.

The Complainant further contends that the Township's reliance on Gober is not relevant because the Township's denial was not based on an inter-agency or intra-agency record as it was in Gober. The Complainant asserts that if a bid submitted pursuant to New Jersey's Local Public Contract Law is not a public record, then what else could it be. The Complainant further contends that if the GRC accepts the Township's exemption, then it could be argued that until all change orders were approved, final

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<sup>4</sup>The memo, referred to as Memo 95 and entitled "Municipal and Police Department Plan and Recommendations," provided recommendations and changes in the requested plans in order to bring the project to within the budgeted amount.

<sup>5</sup>The Custodian notes that the Complainant attended this presentation.

<sup>6</sup>The Complainant attaches additional materials that are not relevant to the adjudication of this matter. Larry A. Kohn v. Township of Livingston (Essex), 2007-319 – Findings and Recommendations of the Executive Director

payment is made to the contractor and the renderings are made public, the plans and specifications can still be subject to review and thus exempt under OPRA.

The Complainant argues that the definition of a public record in OPRA does not require that the governing body accept or approve a record. The Custodian further argues that the Township asserted on a number of occasions that Township building officials were spending considerable time reviewing the requested plans in order to avoid multiple change orders on the project, which leads the Complainant to believe that the Township did have possession of the records at the time of his request.

### **Analysis**

#### **Whether the Custodian responded in a timely manner to the Complainant's November 28, 2007 OPRA request?**

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 also provides that:

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

OPRA further provides that:

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

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

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

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i, a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.<sup>7</sup> 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 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).

The Custodian received the request relevant to this complaint on November 28, 2007 and responded in writing on December 11, 2007 or nine (9) business days following receipt of the request.

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

**Whether the Custodian unlawfully denied access to the requested floor and site plans?**

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*

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<sup>7</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.



*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 provides that:

“[a] government record shall not include the following information which is deemed to be confidential for the purposes of [OPRA] ... *emergency or security information* or procedures for any buildings or facility which, if disclosed, *would jeopardize security* of the building or *facility or persons therein.*” (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 in this complaint asserts that the requested plans are exempt as ACD material because the requested plans were not finalized or approved by the Township at the time of the Complainant’s November 28, 2007 OPRA request. The Custodian further asserts that the requested plans were made and maintained by the architects that created the plans because changes were still being made to the plans until they were approved by the Township on December 17, 2007.

The Complainant argues that the requested plans have been displayed or shown to the public on multiple occasions prior to the Complainant’s OPRA request which should mean that ACD no longer applies. The Complainant further contends that the plans had not been changed between a public display of the plans at a public meeting on July 16, 2007 and their approval on December 17, 2007. The Complainant further asserts that he believes that the plans were maintained by the Township based on the Township’s assertions that building officials had reviewed the plans vigorously in order to minimize alterations.

As a general matter, draft documents are advisory, consultative and deliberative communications. Although OPRA broadly defines a “government record” as records either “made, maintained or kept on file in the course of [an agency’s] official business,” or “received” by an agency in the course of its official business, N.J.S.A. 47:1A-1.1, the statute also excludes from this definition a variety of documents and information. Ibid. See Bergen County Improvement Auth. v. North Jersey Media, 370 N.J. Super. 504, 516

(App. Div. 2004). The statute expressly provides that “inter-agency or intra-agency advisory, consultative, or deliberative material” is not included within the definition of a government record. N.J.S.A. 47: 1A-1 .1.

The courts have consistently held that draft records of a public agency fall within the deliberative process privilege. See U.S. v. Farley, 11 F.3d 1385 (7th Cir. 1993); Pies v. U.S. Internal Rev. Serv., 668 F.2d 1350 (D.C. Cir. 1981); N.Y.C. Managerial Employee Ass’n. v. Dinkins, 807 F.Supp., 955 (S.D.N.Y. 1992); Archer v. Cirrincione, 722 F. Supp. 1118 (S.D. N.Y. 1989); Coalition to Save Horsebarn Hill v. Freedom of Info. Comm., 73 Conn.App. 89, 806 A.2d 1130 (Conn. App. Ct. 2002); pet. for cert. den. 262 Conn. 932, 815 A.2d 132 (2003). As explained in Coalition, the entire draft document is deliberative because in draft form, it “reflect[s] that aspect of the agency’s function that precedes formal and informed decision making.” *Id.* at 95, quoting Wilson v. Freedom of Info. Comm., 181 Conn. 324, 332-33, 435 A.2d 353 (1980).

The New Jersey Appellate Division also has reached this conclusion with regard to draft documents. In the unreported section of In re: Readoption, *supra*, the court reviewed an OPRA request to the Department of Corrections (“DOC”) for draft regulations and draft statutory revisions. The court stated that these drafts were “all clearly pre-decisional and reflective of the deliberative process.” *Id.* at 18. It further held:

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

Additionally, the GRC has previously ruled on the issue of whether draft meeting minutes are exempt from disclosure pursuant to OPRA. In Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), the Council held that “...the Custodian has not unlawfully denied access to the requested meeting minutes as the Custodian certifies that at the time of the request said minutes had not been approved by the governing body and as such, they constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.”

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

In this complaint, although the requested plans were displayed to the public on several occasions, they remained in draft status until they were approved by the Township Council on December 17, 2007, fourteen (14) days after the Complainant's OPRA request. Accordingly, the requested plans should be held in the same regard as unapproved draft meeting minutes because the requested plans were still ACD material until the time that the Township Council officially approved the plans.

Therefore, the unapproved draft site and floor plans constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant to the definition of a government record and are exempt from disclosure under N.J.S.A. 47:1A-1.1 and Parave-Fogg, supra.

Additionally, in Cardillo v. City of Hoboken (Zoning Office), GRC Complaint No. 2005-158 (December 2006), the Complainant requested plans for a renovation of 901 Hudson Street. The Custodian responded asserting that the requested plans were exempt from disclosure as proprietary information. The GRC found that the "records are generally accessible to the public and are routinely filed with the planning or zoning board... [and] do not qualify as... proprietary information. However, the requested records may be exempt from disclosure if they contain ... information that could be potential used by a person seeking to enter the building illegally for the purpose of causing harm to persons in the building or taking and destroying property."<sup>8</sup>

In the complaint currently before the GRC, the Complainant is requesting plans for a new facility that will contain the Township's government and police services, among others. These floor plans provide information that jeopardize the security of the building. As such, the requested floor plans are exempt from disclosure for containing security information or procedures for any building facility which, if disclosed, would jeopardize security of the building or facility or persons therein pursuant to N.J.S.A. 47:1A-1.1. and Cardillo, supra.

**Whether the Custodian's delay in access to the requested record 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:

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<sup>8</sup>The GRC ordered an *in-camera* review of the requested plans to determine if the records are exempt from disclosure for security information or procedures for any building facility which, if disclosed, would jeopardize security of the building or facility or persons therein pursuant to N.J.S.A. 47:1A-1.1. Based on the *in camera*, the GRC held that the requested plans were exempt from OPRA pursuant to N.J.S.A. 47:1A-1.1.

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

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

Although the Custodian’s failure to respond in writing within the statutorily mandated seven (7) business day time frame resulted in a deemed denial of access to the requested record, the Custodian’s denial of access to the requested plans was supported by law. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s deemed denial does appear to be negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian’s failure to respond in writing to the Complainant’s OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the complainant’s OPRA request. Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. The unapproved draft site and floor plans constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant to the definition of a government record and are exempt from disclosure under N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006).
3. The requested floor plans are exempt from disclosure for containing security information or procedures for any building facility which, if disclosed, would

jeopardize security of the building or facility or persons therein pursuant to N.J.S.A. 47:1A-1.1. and Cardillo v. City of Hoboken (Zoning Office), GRC Complaint No. 2005-158 (December 2006).

4. Although the Custodian's failure to respond in writing within the statutorily mandated seven (7) business day time frame resulted in a deemed denial of access to the requested record, the Custodian's denial of access to the requested plans was supported by law. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's deemed denial does appear to be negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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Executive Director

July 23, 2008