



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

**JON S. CORZINE**  
*Governor*

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

**FINAL DECISION**

**June 11, 2009 Government Records Council Meeting**

Larry A. Kohn  
Complainant

Complaint No. 2008-111

v.

Township of Livingston (Essex)  
Custodian of Record

At the June 11, 2009 public meeting, the Government Records Council (“Council”) considered the May 20, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The unapproved, draft budget meeting minutes of the Township Council for the year 2008 constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). Accordingly, the Custodian has borne his burden of proving a lawful denial of access to the draft minutes pursuant to N.J.S.A. 47:1A-6 because he certified that the requested draft minutes had not been approved by the governing body at the time of the Complainant’s request. Further, the Complainant has not met the criteria for overcoming the confidentiality accorded to deliberative records pursuant to In re Readoption of N.J.A.C. 10A:23, 367 N.J. Super. 61, 73-74 (App. Div. 2004), certif. den. 182 N.J. 149 (2004).
2. The Council does not have authority over the Township’s schedule to approve meeting minutes pursuant to N.J.S.A. 47:1A-7.b., Allegretta v. Borough of Fairview, GRC Complaint No. 2005-132 (December 2006), and Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (March 2007).
3. 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 because the Custodian has borne his burden of proving a lawful denial of access to the requested budget meeting



minutes and because the GRC does not have authority over the Township's schedule for approving meeting minutes.

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 11<sup>th</sup> Day of June, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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

Janice L. Kovach  
Government Records Council

**Decision Distribution Date: June 16, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
June 11, 2009 Council Meeting**

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

**GRC Complaint No. 2008-111**

v.

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

**Records Relevant to Complaint:** Township Council's 2008 budget meeting minutes.<sup>3</sup>

**Request Made:** May 5, 2008

**Response Made:** May 14, 2008

**Custodian:** Glenn Turtleaub

**GRC Complaint Filed:** June 23, 2008<sup>4</sup>

**Background**

**May 5, 2008**

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.

**May 14, 2008**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixth (6<sup>th</sup>) business day following receipt of such request. The Custodian states that access to the requested records is denied because the requested meeting minutes have not been approved by the Township Council and are therefore not subject to public access.

**May 20, 2008**

Letter from Complainant to Mayor and Township Council. The Complainant states that pursuant to N.J.S.A. 10:4-14, minutes of any meeting must include sufficient facts and information to permit the public to understand and appraise the reasonableness of the public body's determination. The Complainant states that once he is provided access to the requested budget meeting minutes, he will be able to address why it is

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

<sup>2</sup> Represented by Sharon L. Weiner, Esq., of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

<sup>3</sup> The Complainant requested additional records; however, said records are not the subject of this Denial of Access Complaint.

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

critical to have said minutes available to the public prior to the public hearing on the budget.

**June 23, 2008**

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

- Complainant’s OPRA request dated May 5, 2008
- Custodian’s response to the Complainant’s request dated May 14, 2008
- Letter from Complainant to Mayor and Township Council dated May 20, 2008
- Township’s Administrative Code<sup>5</sup>

The Complainant states that on May 5, 2008, he submitted an OPRA request in which he sought to inspect the Township Council’s 2008 budget meeting minutes. The Complainant states that the Custodian responded via letter dated May 14, 2008, in which the Custodian denied access to the requested minutes on the basis that said minutes have not yet been approved by the Township Council. The Complainant states that Article IV 2-13B of the Township’s Administrative Code provides that approval of the minutes of previous meetings is to be included in the agenda. The Complainant states that following the public hearing on the budget, the approval of the budget meeting minutes were not on the agenda for approval. Additionally, the Complainant states that Article III 2-7 of the Township’s Administrative Code provides that meeting minutes shall be made available to the public. The Complainant states that he aired his frustration to the Mayor and Council in not being given the opportunity to review the requested minutes via letter dated May 20, 2008. The Complainant contends that the meeting minutes are being deliberately withheld and such non-disclosure is in violation of State law.

The Complainant did not agree to mediate this complaint.

**July 16, 2008**

Request for the Statement of Information sent to the Custodian.

**July 23, 2008**

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

- Complainant’s OPRA request dated May 5, 2008
- Custodian’s response to the Complainant’s request dated May 14, 2008

The Custodian certifies that he received the Complainant’s OPRA request via hand delivery on May 5, 2008 at approximately 8:00 pm. The Custodian deems the date of receipt of said request as the next business day, May 6, 2008. The Custodian certifies that he responded to the Complainant’s request via letter dated May 14, 2008 in which the Custodian denied access to the requested minutes on the basis that said minutes had not yet been approved by the Township Council.

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<sup>5</sup> The Complainant attached additional records to his Denial of Access Complaint; however, said records are not relevant to the adjudication of this complaint.

The Custodian states that OPRA's definition of a government record does not include inter-agency or intra-agency advisory, consultative or deliberative material. N.J.S.A. 47:1A-1.1. The Custodian certifies that at the time of the Complainant's OPRA request, the requested budget meeting minutes were not approved by the governing body and thus are not government records because said minutes constitute advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.

The Custodian also states that 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 or intra-agency advisory, consultative or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.”

Similarly, the Custodian states that in Bernstein v. Township of Knowlton, GRC Complaint No. 2007-278 (June 2008), the Council held that “the unapproved, draft executive and public session meeting minutes of the Township Council dated September 10, 2007 constitute inter-agency or intra-agency advisory, consultative or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg, supra.

Further, the Custodian states that in Paff v. Willingboro Board of Education, GRC Complaint No. 2007-272 (May 2008), the Council held that:

“[b]ecause the special meeting Executive Session minutes were not yet approved by the Board at the time of the Complainant's OPRA request, these minutes are exempt from disclosure under OPRA as ACD material pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006) and N.J.S.A. 47:1A-1.1. The Custodian has borne his burden of proof that the denial of access to the special meeting executive session minutes was lawful under N.J.S.A. 47:1A-6.”

The Custodian certifies that his search for the requested records included his personal knowledge that the requested minutes had not been approved by the Township Council at the time of the Complainant's OPRA request. The Custodian also certifies that no records responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”).

Additionally, the Custodian asserts that the remaining issues raised in the Complainant's Denial of Access Complaint are irrelevant and address matters beyond the GRC's authority.

## August 3, 2008

Complainant's response to the Custodian's SOI. The Complainant asserts that pursuant to *N.J.A.C. 5:30-3.5*, the public is to be given access to material utilized in the preparation of the budget. The Complainant asserts that a denial of access to budget meeting minutes on the basis that said minutes constitute advisory, consultative or deliberative material is inconsistent with *N.J.A.C. 5:30-3.5* because said minutes provide insight into the Council's deliberations.

Additionally, the Complainant contends that in *Parave-Fogg v. Lower Alloways Creek Township*, GRC Complaint No. 2006-51 (August 2006), the decision was to deny access to unapproved meeting minutes unless the requestor demonstrates an overriding need for the record. The Complainant asserts that *N.J.A.C. 5:30-3.5* not only identifies an overriding need, but also establishes a requirement that budgetary related information is to be provided to the public prior to the hearing on the budget. The Complainant asserts that the reason why the budget minutes must be released is because said minutes contain pre-decisional material and are reflective of the deliberative process. The Complainant asks the GRC to recognize the unique nature of the budgetary minutes.

Further, the Complainant states that as of this date, the requested meeting minutes have not yet been approved. The Complainant contends that this does not satisfy anyone's definition of prompt access. The Complainant asserts that the Township's failure to approve any budgetary meeting minutes is intentional, deliberate and purposeful. The Complainant states that any limitation on the right of access shall be construed in favor of the public. *N.J.S.A. 47:1A-1*.<sup>6</sup>

### Analysis

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

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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<sup>6</sup> The Complainant also included statements and assertions that are not relevant to the adjudication of this complaint.

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 certifies that he denied access to the requested budget meeting minutes because at the time of the Complainant’s OPRA request, the requested meeting minutes were not approved by the governing body and thus are not government records because said draft minutes constitute advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. The Custodian states that the Council upheld the same conclusion, that meeting minutes not approved by the governing body at the time of a requestor’s OPRA request are exempt from disclosure, in Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), Bernstein v. Township of Knowlton, GRC Complaint No. 2007-278 (June 2008), and Paff v. Willingboro Board of Education, GRC Complaint No. 2007-272 (May 2008).

The question of whether such draft minutes are exempt from disclosure requires consideration of the general question of the status of draft documents under OPRA. As a general matter, draft documents are advisory, consultative and deliberative communications. Although OPRA broadly defines a “government record” as 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.

This exemption is equivalent to the deliberative process privilege, which protects from disclosure pre-decisional records that reflect an agency’s deliberations. In re Readoption of N.J.A.C. 10A:23, 367 N.J. Super. 61, 73-74 (App. Div. 2004), certif. den. 182 N.J. 149 (2004); see also In re Liq. Of Integrity Ins. Co., 165 N.J. 75 (2000). As a result, OPRA “shields from disclosure documents ‘deliberative in nature, containing opinions, recommendations, or advice about agency policies,’ and ‘generated before the adoption of an agency’s policy or decision.’” Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), quoting Gannet New Jersey Partners LP v. County of Middlesex, 379 N.J. Super. 205, 219 (App. Div. 2005).

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

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

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

The court similarly held that memos containing draft procedures and protocols were entirely protected from disclosure. *Id.* at 19. See also Edwards v. City of Jersey City, GRC No. 2002-71 (February 27, 2004) (noting that in general, drafts are deliberative materials).

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.

Although draft minutes always fall under OPRA’s exemption for deliberative material, the Appellate Division has suggested that the confidentiality accorded to deliberative records may be overcome if the requestor asserts and is able to demonstrate an overriding need for the record in question. *See In re Readoption, supra*, 367 N.J.Super. at 73. Resolution of such a claim, if raised by the requestor, will depend upon the particular circumstances of the case in question. The court stated that to apply the balancing test between a party’s need and the public interest in non-disclosure, the court must consider the following factors:

1. “the relevance of the evidence;
2. the availability of other evidence;
3. the government’s role in the litigation; and
4. the extent to which discussion would hinder frank and independent discussion regarding contemplated policies and decisions” (quoting In re Liq. Of Integrity, supra).

In this instant complaint, the Complainant contends that *N.J.A.C. 5:30-3.5* not only identifies an overriding need for the requested budget meeting minutes, but also establishes a requirement that budgetary related information is to be provided to the public prior to the hearing on the budget.

To determine whether the Complainant has overcome the confidentiality accorded to the deliberative budget meeting minutes, the Council must conduct the balancing test as described in In re Readoption, supra. The first portion of the balancing test requires the Council to assess the relevance of the evidence provided by the Complainant. Here, the Complainant asserts that *N.J.A.C. 5:30-3.5* specifically establishes a requirement that budgetary related information is to be provided to the public prior to the hearing on the budget.

*N.J.A.C. 5:30-3.5(b)* provides that:

“[a]fter the introduction of the budget, but no later than seven days prior to the public hearing on the budget, each local unit shall make available to the public such supporting documents that provides appropriate detail covering the makeup of any revenue or appropriation. Such documents shall be made available for public inspection at the office of the municipal clerk or chief financial officer. Copies of the documents shall be made available to the public pursuant to the provisions of N.J.S.A. 47:1A-2.”

Section (c) of the above regulation states that:

“[t]he appropriate detail as required in (b) above shall include those schedules, estimates, or lists of proposed revenues and appropriations that were utilized by the governing body in its final deliberations on the budget, or used in such other circumstances that reflect the details of the

lines items shown in the introduced budget. This provision shall not require the disclosure of any details that were part of a meeting of the governing body that was closed to the public pursuant to the Open Public Meetings Act.”

In reviewing section (b), it is evident that the intent of the regulation is to make documents that support the numbers included in the budget open for public inspection. Said regulation does not imply that budget meeting minutes are included as such supporting documents. Meeting minutes are a recording of the topics discussed by public bodies. Such minutes would not contain the “appropriate detail covering the makeup of any revenue or appropriation” as discussed in section (b). Rather, such documentation would encompass the supplemental documents attached to the draft budget itself. Additionally, section (b) indicates that copies of said supplemental documents shall be made available to the public pursuant to N.J.S.A. 47:1A-2. Said provision of OPRA has been repealed and thus no longer contains any grant of access to specific records.

Thus, the Complainant’s evidence to override the grant of confidentiality afforded to the draft budget meeting minutes is insufficient. As such, the Council need not complete the remainder of the balancing test as described in In re Readoption, *supra*.

Therefore, the unapproved, draft budget meeting minutes of the Township Council for the year 2008 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 pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg, *supra*. Accordingly, the Custodian has borne his burden of proving a lawful denial of access to the draft minutes pursuant to N.J.S.A. 47:1A-6 because he certified that the requested draft minutes had not been approved by the governing body at the time of the Complainant’s request. Further, the Complainant has not met the criteria for overcoming the confidentiality accorded to deliberative records pursuant to In re Readoption, *supra*.

**Whether the Government Records Council has authority over the Township’s schedule for approving meeting minutes?**

OPRA states that:

“[t]he Government Records Council shall:

- establish an informal mediation program to facilitate the resolution of disputes regarding access to government records;
- receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian;
- issue advisory opinions, on its own initiative, as to whether a particular type of record is a government record which is accessible to the public;

- prepare guidelines and an informational pamphlet for use by records custodians in complying with the law governing access to public records;
- prepare an informational pamphlet explaining the public's right of access to government records and the methods for resolving disputes regarding access, which records custodians shall make available to persons requesting access to a government record;
- prepare lists for use by records custodians of the types of records in the possession of public agencies which are government records;
- make training opportunities available for records custodians and other public officers and employees which explain the law governing access to public records; and
- operate an informational website and a toll-free helpline staffed by knowledgeable employees of the council during regular business hours which shall enable any person, including records custodians, to call for information regarding the law governing access to public records and allow any person to request mediation or to file a complaint with the council when access has been denied...”  
N.J.S.A. 47:1A-7.b.

The Complainant states that as of August 3, 2008, the requested budget meeting minutes had not yet been approved by the governing body. The Complainant contends that this does not satisfy anyone’s definition of prompt access. The Complainant states that Article IV 2-13B of the Township’s Administrative Code provides that approval of the minutes of previous meetings is to be included in the agenda. The Complainant states that following the public hearing on the budget, the approval of the budget meeting minutes were not on the agenda for approval. Additionally, the Complainant states that Article III 2-7 of the Township’s Administrative Code provides that meeting minutes shall be made available to the public. The Complainant asserts that the Township’s failure to approve any budgetary meeting minutes is intentional, deliberate and purposeful. The Complainant states that any limitation on the right of access shall be construed in favor of the public. N.J.S.A. 47:1A-1.

N.J.S.A. 47:1A-7.b. delineates the powers of the GRC. The GRC administers OPRA and adjudicates denial of access complaints. The approval of meeting minutes is an act provided for under The Open Public Meetings Act (“OPMA”).

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

Thus, the same ruling applies in this instant complaint. The Council does not have authority over the Township’s schedule to approve meeting minutes pursuant to N.J.S.A. 47:1A-7.b., Allegretta, supra, and Donato, supra.

**Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

OPRA states that:

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

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

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

The Custodian in this complaint has borne his burden of proving a lawful denial of access to the draft minutes pursuant to N.J.S.A. 47:1A-6 because he certified that the requested draft budget meeting minutes had not been approved by the governing body at the time of the Complainant's request. Further, the Complainant has not met the criteria for overcoming the confidentiality accorded to deliberative records pursuant to In re Readoption, supra. The Complainant asserts that the Township's failure to approve any budgetary meeting minutes is intentional, deliberate and purposeful. However, the GRC has no authority over the Township's schedule for approving meeting minutes.

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

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 because the Custodian has borne his burden of proving a lawful denial of access to the requested budget meeting minutes and because the GRC does not have authority over the Township's schedule for approving meeting minutes.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The unapproved, draft budget meeting minutes of the Township Council for the year 2008 constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant the definition of a government record and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). Accordingly, the Custodian has borne his burden of proving a lawful denial of access to the draft minutes pursuant to N.J.S.A. 47:1A-6 because he certified that the requested draft minutes had not been approved by the governing body at the time of the Complainant's request. Further, the Complainant has not met the criteria for overcoming the confidentiality accorded to deliberative records pursuant to In re Readoption of N.J.A.C. 10A:23, 367 N.J. Super. 61, 73-74 (App. Div. 2004), certif. den. 182 N.J. 149 (2004).
2. The Council does not have authority over the Township's schedule to approve meeting minutes pursuant to N.J.S.A. 47:1A-7.b., Allegretta v. Borough of Fairview, GRC Complaint No. 2005-132 (December 2006), and Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (March 2007).
3. 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 because the Custodian has borne his burden of proving a lawful denial of access to the requested budget meeting minutes and because the GRC does not have authority over the Township's schedule for approving meeting minutes.

Prepared By: Dara Lownie  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

May 20, 2009