



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

**JON S. CORZINE**  
*Governor*

**CHARLES A. RICHMAN**  
*Acting Commissioner*

**FINAL DECISION**

**November 18, 2009 Government Records Council Meeting**

Leonard P. Lucente  
Complainant

Complaint No. 2008-119

v.

City of Union City (Hudson)  
Custodian of Record

At the November 18, 2009 public meeting, the Government Records Council (“Council”) considered the November 10, 2009 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 although the Custodian provided a response to the Council’s September 30, 2009 Interim Order, the Council need not address whether the Custodian has complied with said Order because the Complainant withdrew his complaint on October 15, 2009. Therefore, no further adjudication of this complaint is required.

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 18<sup>th</sup> Day of November, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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



Harlynn A. Lack, Secretary  
Government Records Council

**Decision Distribution Date: November 23, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
November 18, 2009 Council Meeting**

**Leonard P. Lucente<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-119**

v.

**City of Union City (Hudson)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Personnel records and dates of hire for Leonard Lucente's employment with the City of Union City.

**Request Made:** May 21, 2008

**Response Made:** June 3, 2008

**Custodian:** William Senande

**GRC Complaint Filed:** June 5, 2008<sup>3</sup>

**Background**

**September 30, 2009**

Government Records Council's ("Council") Interim Order. At its September 30, 2009 public meeting, the Council considered the September 23, 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, found that:

1. Although the Custodian provided a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days, in which the Custodian requested an extension of time to fulfill said request, the Custodian's written response is inadequate pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) because the Custodian failed to provide an anticipated deadline date upon which he will provide the requested records to the Complainant.
2. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven

---

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

<sup>2</sup> Represented by Jacqueline P. Gioioso, Esq., of Scarinci & Hollenbeck, LLC (Lyndhurst, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

(7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

3. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the following requested records to determine the validity of the Custodian’s assertion that the records are either privileged communications between an attorney and his/her client, and are not government records pursuant to N.J.S.A. 47:1A-1.1, the records constitute advisory, consultative or deliberative process material (pre-decisional) pursuant to N.J.S.A. 47:1A-1.1, or the records are not controlled by OPRA, but by the Rules of Court pursuant to N.J.S.A. 47:1A-9:
  - a. Correspondence from City Attorney to Commissioner re: Lucente grievance dated August 19, 1998 (3 pages)
  - b. Correspondence from ABC Prosecutor Gregory T. Farmer to Commissioner re: Union City ABC matter dated November 19, 1999 (1 page)
  - c. Memorandum from Commissioner’s office to City Attorney re: Leonard Lucente dated September 27, 2000 (1 page)
  - d. Memorandum from Commissioner’s office to City Attorney re: Leonard Lucente dated October 27, 2000 (1 page)
  - e. Memo from Commissioner Michael Leggiero to Commissioner Lopez re: request for office space dated January 11, 2001 (1 page)
  - f. Correspondence from City Treasurer’s office to City Attorney re: Leonard Lucente dated March 11, 2001 (13 pages)
  - g. Correspondence from City Attorney to City Payroll Department re: Leonard Lucente dated March 16, 2001 (2 pages)
  - h. Correspondence from City Attorney to Commissioner re: Leonard Lucente dated March 27, 2001 (1 page)
  - i. Correspondence from City Attorney to Commissioner re: Union City and UCEA dated December 13, 2001 (1 page)
  - j. Memorandum from City Attorney to Commissioner re: another City employee and Leonard Lucente dated January 15, 2002 (1 page)
  - k. Correspondence from City Attorney to Commissioner re: settlement, Leonard Lucente dated November 8, 2002 (11 pages)
  - l. Correspondence from Scarinci and Hollenbeck, City Attorney to Union City Commissioner re: request for public records dated December 17, 2002 (2 pages)
  - m. Memorandum to City of Union City re: income source verification (Family Part Matter) dated March 30, 2006 (1 page)
4. **The Custodian must deliver<sup>4</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see #3 above), a document**

---

<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.  
Leonard P. Lucente v. City of Union City (Hudson), 2008-119 – Supplemental Findings and Recommendations of the Executive Director 2

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<sup>6</sup>, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

5. The Custodian lawfully redacted or withheld from disclosure the handwritten notes contained on the Complainant's personnel records because said notes are informal memory aids and are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and O'Shea v. West Milford Board of Education, 391 N.J. Super. 534, 538 (App. Div. 2007). Thus, the Custodian has carried his burden of proving a lawful denial of access to said records pursuant to N.J.S.A. 47:1A-6.
6. The Custodian unlawfully denied access to the portions of the records enumerated below which disclose an individual's name, title, position, salary, payroll record, length of service, date of termination of public employment and the reason for separation, and the amount and type of pension received pursuant to N.J.S.A. 47:1A-10. As such, the Custodian must disclose said portions to the Complainant.
  - a. Memorandum from Mayor Robert Menendez to Payroll Department dated July 30, 1990 (4 pages)
  - b. Memorandum from Joseph R. Marini to Michael Licameli re: accumulated time for 1993 – Department of City Clerk dated February 4, 1994 (1 page)
7. **The Custodian shall comply with item # 6 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>7</sup>, to the Executive Director.**
8. 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.

**October 5, 2009**

Council's Interim Order distributed to the parties.

---

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

<sup>6</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>7</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**October 13, 2009**

E-mail from GRC to Custodian’s Counsel. The GRC grants a one (1) business day extension of time for the Custodian to comply with the Council’s Interim Order.<sup>8</sup>

**October 13, 2009**

Letter from Custodian’s Counsel to GRC. Pursuant to *N.J.A.C.* 5:105-2.12(d), the Custodian’s Counsel requests a stay of the Council’s Interim Order as it pertains to the documents ordered for an *in camera* inspection which the Custodian asserts are protected under the attorney-client privilege. The Custodian’s Counsel states that while the Custodian intends to produce other records requested by the Council in its Interim Order, the Custodian also intends to file a motion for reconsideration of the Council’s Interim Order.<sup>9</sup>

**October 13, 2009<sup>10</sup>**

Custodian’s response to the Council’s Interim Order. The Custodian certifies that he has enclosed ten (10) copies of items 3(e) and 3(m) listed in the Council’s Interim Order for an *in camera* review. The Custodian certifies that he has requested a stay of the Council’s Interim Order as it pertains to items 3(a), 3(b), 3(c), 3(d), 3(f), 3(g), 3(h), 3(i), 3(j), 3(k) and 3(l). Additionally, the Custodian certifies that pursuant to paragraph 6 of the Council’s Interim Order, the Custodian has provided said records to the Complainant with redactions, including a detailed lawful basis for each redaction.

**October 15, 2009**

E-mail from Complainant to the GRC. The Complainant agrees to withdraw his Denial of Access Complaint.

**Analysis**

**Whether the Custodian complied with the Council’s September 30, 2009 Interim Order?**

Although the Custodian provided a response to the Council’s September 30, 2009 Interim Order, the Council need not address whether the Custodian has complied with said Order because the Complainant withdrew his complaint on October 15, 2009. Therefore, no further adjudication of this complaint is required.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that although the Custodian provided a response to the Council’s September 30, 2009 Interim Order, the Council need not address whether the Custodian has complied with said Order because the Complainant withdrew his complaint on October 15, 2009. Therefore, no further adjudication of this complaint is required.

---

<sup>8</sup> In response to Counsel’s verbal request.

<sup>9</sup> The Custodian’s Counsel articulates the City’s arguments for the reason for the stay, pursuant to *N.J.A.C.* 5:105-2.12(f); however, said arguments are not relevant to the adjudication of this complaint.

<sup>10</sup> The GRC received said letter on October 14, 2009.

Prepared By: Dara Lownie  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

November 10, 2009



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

JON S. CORZINE  
Governor

CHARLES A. RICHMAN  
Acting Commissioner

**INTERIM ORDER**

**September 30, 2009 Government Records Council Meeting**

Leonard P. Lucente  
Complainant

Complaint No. 2008-119

v.

City of Union City (Hudson)  
Custodian of Record

At the September 30, 2009 public meeting, the Government Records Council (“Council”) considered the September 23, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the amended findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian provided a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days, in which the Custodian requested an extension of time to fulfill said request, the Custodian’s written response is inadequate pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) because the Custodian failed to provide an anticipated deadline date upon which he will provide the requested records to the Complainant.
2. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
3. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the following requested records to determine the validity of the Custodian’s assertion that the records are either privileged communications between an attorney and his/her client, and are not government records pursuant to N.J.S.A. 47:1A-1.1, the records constitute advisory, consultative or





deliberative process material (pre-decisional) pursuant to N.J.S.A. 47:1A-1.1, or the records are not controlled by OPRA, but by the Rules of Court pursuant to N.J.S.A. 47:1A-9:

- a. Correspondence from City Attorney to Commissioner re: Lucente grievance dated August 19, 1998 (3 pages)
  - b. Correspondence from ABC Prosecutor Gregory T. Farmer to Commissioner re: Union City ABC matter dated November 19, 1999 (1 page)
  - c. Memorandum from Commissioner's office to City Attorney re: Leonard Lucente dated September 27, 2000 (1 page)
  - d. Memorandum from Commissioner's office to City Attorney re: Leonard Lucente dated October 27, 2000 (1 page)
  - e. Memo from Commissioner Michael Leggiero to Commissioner Lopez re: request for office space dated January 11, 2001 (1 page)
  - f. Correspondence from City Treasurer's office to City Attorney re: Leonard Lucente dated March 11, 2001 (13 pages)
  - g. Correspondence from City Attorney to City Payroll Department re: Leonard Lucente dated March 16, 2001 (2 pages)
  - h. Correspondence from City Attorney to Commissioner re: Leonard Lucente dated March 27, 2001 (1 page)
  - i. Correspondence from City Attorney to Commissioner re: Union City and UCEA dated December 13, 2001 (1 page)
  - j. Memorandum from City Attorney to Commissioner re: another City employee and Leonard Lucente dated January 15, 2002 (1 page)
  - k. Correspondence from City Attorney to Commissioner re: settlement, Leonard Lucente dated November 8, 2002 (11 pages)
  - l. Correspondence from Scarinci and Hollenbeck, City Attorney to Union City Commissioner re: request for public records dated December 17, 2002 (2 pages)
  - m. Memorandum to City of Union City re: income source verification (Family Part Matter) dated March 30, 2006 (1 page)
4. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see #3 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<sup>3</sup>, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

---

<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.

<sup>3</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

5. The Custodian lawfully redacted or withheld from disclosure the handwritten notes contained on the Complainant's personnel records because said notes are informal memory aids and are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and O'Shea v. West Milford Board of Education, 391 N.J. Super. 534, 538 (App. Div. 2007). Thus, the Custodian has carried his burden of proving a lawful denial of access to said records pursuant to N.J.S.A. 47:1A-6.
6. The Custodian unlawfully denied access to the portions of the records enumerated below which disclose an individual's name, title, position, salary, payroll record, length of service, date of termination of public employment and the reason for separation, and the amount and type of pension received pursuant to N.J.S.A. 47:1A-10. As such, the Custodian must disclose said portions to the Complainant.
  - a. Memorandum from Mayor Robert Menendez to Payroll Department dated July 30, 1990 (4 pages)
  - b. Memorandum from Joseph R. Marini to Michael Licameli re: accumulated time for 1993 – Department of City Clerk dated February 4, 1994 (1 page)
7. **The Custodian shall comply with item # 6 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>4</sup>, to the Executive Director.**
8. 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 September, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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

---

<sup>4</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Janice L. Kovach, Secretary  
Government Records Council

**Decision Distribution Date: October 5, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
September 30, 2009 Council Meeting**

**Leonard P. Lucente<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-119**

**v.**

**City of Union City (Hudson)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Personnel records and dates of hire for Leonard Lucente's employment with the City of Union City.

**Request Made:** May 21, 2008

**Response Made:** June 3, 2008

**Custodian:** William Senande

**GRC Complaint Filed:** June 5, 2008<sup>3</sup>

**Background**

**May 21, 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 22, 2008**

Letter from Complainant to Custodian. The Complainant clarifies that his OPRA request is for "personnel" records, not "personal" records.

**June 3, 2008**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the eighth (8<sup>th</sup>) business day following receipt of such request, and the seventh (7<sup>th</sup>) business day following receipt of the Complainant's clarified request. The Custodian states that he requires additional time to review the requested records for any privileged information.

**June 5, 2008**

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

---

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

<sup>2</sup> Represented by Jacqueline P. Gioioso, Esq., of Scarinci Hollenbeck (Lyndhurst, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

- Complainant's OPRA request dated May 21, 2008
- Custodian's response to the Complainant's OPRA request dated June 3, 2008

The Complainant states that he submitted his OPRA request on May 21, 2008 for his own personnel records, which also included his hire dates for employment with the City of Union City. The Complainant states that he received the Custodian's written response on June 3, 2008 in which the Custodian indicated that he needed additional time to determine if there was any privileged information contained in the requested records. The Complainant asserts that he should be entitled to his own personnel records.

Additionally, the Complainant does not agree to mediate this complaint.

**July 25, 2008**

Request for the Statement of Information ("SOI") sent to the Custodian.

**July 29, 2008**

Letter of Representation from Custodian's Counsel. Counsel requests an extension of time to submit the Custodian's completed SOI.

**July 29, 2008**

E-mail from GRC to Custodian's Counsel. The GRC grants the Custodian's Counsel an extension of time until the close of business on August 8, 2008 to submit the Custodian's completed SOI.

**August 7, 2008**

E-mail from GRC to Custodian's Counsel. The GRC grants the Custodian's Counsel an extension of time until the close of business on August 15, 2008 to submit the Custodian's completed SOI.<sup>4</sup>

**August 14, 2008**

Custodian's SOI. The Custodian certifies that he received the Complainant's OPRA request on May 21, 2008. The Custodian certifies that on the same date, he also received the Complainant's signed Release of Personnel File form, as the Complainant is an employee of the City. The Custodian also certifies that on May 22, 2008 he received a letter from the Complainant in which the Complainant clarified that his request sought access to his "personnel" records, not "personal" records. The Custodian certifies that he notified the Complainant via letter dated June 3, 2008 that he needed additional time to review the Complainant's personnel file for any privileged material. The Custodian certifies that the Complainant's personnel file contains over 1,000 pages. Additionally, the Custodian certifies that due to prior litigation with the Complainant, his personnel file may contain attorney-client privileged information, or advisory, consultative or deliberative material.

Further, the Custodian certifies that between the dates of June 3, 2008 and June 10, 2008, the Custodian and his staff maintained verbal contact with the Complainant regarding the progress on his OPRA request. The Custodian states that on June 10, 2008, Michelle Jurado, a member of the Custodian's staff, telephoned the Complainant to

---

<sup>4</sup> Based on Counsel's verbal request for said extension.

advise that the review of his personnel file was almost complete and that she would contact him again when he could view the records. The Custodian states that Ms. Jurado telephoned the Complainant again on July 17, 2008 to inform him that the requested records would be available for review on July 21, 2008. The Custodian states that the Complainant made an appointment to review the records on July 22, 2008. The Custodian certifies that he prepared a privilege log to identify the records, or portions of records, which were withheld from disclosure.

The Custodian states that the Complainant came in to review his personnel file on July 22, 2008. The Custodian states that the Complainant briefly reviewed the file, selected six (6) pages to purchase, and indicated that he was only interested in receiving his hiring dates. The Custodian certifies that he did not provide the Complainant with the privilege log because the Complainant was not interested in reviewing the entire file.

Additionally, the Custodian asserts that at no time between May 21, 2008 and July 22, 2008 did the Complainant object to the Custodian's need for additional time to fulfill the Complainant's OPRA request. The Custodian certifies that with the exception of the records identified in the privilege log, he provided the Complainant access to his entire personnel file.

The Custodian also certifies that his search for the requested records included compiling the Complainant's personnel files from all departments within the City where the Complainant has worked over the past 34 years.

The Custodian further certifies that in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM"), personnel records must be retained until 6 years after termination of employment.

### **October 24, 2008**

Letter from Custodian's Counsel to GRC. Counsel asks the GRC to accept this letter brief in support of the Custodian's SOI. Counsel states that OPRA exempts from public access personnel and pension records with certain exceptions. N.J.S.A. 47:1A-10. Counsel also states that in Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005), the court held that all information contained in the requested records, "other than a public employee's name, title, position, salary, payroll record, length of service, date of termination of public employment and the reason for separation, and the amount and type of pension received, is not considered a government record."

Additionally, Counsel states that the City is a civil service municipality which is governed by Title 4A of the New Jersey Administrative Code. Specifically, Counsel states that N.J.A.C. 4A:1-2.2 also exempts from public access personnel records with certain exceptions. Counsel claims that said code envisions the redaction of confidential information such as deliberative, consultative, and evaluative material. Counsel asserts that OPRA does not allow for unredacted, unfettered access to one's own personnel files.

Further, Counsel suggests that the GRC recognize the law regarding statutory interpretation. Counsel states that in Rumson Estates, Inc. v. Fair Haven, 177 N.J. 338,

354 (2003), the court held that “[w]here statutory language is clear, courts should give it effect unless it is evident that the Legislature did not intend such meaning.” Additionally, Counsel states that the United States Supreme Court in Connecticut Nat’l Bank v. Germain, 503 U.S. 249, at 253-4 (1992) held that “...courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”

Counsel contends that the New Jersey Legislature is clear regarding the personnel record exemption, and specifically identified information deemed to not be an invasion into an individual’s privacy to be disclosed to the public.

Additionally, Counsel states that regarding the Legislature’s use of the word “shall” in a statute, the court in Dugan v. Camden County Clerk’s Office, 376 N.J. Super. 271 at 276 (App. Div. 2005) held that “[u]nless a contrary meaning is justified by the character of a legislative enactment, the use of the term ‘shall’ conveys a mandatory meaning. Cryan v. Klein, 148 N.J. Super. 27, 30-31 (App. Div. 1977).”

Further, Counsel states that in Thomsen v. Mercer-Charles, 187 N.J. 197 (2006), the court held that:

“[t]he ‘paramount [judicial] goal when interpreting a statute’ is to determine and fulfill the legislative intent. DiProspero v. Penn, 183 N.J. 477, 492 (2005). To achieve that goal, we first look to the statutory language, State v. Pena, 178 N.J. 297,307 (2004), and interpret the language in accordance with its plain meaning if it is ‘clear and unambiguous on its face and admits of only one interpretation.’ State v. Thomas, 166 N.J. 560, 567 (2001) (quoting State v. Butler, 89 N.J. 220, 226 (1982)). If the statute’s language ‘is susceptible to different interpretations, the court considers extrinsic factor, such as the statute’s purpose, legislative history, and statutory context to ascertain the legislature’s intent.’ Aponte-Correa v. Allstate Ins. Co., 163 N.J. 318, 323 (2000) (quoting Twp. Of Pennsauken v. Schad, 160 N.J. 156, 170 (1999)); see also DiProspero, *supra*, 183 N.J. at 492-93; State v. Pena, 178 N.J. at 307-08.”

Counsel asserts that the statutory language of OPRA is clear that personnel records are not government records subject to public access, with the exception of the specific items identified under N.J.S.A. 47:1A-10. Counsel contends that the Complainant does not have a right to demand unrestricted access to his own personnel file, and the Custodian is obligated to redact any confidential material contained in said file. Counsel claims that neither OPRA nor the Administrative Regulations support the contention that the employee has immediate access to his personnel file. Counsel states that the Complainant indicated that he only wanted to know his hire dates and refused to inspect the file provided to him. Additionally, Counsel claims that because the requested records are personnel records which are not considered government records under OPRA, the GRC should dismiss this complaint.

**July 22, 2009**

Letter from GRC to Custodian. The GRC states that in the Custodian's SOI dated August 14, 2008, the Custodian references a privilege log that identifies the records, or portions of the records, which the Custodian withheld from disclosure. The GRC requests that the Custodian provide the GRC with said privilege log.

**July 27, 2009**

E-mail from Custodian's Counsel to GRC. Counsel submits the Custodian's privilege log which identifies the records the Custodian withheld from disclosure. The Custodian's log regarding File No. 102.7280 (the Complainant's personnel file) is below:

<b>Bates Stamp No.</b>	<b>Reason for Redaction</b>
2,3,5,13,53,55,56-57,68	Handwritten notes are not government records. Said notes constitute inter-agency or intra-agency advisory, consultative, or deliberative material which is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> and <u>O'Shea v. West Milford Board of Education</u> , 391 <u>N.J. Super.</u> 534, 537-539 (App. Div. 2007), cert. denied 192 <u>N.J.</u> 292 (2007). The handwritten notes reflect the pre-decisional opinion of city officials relative to the underlying record involved and are exempt from disclosure by application of the deliberative process privilege. <u>In re: Liquidation Indemnity Insurance Company</u> , 165 <u>N.J.</u> 75 (2000).
20	Handwritten notes are not government records. Said notes constitute inter-agency or intra-agency advisory, consultative, or deliberative material which is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> and <u>O'Shea v. West Milford Board of Education</u> , 391 <u>N.J. Super.</u> 534, 537-539 (App. Div. 2007). The handwritten notes reflect the pre-decisional opinion of city officials relative to the underlying record involved and are exempt from disclosure by application of the deliberative process privilege. <u>In re: Liquidation Indemnity Insurance Company</u> , 165 <u>N.J.</u> 75 (2000).  Notes made in response to the filing of a grievance by the named employee.
22, 39, 41, 131	An indecipherable note at the bottom of a resolution, used to jog memory, was removed.
6, 8, 9, 19, 62, 70	Produced as factual or decisional.
50, 64	The material is related to another city employee and is not a government record pursuant to <u>N.J.S.A. 47:1A-10</u> .
146, 147	Access to correspondence from child support enforcement unit, March 30, 2006, Hudson Superior Court, is not controlled by OPRA, but by the Rules of Court.



**July 30, 2009**

Letter from GRC to Custodian. The GRC states that the Custodian's privilege log references the records withheld from disclosure by Bates Stamp number. The GRC states that without having any of the records in its possession, the Bates Stamp numbers do not assist the GRC in determining what records were not provided to the Complainant. The GRC requests that the Custodian revise his privilege log to specifically identify the records withheld from disclosure.

**July 31, 2009**

E-mail from Custodian's Counsel to GRC. Counsel requests a ten (10) business day extension of time to submit the Custodian's privilege log.

**July 31, 2009**

E-mail from GRC to Custodian's Counsel. The GRC grants Counsel's ten (10) business day extension of time to submit the Custodian's privilege log due to the voluminous nature of the records involved in this complaint.

**August 19, 2009**

Custodian's Certification. The Custodian certifies that notes between City Commissioners and/or staff having some context or factual and decisional content to them, after consultation with Corporation Counsel, were produced to the Complainant (Bates Stamp Nos. 6, 8, 9, 19, 62, and 70).<sup>5</sup> The Custodian certifies that other than the records identified below, he provided the Complainant with access to all other records contained in his personnel file on July 22, 2008. The Custodian's Counsel asserts, however, that because the Complainant indicated that he was only interested in obtaining his hiring dates at the time he reviewed the file, the privilege log below is a moot issue.

<b>Documents Not Provided in Whole or in Part (general nature description)</b>	<b>No. of Pages</b>	<b>Date of Record</b>	<b>Legal Explanation and Statutory Authority for Non-Disclosure or Redactions</b>
Correspondence from City Attorney to Commissioner re: Lucente grievance	3	August 19, 1998	Privileged communications between an attorney and his/her client are not government records. <u>N.J.S.A. 47:1A-1.1.</u>
Correspondence from ABC Prosecutor Gregory T. Farmer to Commissioner re: Union City ABC matter	1	November 19, 1999	Privileged communications between an attorney and his/her client are not government records. <u>N.J.S.A. 47:1A-1.1.</u>
Memorandum from Commissioner's office to City Attorney re: Leonard Lucente	1	September 27, 2000	Privileged communications between an attorney and his/her client are not government records. <u>N.J.S.A. 47:1A-1.1.</u>

<sup>5</sup> The Custodian provided said information to the GRC in his initial privilege log submission dated July 27, 2009.

Memorandum from Commissioner's office to City Attorney re: Leonard Lucente	1	October 27, 2000	Privileged communications between an attorney and his/her client are not government records. <u>N.J.S.A. 47:1A-1.1.</u>
Correspondence from City Treasurer's office to City Attorney re: Leonard Lucente	13	March 11, 2001	Privileged communications between an attorney and his/her client are not government records. <u>N.J.S.A. 47:1A-1.1.</u>
Correspondence from City Attorney to City Payroll Department re: Leonard Lucente	2	March 16, 2001	Privileged communications between an attorney and his/her client are not government records. <u>N.J.S.A. 47:1A-1.1.</u>
Correspondence from City Attorney to Commissioner re: Leonard Lucente	1	March 27, 2001	Privileged communications between an attorney and his/her client are not government records. <u>N.J.S.A. 47:1A-1.1.</u>
Correspondence from City Attorney to Commissioner re: Union City and UCEA	1	December 13, 2001	Privileged communications between an attorney and his/her client are not government records. <u>N.J.S.A. 47:1A-1.1.</u>
Memorandum from City Attorney to Commissioner re: another City employee and Leonard Lucente	1	January 15, 2002	Privileged communications between an attorney and his/her client are not government records. <u>N.J.S.A. 47:1A-1.1.</u>
Correspondence from City Attorney to Commissioner re: settlement, Leonard Lucente	11	November 8, 2002	Privileged communications between an attorney and his/her client are not government records. <u>N.J.S.A. 47:1A-1.1.</u>
Correspondence from Scarinci and Hollenbeck, City Attorney to Union City Commissioner re: request for public records	2	December 17, 2002	Privileged communications between an attorney and his/her client are not government records. <u>N.J.S.A. 47:1A-1.1.</u>
Handwritten, unsigned notes to City Commissioner on single page of union agreement	1 (Bates Stamp No. 4, 5)	Undated	Inter-agency or intra-agency advisory, consultative or deliberative material is not considered a government record pursuant to <u>N.J.S.A. 47:1A-1.1.</u> <i>See also O'Shea v. West Milford</i>

			<u>Board of Education</u> , 391 N.J. Super. 534, 537-540 (App. Div. 2007).
Draft resolution to settle pending litigation re: Lucente v. Union City	15 (Bates Stamp No. 131 etc.)	Undated	An undecipherable cut-off unsigned note on the bottom of one page was redacted because it is not a government record. The remaining 14 pages were provided to the requestor in their entirety.
Unsigned handwritten note by unidentified author on letter from Leonard Lucente to Robert Menendez, Mayor	1 (Bates Stamp No. 68)	April 25, 1990	Inter-agency or intra-agency advisory, consultative or deliberative material is not considered a government record pursuant to <u>N.J.S.A. 47:1A-1.1</u> . See also <u>O’Shea v. West Milford Board of Education</u> , 391 N.J. Super. 534, 537-540 (App. Div. 2007).
Sticky note to Commissioner from payroll staff on letter from Leonard Lucente to Joseph Marini, Commissioner re: accumulated time	1 (Bates Stamp No. 55)	March 31, 1994	Inter-agency or intra-agency advisory, consultative or deliberative material is not considered a government record pursuant to <u>N.J.S.A. 47:1A-1.1</u> . See also <u>O’Shea v. West Milford Board of Education</u> , 391 N.J. Super. 534, 537-540 (App. Div. 2007).
Handwritten, unsigned notes in margins of letter from Thomas L. Curcio, Esq. (Leonard Lucente’s attorney) to Commissioner Rafael Fraguela re: Leonard Lucente grievance proceeding	3 (Bates Stamp No. 56-58)	July 6, 1998	Inter-agency or intra-agency advisory, consultative or deliberative material is not considered a government record pursuant to <u>N.J.S.A. 47:1A-1.1</u> . See also <u>O’Shea v. West Milford Board of Education</u> , 391 N.J. Super. 534, 537-540 (App. Div. 2007).
Handwritten, unsigned note on document to Commissioner’s staff on Memorandum to	1 (Bates Stamp No. 52, 53)	January 13, 1999	Inter-agency or intra-agency advisory, consultative or deliberative material is not considered a

Commissioner Rafael Fraguela from Leonard P. Lucente re: job			government record pursuant to <u>N.J.S.A. 47:1A-1.1</u> . <i>See also</i> <u>O’Shea v. West Milford Board of Education</u> , 391 <u>N.J. Super. 534, 537-540</u> (App. Div. 2007).
Multiple unsigned notes and a note from Commissioner to City Administrator on memorandum from Leonard Lucente to Commissioner Fraguela re: vacation	1 (Bates Stamp No. 39-40)	April 24, 1999	Inter-agency or intra-agency advisory, consultative or deliberative material is not considered a government record pursuant to <u>N.J.S.A. 47:1A-1.1</u> . <i>See also</i> <u>O’Shea v. West Milford Board of Education</u> , 391 <u>N.J. Super. 534, 537-540</u> (App. Div. 2007).
Handwritten note from Commissioner to Commissioner on memorandum from Leonard Lucente to Commissioner Rivas re: legalized games of chance/request for compensation	1 (Bates Stamp No. 22)	July 30, 2002	Inter-agency or intra-agency advisory, consultative or deliberative material is not considered a government record pursuant to <u>N.J.S.A. 47:1A-1.1</u> . <i>See also</i> <u>O’Shea v. West Milford Board of Education</u> , 391 <u>N.J. Super. 534, 537-540</u> (App. Div. 2007).
Handwritten note from Commissioner to Commissioner on letter from Leonard Lucente to Commissioner Rivas re: overtime for Leonard Lucente	1 (Bates Stamp No. 20)	November 1, 2002	Inter-agency or intra-agency advisory, consultative or deliberative material is not considered a government record pursuant to <u>N.J.S.A. 47:1A-1.1</u> . <i>See also</i> <u>O’Shea v. West Milford Board of Education</u> , 391 <u>N.J. Super. 534, 537-540</u> (App. Div. 2007).
Sticky note from and to Commissioner and staff on Memorandum from Leonard Lucente to Commissioner Rivas re: new computer	1 (Bates Stamp No. 13)	March 17, 2004	Inter-agency or intra-agency advisory, consultative or deliberative material is not considered a government record pursuant to <u>N.J.S.A. 47:1A-1.1</u> . <i>See also</i> <u>O’Shea v. West Milford</u>

			<u>Board of Education</u> , 391 N.J. Super. 534, 537-540 (App. Div. 2007).
Various unsigned, handwritten notes in different handwriting on a letter from Michael W. Kane to Union City, Office of the ABC Prosecutor re: ABC involving a night club attached to Municipal Clerk's letter to Mayor and Commissioners	1 (Bates Stamp No. 2, 3)	September 1, 2004	Inter-agency or intra-agency advisory, consultative or deliberative material is not considered a government record pursuant to <u>N.J.S.A. 47:1A-1.1</u> . See also <u>O'Shea v. West Milford Board of Education</u> , 391 N.J. Super. 534, 537-540 (App. Div. 2007).
Memo from Commissioner Michael Leggiro to Commissioner Lopez re: request for office space	1 (Bates Stamp No. 41)	January 11, 2001	Advisory, consultative or deliberative process materials (pre-decisional) pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
Memorandum from Mayor Robert Menendez to Payroll Department	4 (Bates Stamp No. 64)	July 30, 1990	The names of other employees on the memo and their personal information were redacted to protect their reasonable expectation of privacy under <u>N.J.S.A. 47:1A-1</u> and as exceeding the scope of OPRA.
Memorandum from Joseph R. Marini to Michael Licameli re: accumulated time for 1993 – Department of City Clerk	1 (Bates Stamp No. 50)	February 4, 1994	The names of other employees on the memo and their personal information were redacted to protect their reasonable expectation of privacy under <u>N.J.S.A. 47:1A-1</u> and as exceeding the scope of OPRA.
Memorandum to City of Union City re: income source verification (Family Part Matter)	1 (Bates Stamp No. 146)	March 30, 2006	This record is not controlled by OPRA, but by the Rules of Court. <u>N.J.S.A. 47:1A-9</u> .

## 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... A government record shall not include...any record within the attorney-client privilege.*” (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 ...* If the government record is in storage or archived, the requestor shall be so *advised within seven business days after the custodian receives the request.* The requestor shall be advised by the custodian *when the record can be made available.* If the *record is not made available by that time,* access shall be *deemed denied.*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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

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

Additionally, OPRA provides that:

“personnel or pension records of any individual...shall not be considered a government record... except that:

- an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record;
- personnel or pension records of any individual shall be accessible... *when authorized by an individual in interest...*” (Emphasis added). N.J.S.A. 47:1A-10.

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 GRC first turns to the issue of whether the Custodian responded to the Complainant's OPRA request in a timely manner. The Custodian certified that he received the Complainant's OPRA request on May 21, 2009. The Custodian certified that on May 22, 2008 he received a letter from the Complainant in which the Complainant clarified that his request sought access to his “personnel” records, not “personal” records. The Custodian certified that he notified the Complainant via letter dated June 3, 2008, the eighth (8<sup>th</sup>) business day following receipt of the Complainant's request, and the seventh (7<sup>th</sup>) business day following receipt of the Complainant's clarified request, that he needed additional time to review the Complainant's personnel file for any privileged material. The Custodian did not provide the Complainant with an anticipated date upon which he would provide the requested records to the Complainant.

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>6</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g.,

---

<sup>6</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.

N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). Additionally, N.J.S.A. 47:1A-5.i. provides that if a custodian requires time beyond the statutorily mandated seven (7) business days to fulfill a request, the custodian must advise the requestor when the records can be made available; a custodian's failure to provide the records by said date results in a deemed denial.

In Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the Custodian provided the Complainant with a written response to the Complainant's OPRA request on the seventh (7<sup>th</sup>) business day following receipt of said request. In said response, the Custodian requested an extension of time to respond to said request but failed to provide an anticipated deadline date upon which the requested records would be provided. The Council held that the Custodian's request for an extension of time was inadequate under OPRA pursuant to N.J.S.A. 47:1A-5.i.

The facts in Hardwick are similar to the facts in this instant complaint; specifically, that the Custodian provided a written response to the Complainant's request within the statutorily mandated seven (7) business days.<sup>7</sup> In said response, the Custodian requested an extension of time but failed to provide an anticipated deadline date upon which the records would be provided.

Therefore, although the Custodian provided a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days, in which the Custodian requested an extension of time to fulfill said request, the Custodian's written response is inadequate pursuant to N.J.S.A. 47:1A-5.i. and Hardwick, supra, because the Custodian failed to provide an anticipated deadline date upon which he will provide the requested records to the Complainant.

Moreover, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra.

Next, the GRC examines whether the Custodian unlawfully denied access to records contained in the Complainant's personnel file that the Custodian withheld from disclosure. The Custodian certified that the Complainant's personnel file contained over 1,000 pages. The Custodian stated that the Complainant reviewed his personnel file on July 22, 2008. The Custodian stated that the Complainant briefly reviewed the file, selected six (6) pages to purchase, and indicated that he was only interested in receiving his hiring dates. The Custodian certified that he did not provide the Complainant with the privilege log because the Complainant was not interested in reviewing the entire file. The Custodian certified that he provided the Complainant with all records except those identified in the privilege log. The Custodian's Counsel asserted, however, that because the Complainant indicated that he was only interested in obtaining his hiring dates, the privilege log below is a moot issue.

---

<sup>7</sup> In this complaint, the Custodian provided the Complainant with a written response to his OPRA request on the seventh (7) business day following receipt of the Complainant's clarified request.  
Leonard P. Lucente v. City of Union City (Hudson), 2008-119- Findings and Recommendations of the Executive Director



However, the basis of the Complainant's Denial of Access Complaint is that the Custodian indicated that he needed additional time to determine if there was any privileged information contained in the requested records. The Complainant asserted that he should be entitled to his own personnel records in their entirety. The Complainant did not amend his complaint to only challenge the Custodian's response to his request for his dates of hire. As such, the Complainant's initial claim in this complaint is still at issue.

Regarding access to the Complainant's entire personnel file, the Custodian's Counsel asserted that OPRA does not allow for unfettered access to one's own personnel files. Counsel contended that the New Jersey Legislature is clear regarding the personnel record exemption, and specifically identified information deemed to not be an invasion into an individual's privacy to be disclosed to the public, such as a public employee's name, title, position, salary, payroll record, length of service, date of termination of public employment and the reason for separation, and the amount and type of pension received. N.J.S.A. 47:1A-10. However, said provision continues to state that personnel records can be disclosed "when authorized by an individual in interest..." The GRC has previously defined the term "individual in interest" in Culmone v. Longport Police Department, GRC Complaint No. 2004-147 (March 2005). In said complaint, the Council stated that:

"N.J.S.A. 47:1A-10 is a codified version of Executive Order 11 (1974) and has been applied and understood that only individuals who have access to personnel and pension records are specific public officials and the person who is the subject of the personnel file. An 'individual in interest' is to mean the person who is the subject of the personnel file, furthermore, that person may accept to waive their privacy right and authorize the disclosure of their personnel records. In considering N.J.S.A. 47:1A-10 in its entirety, the term 'individual' refers to the person who is the subject of the personnel or pension record."

In this instant complaint, the Complainant sought access to his own personnel file, and thus is an "individual in interest" pursuant to N.J.S.A. 47:1A-10 and Culmone, *supra* and is allowed to access his own personnel file. Nevertheless, it is still possible that other records or portions of records, contained in the Complainant's personnel file are shielded from public access pursuant to other provisions of OPRA. In fact, the Custodian denied access to certain records contained in the Complainant's personnel file for various reasons.

First, the Custodian certified that the following records were withheld from disclosure because said records are privileged communications between an attorney and his/her client, and are not government records pursuant to N.J.S.A. 47:1A-1.1:

1. Correspondence from City Attorney to Commissioner re: Lucente grievance dated August 19, 1998 (3 pages)
2. Correspondence from ABC Prosecutor Gregory T. Farmer to Commissioner re: Union City ABC matter dated November 19, 1999 (1 page)
3. Memorandum from Commissioner's office to City Attorney re: Leonard Lucente dated September 27, 2000 (1 page)

4. Memorandum from Commissioner's office to City Attorney re: Leonard Lucente dated October 27, 2000 (1 page)
5. Correspondence from City Treasurer's office to City Attorney re: Leonard Lucente dated March 11, 2001 (13 pages)
6. Correspondence from City Attorney to City Payroll Department re: Leonard Lucente dated March 16, 2001 (2 pages)
7. Correspondence from City Attorney to Commissioner re: Leonard Lucente dated March 27, 2001 (1 page)
8. Correspondence from City Attorney to Commissioner re: Union City and UCEA dated December 13, 2001 (1 page)
9. Memorandum from City Attorney to Commissioner re: another City employee and Leonard Lucente dated January 15, 2002 (1 page)
10. Correspondence from City Attorney to Commissioner re: settlement, Leonard Lucente dated November 8, 2002 (11 pages)
11. Correspondence from Scarinci and Hollenbeck, City Attorney to Union City Commissioner re: request for public records dated December 17, 2002 (2 pages)

Additionally, the Custodian certified that he withheld access to a memo from Commissioner Michael Leggiero to Commissioner Lopez re: request for office space dated January 11, 2001 (1 page) because said record constitutes advisory, consultative or deliberative process material (pre-decisional) pursuant to N.J.S.A. 47:1A-1.1.

Further, the Custodian certified that he withheld the Memorandum to City of Union City re: income source verification (Family Part Matter) dated March 30, 2006 (1 page) because said record is not controlled by OPRA, but by the Rules of Court. N.J.S.A. 47:1A-9.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC<sup>8</sup> in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The court stated that:

“OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.”

The court also stated that:

“[t]he statute also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7f.”

<sup>8</sup> Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).  
Leonard P. Lucente v. City of Union City (Hudson), 2008-119 – Findings and Recommendations of the Executive Director

This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.”

Further, the court stated that:

“[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.”

Therefore, pursuant to Paff, supra, the GRC must conduct an *in camera* review of the following requested records to determine the validity of the Custodian’s assertion that the records are either privileged communications between an attorney and his/her client, and are not government records pursuant to N.J.S.A. 47:1A-1.1, the records constitute advisory, consultative or deliberative process material (pre-decisional) pursuant to N.J.S.A. 47:1A-1.1, or the records are not controlled by OPRA, but by the Rules of Court pursuant to N.J.S.A. 47:1A-9:

1. Correspondence from City Attorney to Commissioner re: Lucente grievance dated August 19, 1998 (3 pages)
2. Correspondence from ABC Prosecutor Gregory T. Farmer to Commissioner re: Union City ABC matter dated November 19, 1999 (1 page)
3. Memorandum from Commissioner’s office to City Attorney re: Leonard Lucente dated September 27, 2000 (1 page)
4. Memorandum from Commissioner’s office to City Attorney re: Leonard Lucente dated October 27, 2000 (1 page)
5. Memo from Commissioner Michael Leggiero to Commissioner Lopez re: request for office space dated January 11, 2001 (1 page)
6. Correspondence from City Treasurer’s office to City Attorney re: Leonard Lucente dated March 11, 2001 (13 pages)
7. Correspondence from City Attorney to City Payroll Department re: Leonard Lucente dated March 16, 2001 (2 pages)
8. Correspondence from City Attorney to Commissioner re: Leonard Lucente dated March 27, 2001 (1 page)
9. Correspondence from City Attorney to Commissioner re: Union City and UCEA dated December 13, 2001 (1 page)
10. Memorandum from City Attorney to Commissioner re: another City employee and Leonard Lucente dated January 15, 2002 (1 page)
11. Correspondence from City Attorney to Commissioner re: settlement, Leonard Lucente dated November 8, 2002 (11 pages)
12. Correspondence from Scarinci and Hollenbeck, City Attorney to Union City Commissioner re: request for public records dated December 17, 2002 (2 pages)
13. Memorandum to City of Union City re: income source verification (Family Part Matter) dated March 30, 2006 (1 page)

Additionally, the Custodian certified that he withheld the following handwritten notes from disclosure because said notes constitute inter-agency or intra-agency advisory, consultative or deliberative material which is not considered a government record pursuant to N.J.S.A. 47:1A-1.1. See also O’Shea v. West Milford Board of Education, 391 N.J. Super. 534, 537-540 (App. Div. 2007).

1. Handwritten, unsigned notes to City Commissioner on single page of union agreement undated (1 page)
2. Unsigned note on the bottom of a page on a draft resolution to settle pending litigation re: Lucente v. Union City undated (1 page)
3. Unsigned handwritten note by unidentified author on letter from Leonard Lucente to Robert Menendez, Mayor dated April 25, 1990 (1 page)
4. Sticky note to Commissioner from payroll staff on letter from Leonard Lucente to Joseph Marini, Commissioner re: accumulated time dated March 31, 1994 (1 page)
5. Handwritten, unsigned notes in margins of letter from Thomas L. Curcio, Esq. (Leonard Lucente’s attorney) to Commissioner Rafael Fraguela re: Leonard Lucente grievance proceeding dated July 6, 1998 (3 pages)
6. Handwritten, unsigned note on document to Commissioner’s staff on Memorandum to Commissioner Rafael Fraguela from Leonard P. Lucente re: job dated January 13, 1999 (1 page)
7. Multiple unsigned notes and a note from Commissioner to City Administrator on memorandum from Leonard Lucente to Commissioner Fraguela re: vacation dated April 24, 1999 (1 page)
8. Handwritten note from Commissioner to Commissioner on memorandum from Leonard Lucente to Commissioner Rivas re: legalized games of chance/request for compensation dated July 30, 2002 (1 page)
9. Handwritten note from Commissioner to Commissioner on letter from Leonard Lucente to Commissioner Rivas re: overtime for Leonard Lucente dated November 1, 2002 (1 page)
10. Sticky note from and to Commissioner and staff on Memorandum from Leonard Lucente to Commissioner Rivas re: new computer dated March 17, 2004 (1 page)
11. Various unsigned, handwritten notes in different handwriting on a letter from Michael W. Kane to Union City, Office of the ABC Prosecutor re: ABC involving a night club attached to Municipal Clerk’s letter to Mayor and Commissioners dated September 1, 2004 (1 page)

OPRA excludes from the definition of a government record “inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the “deliberative process privilege.”

In O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006), the Council stated that “neither the statute nor the courts have defined the terms... ‘advisory, consultative, or deliberative’ in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from

disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J.149 (App. Div. 2004).

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). Specifically, the New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Education Law Center v. NJ Department of Education, 198 N.J. 274, 966 A.2d 1054, 1069 (2009). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

The deliberative process privilege was discussed at length in In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000). There, the court addressed the question of whether the Commissioner of Insurance, acting in the capacity of Liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. *Id.* at 81. The court adopted a qualified deliberative process privilege based upon the holding of McClain v. College Hospital, 99 N.J. 346 (1985), Liquidation of Integrity, *supra*, 165 N.J. at 88. In doing so, the court noted that:

“[a] document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. ... Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. ... Purely factual material that does not reflect deliberative processes is not protected. ... Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the "preponderating policy" and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.” (Citations omitted.) *Id.* at 84-85.

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

“[t]he initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing

opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.” In Re Liquidation of Integrity, *supra*, 165 N.J. at 88, *citing McClain*, *supra*, 99 N.J. at 361-62.

In In Re Liquidation of Integrity, *supra*, 165 N.J. at 84-5, the judiciary set forth the legal standard for applying the deliberative process privilege as follows:

- (1) 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.
    - i. Deliberative materials do not include purely factual materials.
    - ii. 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.
  - c. 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*.
  - d. 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*.
  - e. 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*.

Additionally, in O’Shea v. West Milford Board of Education, 391 N.J. Super. 534, 538 (App. Div. 2007),<sup>9</sup> the Complainant requested handwritten notes of an executive session meeting. The court held that:

---

<sup>9</sup>This case is an appeal of the GRC’s decision of Martin O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006).  
Leonard P. Lucente v. City of Union City (Hudson), 2008-119 – Findings and Recommendations of the Executive Director

“[w]e reject O’Shea’s contention that the Secretary’s handwritten notes, jotted down as a memory aid to assist in preparing the formal minutes, are public records merely because they were ‘made’ by a government official. Under that rationale any Board member’s personal handwritten notes, taken during a meeting to assist the member to recall what occurred, would be a public record because the member might arguably refer to them later in reviewing the Secretary’s draft of the formal minutes. Taken further, every yellow-sticky note penned by a government official to help him or her remember a work-related task would be a public record. Such absurd results were not contemplated or required by OPRA.”

Further, in Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the Complainant sought access to the personal notes of the employees attending Department of Transportation staff meetings. The Council held that “the personal notes of the attendees which are responsive to the request are informal memory aids and are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and O’Shea, supra.”

Therefore, the Custodian lawfully redacted or withheld from disclosure the handwritten notes contained on the Complainant’s personnel records because said notes are informal memory aids and are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and O’Shea, supra. Thus, the Custodian has carried his burden of proving a lawful denial of access to said records pursuant to N.J.S.A. 47:1A-6.

Also, the Custodian certified that he withheld the names of other employees on the following records and redacted said employees’ personal information to protect their reasonable expectation of privacy under N.J.S.A. 47:1A-1 and as exceeding the scope of OPRA.

1. Memorandum from Mayor Robert Menendez to Payroll Department dated July 30, 1990 (4 pages)
2. Memorandum from Joseph R. Marini to Michael Licameli re: accumulated time for 1993 – Department of City Clerk dated February 4, 1994 (1 page)

Although the records enumerated above may contain sensitive personal information, which if disclosed, would violate a citizen’s reasonable expectation of privacy, pursuant to N.J.S.A. 47:1A-1, OPRA does allow for the disclosure of certain information regarding public employees. Specifically, OPRA provides that custodians must disclose an individual’s name, title, position, salary, payroll record, length of service, date of termination of public employment and the reason for separation, and the amount and type of pension received. N.J.S.A. 47:1A-10.

Therefore, the Custodian unlawfully denied access to the portions of the records enumerated above which disclose an individual’s name, title, position, salary, payroll record, length of service, date of termination of public employment and the reason for separation, and the amount and type of pension received pursuant to N.J.S.A. 47:1A-10. As such, the Custodian must disclose said portions to the Complainant.

**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?**

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. Although the Custodian provided a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days, in which the Custodian requested an extension of time to fulfill said request, the Custodian's written response is inadequate pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) because the Custodian failed to provide an anticipated deadline date upon which he will provide the requested records to the Complainant.
2. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
3. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the following requested records to determine the validity of the Custodian's assertion that the records are either privileged communications between an attorney and his/her client, and are not government records pursuant to N.J.S.A. 47:1A-1.1, the records constitute advisory, consultative or deliberative process material (pre-decisional) pursuant to N.J.S.A. 47:1A-1.1, or the records are not controlled by OPRA, but by the Rules of Court pursuant to N.J.S.A. 47:1A-9:
  - a. Correspondence from City Attorney to Commissioner re: Lucente grievance dated August 19, 1998 (3 pages)
  - b. Correspondence from ABC Prosecutor Gregory T. Farmer to Commissioner re: Union City ABC matter dated November 19, 1999 (1 page)
  - c. Memorandum from Commissioner's office to City Attorney re: Leonard Lucente dated September 27, 2000 (1 page)
  - d. Memorandum from Commissioner's office to City Attorney re: Leonard Lucente dated October 27, 2000 (1 page)
  - e. Memo from Commissioner Michael Leggiero to Commissioner Lopez re: request for office space dated January 11, 2001 (1 page)



- f. Correspondence from City Treasurer's office to City Attorney re: Leonard Lucente dated March 11, 2001 (13 pages)
  - g. Correspondence from City Attorney to City Payroll Department re: Leonard Lucente dated March 16, 2001 (2 pages)
  - h. Correspondence from City Attorney to Commissioner re: Leonard Lucente dated March 27, 2001 (1 page)
  - i. Correspondence from City Attorney to Commissioner re: Union City and UCEA dated December 13, 2001 (1 page)
  - j. Memorandum from City Attorney to Commissioner re: another City employee and Leonard Lucente dated January 15, 2002 (1 page)
  - k. Correspondence from City Attorney to Commissioner re: settlement, Leonard Lucente dated November 8, 2002 (11 pages)
  - l. Correspondence from Scarinci and Hollenbeck, City Attorney to Union City Commissioner re: request for public records dated December 17, 2002 (2 pages)
  - m. Memorandum to City of Union City re: income source verification (Family Part Matter) dated March 30, 2006 (1 page)
4. **The Custodian must deliver<sup>10</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see #3 above), a document or redaction index<sup>11</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>12</sup>, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
5. The Custodian lawfully redacted or withheld from disclosure the handwritten notes contained on the Complainant's personnel records because said notes are informal memory aids and are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and O'Shea v. West Milford Board of Education, 391 N.J. Super. 534, 538 (App. Div. 2007). Thus, the Custodian has carried his burden of proving a lawful denial of access to said records pursuant to N.J.S.A. 47:1A-6.
6. The Custodian unlawfully denied access to the portions of the records enumerated below which disclose an individual's name, title, position, salary, payroll record, length of service, date of termination of public employment and the reason for separation, and the amount and type of pension received pursuant to N.J.S.A. 47:1A-10. As such, the Custodian must disclose said portions to the Complainant.

---

<sup>10</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>11</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

<sup>12</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

- a. Memorandum from Mayor Robert Menendez to Payroll Department dated July 30, 1990 (4 pages)
  - b. Memorandum from Joseph R. Marini to Michael Licameli re: accumulated time for 1993 – Department of City Clerk dated February 4, 1994 (1 page)
7. **The Custodian shall comply with item # 6 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>13</sup>, to the Executive Director.**
  8. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Prepared By: Dara Lownie  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

September 23, 2009

---

<sup>13</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."  
Leonard P. Lucente v. City of Union City (Hudson), 2008-119 – Findings and Recommendations of the Executive Director