



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 4, 2009 Government Records Council Meeting

Divya Srivastay-Seth
Complainant

Complaint No. 2008-152

v.

NJ Department of Banking & Insurance
Custodian of Record

At the November 4, 2009 public meeting, the Government Records Council (“Council”) considered the October 21, 2009 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has not complied with the Council’s August 11, 2009 Interim Order within five (5) business days from receipt of the Council’s Interim Order. However, the Custodian did ultimately comply with the Interim Order by September 18, 2009.
2. The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to the requested record as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. As such, the Custodian has born his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.
3. The Custodian lawfully denied access to the requested record because said record is a memorandum prepared with the stated purpose “to assist with the Board’s discussion” of the re-proposal of the Board’s regulations. The memorandum is clearly deliberative in nature in which the author highlights changes to the existing regulations which the Board may need to consider. 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. This memorandum fits squarely within the definition of this exemption.



4. Although the Custodian failed to comply with the Council's August 11, 2009 Interim Order within five (5) business days of receipt of the Order, the Custodian did ultimately comply with the Council's August 11, 2009 Interim Order on September 18, 2009. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's untimely compliance with the Council's August 11, 2009 Interim Order appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination ¹
1	Internal memorandum from Ellen DeRosa to the SEH Board that was considered at the June 13, 2008 Board meeting	Access to this record was denied in its entirety.	Custodian asserts that this record is exempt from disclosure as advisory, consultative or deliberative materials pursuant to <u>N.J.S.A. 47:1A-1.1</u> .	This record is exempt from disclosure in its entirety. The record is a memorandum prepared with the stated purpose "to assist with the Board's discussion" of the re-proposal of the Board's regulations. The memorandum is clearly deliberative in

¹ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

				<p>nature in which the author highlights changes to the existing regulations which the Board may need to consider. 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. This memorandum fits squarely within the definition of this exemption.</p>
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This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 4th 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.

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: November 9, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
November 4, 2009 Council Meeting**

**Divya Srivastay-Seth¹
Complainant**

GRC Complaint No. 2008-152

v.

**NJ Department of Banking & Insurance²
Custodian of Records**

Records Relevant to Complaint: Any and all copies of draft proposals for re-adoption of the Small Employee Health Benefits (“SEH”) program including draft proposal referred to during the June 18, 2008 meeting.

Request Made: June 23, 2008

Response Made: June 24, 2008

Custodian: Gary Vogler

GRC Complaint Filed: July 16, 2008³

Records Submitted for *In Camera* Examination: Unredacted internal memorandum from Ellen DeRosa to the SEH Board that was considered at the 6/18/08 SEH Board meeting (8 pages).

Background

August 11, 2009

Government Records Council’s Interim Order. At the August 11, 2009 public meeting, the Government Records Council (“Council”) considered the August 4, 2009 Executive Director’s Findings and Recommendations 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. 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 internal memorandum distributed to Small Employee Health Benefits Board members at the June 18, 2008 meeting in order to determine the validity of the Custodian’s assertion that the record constitutes inter-agency or intra-agency advisory, consultative and deliberative information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

¹ No legal representation listed on record.

² Represented by DAG Paul G. Witko, on behalf of the NJ Attorney General.

³ The GRC received the Denial of Access Complaint on said date.

2. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see No. 1 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁶, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. 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.

August 12, 2009

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

September 10, 2009

E-mail from the GRC to the Custodian. The GRC informs the Custodian that compliance with the Council's August 11, 2009 Interim Order was due on Thursday, August 20, 2009 and the GRC is not in receipt of a certification from the Custodian or the records required for the *in camera* review. Additionally, the GRC informs the Custodian that the time has expired on the submission deadlines for a request for a stay of the Order pursuant to *N.J.A.C. 5:105-2.12* and request for reconsideration pursuant to *N.J.A.C. 5:105-2.10*. The GRC requests the Custodian respond immediately to this e-mail indicating when the Custodian will comply with the Council's Interim Order.

September 18, 2009

Certification of the Custodian in response to the Council's Interim Order with the record requested for the *in camera* review, and a document index. The Custodian certifies that he is the Records Custodian for the NJ Department of Banking & Insurance and that the record enclosed is a true and exact copy of the unredacted memorandum from Ellen DeRosa, Executive Director of the NJ Small Employer Health Coverage Program to all SEH board members that was initially distributed via e-mail on June 13, 2008, and through in-person distributions to SEH board members, as needed, at the June 18, 2008 meeting. The Custodian further certified that this record is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 as advisory, consultative or deliberative materials ("ACD").

⁴ 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.

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

⁶ "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."

Analysis

Whether the Custodian complied with the Council's August 11, 2009 Interim Order?

At its August 11, 2009 public meeting, the Council determined that because the Custodian has asserted that the requested record was lawfully denied pursuant to N.J.S.A. 47:1A-1.1 as advisory, consultative or deliberative material, the Council must determine whether the legal conclusion asserted by the Custodian is properly applied to the record at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested record to determine the validity of the Custodian's assertion that the requested record was properly denied.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted document, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or on August 20, 2009.

The Custodian did not provide the GRC with any response to the Council's August 11, 2009 Interim Order by August 20, 2009. The GRC e-mailed the Custodian on September 10, 2009 requesting compliance. The Custodian provided the GRC with a certification, the unredacted record requested for the *in camera* inspection, and a document index on September 18, 2009.

Therefore, the Custodian has not complied with the Council's August 11, 2009 Interim Order within five (5) business days from receipt of the Council's Interim Order. However, the Custodian did ultimately comply with the Interim Order by September 18, 2009.

Whether the Custodian unlawfully denied the Complainant access to the June 13, 2008 memorandum to the SEH Board Members?

The Custodian asserts that he lawfully denied the Complainant access to the requested record because said record is exempt from disclosure under OPRA as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. Conversely, the Complainant asserts that the requested record is a re-adoption proposal of SEH regulations that is not exempt from disclosure under OPRA.

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, 492 A.2d 991.

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*.

The GRC conducted an *in camera* examination on the submitted record. The results of this examination are set forth in the following table:

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination ⁷
1	Internal memorandum from Ellen DeRosa to the SEH Board that was considered at the June 13, 2008 Board meeting	Access to this record was denied in its entirety.	Custodian asserts that this record is exempt from disclosure as advisory, consultative or deliberative materials pursuant to <u>N.J.S.A. 47:1A-1.1</u> .	This record is exempt from disclosure in its entirety. The record is a memorandum prepared with the stated purpose "to assist with the Board's discussion" of the re-proposal of the Board's regulations. The memorandum is clearly deliberative in nature in which the author highlights changes to the existing regulations which the Board may need to consider. The deliberative process privilege is a doctrine that permits government

⁷ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

				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. This memorandum fits squarely within the definition of this exemption.
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Thus, the Custodian lawfully denied access to the requested record because said record is a memorandum prepared with the stated purpose “to assist with the Board’s discussion” of the re-proposal of the Board’s regulations. The memorandum is clearly deliberative in nature in which the author highlights changes to the existing regulations which the Board may need to consider. 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. This memorandum fits squarely within the definition of this exemption.

Whether the Custodian’s untimely compliance with the Council’s August 11, 2009 Interim Order rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

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

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

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

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

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

Although the Custodian failed to comply with the Council’s August 11, 2009 Interim Order within five (5) business days of receipt of the Order, the Custodian did ultimately comply with the Council’s August 11, 2009 Interim Order on September 18, 2009. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s untimely compliance with the Council’s August 11, 2009 Interim Order appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has not complied with the Council’s August 11, 2009 Interim Order within five (5) business days from receipt of the Council’s Interim Order. However, the Custodian did ultimately comply with the Interim Order by September 18, 2009.
2. The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to the requested record as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. As such, the Custodian has born his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.
3. The Custodian lawfully denied access to the requested record because said record is a memorandum prepared with the stated purpose “to assist with the Board’s discussion” of the re-proposal of the Board’s regulations. The memorandum is clearly deliberative in nature in which the author highlights changes to the existing regulations which the Board may need to consider. 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. This memorandum fits squarely within the definition of this exemption.

4. Although the Custodian failed to comply with the Council's August 11, 2009 Interim Order within five (5) business days of receipt of the Order, the Custodian did ultimately comply with the Council's August 11, 2009 Interim Order on September 18, 2009. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's untimely compliance with the Council's August 11, 2009 Interim Order appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared and
Approved By: Catherine Starghill, Esq.
Executive Director

October 21, 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

August 11, 2009 Government Records Council Meeting

Divya Srivastav-Seth
Complainant

Complaint No. 2008-152

v.

New Jersey Department of Banking & Insurance,
Division of Small Employer Health Program Board
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council ("Council") considered the August 4, 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. 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 internal memorandum distributed to Small Employee Health Benefits Board members at the June 18, 2008 meeting in order to determine the validity of the Custodian's assertion that the record constitutes inter-agency or intra-agency advisory, consultative and deliberative information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see No. 1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4³, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

¹ 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.

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

³ "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."



3. 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 11th Day of August, 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: August 12, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Divya Srivastav-Seth¹
Complainant**

GRC Complaint No. 2008-152

v.

**New Jersey Department of Banking & Insurance,
Division of Small Employer Health Program Board²
Custodian of Records**

Records Relevant to Complaint: Any and all copies of draft proposals for re-adoption of the Small Employee Health Benefits (“SEH”) program including draft proposal referred to during the June 18, 2008 meeting.

Request Made: June 23, 2008

Response Made: June 24, 2008

Custodian: Gary Vogler

GRC Complaint Filed: July 16, 2008³

Background

June 23, 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.

June 24, 2008

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the first (1st) business day following receipt of such request. The Custodian states that access to the requested records is denied because the records are considered inter-agency or intra-agency advisory, consultative and deliberative (“ACD”) material exempt from disclosure under OPRA.

July 16, 2008

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

- Complainant’s OPRA request dated June 23, 2008.

¹ No legal representation listed on record.

² Represented by DAG Paul G. Witko, on behalf of the NJ Attorney General.

³ The GRC received the Denial of Access Complaint on said date.

- State of New Jersey Government Records Request Receipt from the Custodian to the Complainant dated June 24, 2008.

The Complainant states that she submitted an OPRA request to the New Jersey Department of Banking & Insurance (“DOBI”) on June 23, 2008. The Complainant states that the basis for her OPRA request comes from attending a Small Employee Health Benefits (“SEH”) Board meeting on June 18, 2008. The Complainant asserts that at this meeting, Ms. Ellen DeRosa (“Ms. DeRosa”), Executive Director of the New Jersey Individual and Small Employer Health Coverage Programs, handed out a copy of a draft proposal for re-adoption of the SEH program to all members of the SEH Board. The Complainant asserts that the SEH Board discussed certain provisions of a re-adoption proposal at the meeting and even agreed to establish an ad hoc committee to review provisions and evaluate said re-adoption proposal.

The Complainant states that the Custodian responded on June 24, 2008, denying access to the requested records pursuant to N.J.S.A. 47:1A-1.1., which exempts the disclosure of ACD material.

The Complainant asserts that the ACD privilege found in OPRA is rooted in the notion that public agencies have an interest in protecting the integrity of its deliberations. Further, the Complainant asserts that the ACD privilege is aimed at protecting the quality of government decisions by shielding the communications received by a public official from public disclosure.

However, the Complainant contends that two (2) requirements must be met in order to exempt a government record from disclosure as ACD material. First, the Complainant asserts that the document must be pre-decisional, meaning the record was generated before the adoption of an agency’s policy or decision. Second, the Complainant asserts that the record must be deliberative in nature, containing opinions, recommendations or advice about agency policy. The Complainant contends that, pursuant to In re: Liquidation of Integrity Insurance Company, 165 N.J. 75, 83 (2000) (citation omitted) and Education Law Canter ex rel. Burke v. New Jersey Department of Education, 396 N.J. Super. 634 (App. Div. 2007), any public agency which invokes the ACD privilege has the burden of establishing the exemption.

The Complainant argues that the Custodian failed to bear his burden of proving a lawful denial of access pursuant to OPRA. The Complainant contends that the proposed draft of the re-adoption proposal is not pre-decisional in the sense that it was finished. The Complainant asserts that the record did not contain notations or opinions which were indicative of the deliberative or analytical process. Additionally, the Complainant asserts that the draft proposal was circulated to commercial insurers for their review; therefore, the proposal itself does not indicate a need for privacy or non-disclosure.

The Complainant requests that the GRC order disclosure of all records responsive to her June 23, 2008 OPRA request.

August 6, 2008

E-mail from the Custodian's Counsel to the GRC. Counsel states that he is in receipt of the Complainant's Denial of Access Complaint, which indicates that the Complainant is interested in mediation. Counsel states that DOBI does not wish to mediate the instant complaint.

Additionally, Counsel requests an extension of time until August 20, 2008 to submit the Statement of Information ("SOI").

August 7, 2008

Request for the SOI sent to the Custodian. The GRC grants the Custodian an extension of time until August 20, 2008 to file the SOI.

August 20, 2008

Custodian's SOI with the following attachments:

- State of New Jersey Government Records Request Receipt from the Custodian to the Complainant dated June 24, 2008.
- Certification of Ms. DeRosa.

The Custodian certifies that no records responsive 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").⁴

Counsel states that, in 1992, the Legislature enacted the Small Employer Health Benefits Act ("Act") in order to provide guaranteed access to small group health insurance for employers with between two (2) and fifty (50) eligible employees. N.J.S.A. 17B:27A-17 et seq. Counsel states that the Act created the SEH Board to oversee and administer its provisions. N.J.S.A. 17B:27A-29. Counsel states that pursuant to N.J.S.A. 17B:27A-25.9, which directs the Commissioner of DOBI to promulgate rules and regulations to effectuate the provisions of the Act, the SEH Board promulgated regulations to establish procedures and standards for fair and equitable administration of the SEH program. Counsel states that these regulations are set to expire on February 19, 2009.

Counsel states that the SEH Board, which is subject to the requirements of the Open Public Meetings Act, held a regularly scheduled meeting on June 18, 2008. Counsel states that Ms. DeRosa distributed an internal memorandum, previously distributed to all SEH Board members via e-mail on June 13, 2008, analyzing certain issues with regard to the re-adoption of the SEH regulations to any Board member that needed a copy. *See* Certification of Ms. DeRosa, paragraph 5.

Counsel states that the Complainant submitted an OPRA request to DOBI seeking a draft proposal referred to in the June 18, 2008 meeting. Counsel avers that no such proposals were discussed or distributed at the June 18, 2008 meeting, but that it appears that the Complainant is requesting the internal memorandum distributed by Ms. DeRosa.

⁴ The Custodian did not identify the search conducted.

Counsel states that DOBI denied access to the request stating that the record was pre-decisional and considered ACD material exempt from disclosure under OPRA.

Counsel contends that the Complainant erred in requesting a draft proposal, because Ms. DeRosa was actually distributing an internal memorandum regarding issues raised about a re-adoption proposal that had yet to be drafted; thus, no proposal exists. *See* Certification of Ms. DeRosa, paragraph 6. Counsel argues that neither the internal memorandum nor draft proposal, if one existed, is considered a government record pursuant to OPRA.

Counsel argues that In Re: Liquidation of Integrity Insurance Company, 165 N.J. 75, 83 (2000) (citation omitted), the court held that a document must meet two (2) requirements for the deliberative process privilege to apply. First, Counsel avers that the document must have been generated prior to the adoption of the agency's policy or decision. *Ibid.* at 84. Second, Counsel avers that the document must be "deliberative in nature, containing opinions, recommendations, or advice about agency policies." *Ibid.* at 84-85. Counsel contends that the initial burden falls on a state agency to prove that the document in question meets the requirements to be considered ACD material and that once the threshold of deliberative nature has been established, the burden of showing that a compelling or substantial need for the document overrides the agency's interest in non-disclosure falls to the requestor. Counsel asserts that applying the above principles to the instant complaint results in the conclusion that the memorandum sought is exempt from disclosure as ACD material.

Counsel argues that the Complainant's statement that "this document is not pre-decisional in the sense that it was a finished if not ratified proposal," is errant. Counsel asserts that nothing about the re-adoption process is finished and that regulations have not been proposed or adopted yet. Counsel further states that even the Complainant conceded that the SEH Board established an ad hoc committee at the June 18, 2008 meeting in order to review matters to be considered in a re-adoption proposal. *Ibid.* at paragraph 6.

Further, Counsel takes issue with the Complainant's argument that the SEH Board discussed issues involving the re-adoption process at the meeting and that the deliberative process privilege does not apply. Counsel argues that while the SEH Board noted at the June 18, 2008 meeting that there were some issues with regards to the re-adoption process, the SEH Board did not discuss such issues in detail; thus, the deliberative process remains intact. *Ibid.* at paragraph 7.

Moreover, Counsel argues that the internal memorandum contains analysis of the issues in connection with the re-adoption process. Counsel contends that because DOBI has met the threshold for establishing that the requested memorandum is considered ACD material, the burden shifts to the Complainant to demonstrate a compelling or substantial need for disclosure. Counsel contends that the Complainant has failed to do so.

Counsel also argues that, contrary to the Complainant's argument that some of the SEH Board members receiving the internal memorandum were employed by insurance companies, the Legislature specifically required that the SEH Board contain members

from the insurance industry, as well as from the public. N.J.S.A. 17B:27A-29a. Counsel avers that all SEH Board members are obligated to faithfully discharge their statutory duties, including the need to ensure the privacy of ACD material.

Finally, Counsel contends that there is no question that the requested memorandum is exempt from disclosure pursuant to OPRA. Counsel requests that the GRC dismiss this complaint and submits that no knowing and willful violation has occurred.

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 ...[t]he terms shall not include *inter-agency or intra agency advisory, consultative, or deliberative* material.” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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

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

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

The Complainant in the instant complaint states that she submitted an OPRA request to the Custodian on June 23, 2008 for any and all draft proposals, including the one talked about at a June 18, 2008 meeting. The Complainant states that the Custodian responded on June 24, 2008, stating that access to the requested records is denied because the records constitute ACD material. The Complainant contends in the Denial of Access

Complaint that she was seeking the document handed out by Ms. DeRosa to SEH Board members at the June 18, 2008 meeting, which the Complainant thought to be a re-adoption proposal. Further the Complainant asserts that the Custodian failed to bear her burden of proving why the records should be exempt from disclosure pursuant to OPRA.

Conversely, Counsel states in the SOI that, according to Ms. DeRosa's legal certification, the document distributed to SEH Board members on June 18, 2008 was an internal memorandum regarding issues raised about a re-adoption proposal that had yet to be drafted; thus, no proposals exist. Counsel further argues that the internal memorandum clearly meets the two (2) part criterion necessary to designate a record as ACD material.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC⁵ 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. 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.”

⁵ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
Divya Srivastav-Seth v. New Jersey Department of Banking and Insurance, Division of Small Employer Health Program Board,
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Therefore, pursuant to Paff, supra, the GRC must conduct an *in camera* review of the internal memorandum distributed to SEH Board members at the June 18, 2008 public meeting in order to determine the validity of the Custodian's assertion that the record constitutes ACD information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Whether the Custodian's denial of access to the requested record rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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. 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 internal memorandum distributed to Small Employee Health Benefits Board members at the June 18, 2008 meeting in order to determine the validity of the Custodian's assertion that the record constitutes inter-agency or intra-agency advisory, consultative and deliberative information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see No. 1 above), a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁸, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. 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: Frank F. Caruso
Case Manager

⁶ 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.

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

⁸ "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."

Approved By: Catherine Starghill, Esq.
Executive Director

August 4, 2009