



**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**

**December 22, 2009 Government Records Council Meeting**

Frank Amoresano  
Complainant

Complaint No. 2008-168

v.

Rowan University  
Custodian of Record

At the December 22, 2009 public meeting, the Government Records Council (“Council”) considered the December 9, 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 complied with the Council’s November 4, 2009 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council’s Order.
2. The *In Camera* Examination set forth in the table below reveals the Custodian has lawfully denied access to the record listed in the document index pursuant to N.J.S.A. 47:1A-6 because the record was used in the deliberative or decision-making process regarding the scope of the Fiscal 2007 internal audits.
3. There is no need to determine 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 because the Custodian lawfully denied access to the requested record.

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 <sup>1</sup>
1	Audit Risk Assessment & Recommended Audit Plan – June 2006 prepared by Accume Partners	An assessment and recommendation by Accume Partners regarding the scope of the Fiscal 2007 internal audits.	The Custodian asserts that the record is exempt from disclosure as advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1</u> .	<p>The record contains recommendations for the Audit Committee and management to consider in determining the scope of the Fiscal 2007 internal audits (and thus cost) based on the risk assessment estimates of Rowan University made by Accume Partners.</p> <p>As such, the record is exempt from disclosure as advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1</u>. because the record was used in</p>

<sup>1</sup> **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.

				the deliberative or decision-making process regarding the scope of the Fiscal 2007 internal audits.
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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 22<sup>nd</sup> Day of December, 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: January 5, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
December 22, 2009 Council Meeting**

**Frank Amoresano<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-168**

**v.**

**Rowan University<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Any and all audit plans prepared by Accume Partners for the time period March 31, 2006 through July 15, 2008.
2. All cover letters for all audit assignments completed for the time period April 1, 2006 through the present.

**Request Made:** July 16, 2008

**Response Made:** July 22, 2008

**Custodian:** Marguerite Carbonaro-Davey<sup>3</sup>

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

**Records Submitted for *In Camera* Examination:** The Audit Risk Assessment & Recommended Audit Plan prepared in 2006.

**Background**

**November 4, 2009**

Government Records Council's Interim Order. At the November 4, 2009 public meeting, the Government Records Council ("Council") considered the October 21, 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 requested Audit Risk Assessment & Recommended Audit Plan prepared in 2006 to determine the validity of the Custodian's assertion that the record constitutes inter-agency or intra-agency advisory, consultative and deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

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

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

<sup>3</sup> The Custodian originally named in this complaint is Richard Hale.

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

2. **The Custodian must deliver<sup>5</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see No. 1 above), a document or redaction index<sup>6</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>7</sup>, 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 Custodian certified in the Statement of Information that she responded in writing to the Complainant advising that no cover letters responsive to the Complainant's request Item No. 2 existed at the time of the Complainant's request, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, the Custodian has not unlawfully denied access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. 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.

#### **November 5, 2009**

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

#### **November 12, 2009**

Certification of the Custodian in response to the Council's Interim Order with the record requested for the *in camera* review.<sup>8</sup> The Custodian certifies that he is presently serving as the Custodian of Records for this matter.<sup>9</sup> The Custodian also certifies that the record provided is the record requested by the Council in its November 4, 2009 Interim Order. Additionally, the Custodian certifies that the document index enclosed was previously submitted to the GRC with the Statement of Information dated October 27, 2008.

### **Analysis**

#### **Whether the Custodian complied with the Council's November 4, 2009 Interim Order?**

At its November 4, 2009 public meeting, the Council determined that because the Custodian has asserted that the requested record was lawfully denied because the record is exempt from disclosure as advisory, consultative or deliberative ("ACD") material pursuant to N.J.S.A. 47:1A-1.1, the Council must determine whether the legal conclusion asserted by

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<sup>5</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>6</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

<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."

<sup>8</sup> No document or redaction index was necessary because the entire record was withheld from disclosure to the Complainant.

<sup>9</sup> The present Custodian for purposes of this matter is now Joseph F. Scully, Jr., Chief Financial Officer. Frank Amoresano v. Rowan University, 2008-168 – *In Camera* Findings and Recommendations of the Executive Director

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 November 12, 2009.

The Custodian provided the GRC with a legal certification, document index and the unredacted record requested for the *in camera* inspection on November 12, 2009. Therefore, the Custodian timely complied with the Council's November 4, 2009 Interim Order.

### **Whether the Custodian unlawfully denied the Complainant access to the requested record?**

The Custodian contends that the Audit Risk Assessment & Recommended Audit Plan is ACD material which is not subject to disclosure pursuant to N.J.S.A. 47:1A-1.1. The Custodian contends that the report, prepared by Accume Partners, contained recommendations on which areas Rowan University should be audited and that the Audit Committee took action based on said recommendations. Conversely, the Complainant argues that the audit plan would give taxpayers a clear indication of how Rowan University is using public funds.

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.

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 <sup>10</sup>
1	Audit Risk Assessment & Recommended Audit Plan – June 2006 prepared by Accume Partners	An assessment and recommendation by Accume Partners regarding the scope of the Fiscal 2007 internal audits.	The Custodian asserts that the record is exempt from disclosure as advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1</u> .	<p>The record contains recommendations for the Audit Committee and management to consider in determining the scope of the Fiscal 2007 internal audits (and thus cost) based on the risk assessment estimates of Rowan University made by Accume Partners.</p> <p>As such, the record is exempt from disclosure as advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1</u> because the</p>

<sup>10</sup> **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.

				record was used in the deliberative or decision-making process regarding the scope of the Fiscal 2007 internal audits.
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Thus, the Custodian lawfully denied access to the requested record because it is exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. because the record was used in the deliberative or decision-making process regarding the scope of the Fiscal 2007 internal audits. As such, there is no need to determine 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 because the Custodian lawfully denied access to the requested record.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council’s November 4, 2009 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council’s Order.
2. The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to the record listed in the document index pursuant to N.J.S.A. 47:1A-6 because the record was used in the deliberative or decision-making process regarding the scope of the Fiscal 2007 internal audits.
3. There is no need to determine 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 because the Custodian lawfully denied access to the requested record.

Prepared By: Catherine Starghill, Esq.  
Executive Director

December 9, 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

November 4, 2009 Government Records Council Meeting

Frank Amoresano  
Complainant

Complaint No. 2008-168

v.

Rowan University  
Custodian of Record

At the November 4, 2009 public meeting, the Government Records Council ("Council") considered the October 21, 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 requested Audit Risk Assessment & Recommended Audit Plan prepared in 2006 to determine the validity of the Custodian's assertion that the record constitutes inter-agency or intra-agency advisory, consultative and deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see No. 1 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 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.**

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<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."



3. The Custodian certified in the Statement of Information that she responded in writing to the Complainant advising that no cover letters responsive to the Complainant's request Item No. 2 existed at the time of the Complainant's request, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, the Custodian has not unlawfully denied access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. 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 4<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.

Janice L. Kovach, Secretary  
Government Records Council

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

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Frank Amoresano<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-168**

**v.**

**Rowan University<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

1. Any and all audit plans prepared by Accume Partners for the time period March 31, 2006 through July 15, 2008.
2. All cover letters for all audit assignments completed for the time period April 1, 2006 through the present.

**Request Made:** July 16, 2008

**Response Made:** July 22, 2008

**Custodian:** Marguerite Carbonaro-Davey<sup>3</sup>

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

**Background**

**July 16, 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.

**July 22, 2008**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fourth (4<sup>th</sup>) business day following receipt of such request. The Custodian states that access to the records responsive to request Item No. 1 is denied because audit plans are considered inter-agency or intra-agency advisory, consultative and deliberative ("ACD") material pursuant to N.J.S.A. 47:1A-1.1. Additionally, the Custodian states that no cover letters responsive to request Item No. 2 for the time period April 1, 2006 through the present exist.

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

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

<sup>3</sup> The Custodian originally named in this complaint is Richard Hale.

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

**August 4, 2008**

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching the Complainant’s OPRA request dated July 16, 2008 with the Custodian’s notes thereon.

The Complainant states that he submitted a request to Rowan University on July 16, 2008. The Complainant states that he received a response from the Custodian on July 22, 2008 denying access to the records responsive to request Item No. 1 as ACD material and that no records responsive to request Item No. 2 exist.

The Complainant argues that audit plans are more than ACD material. The Complainant contends that the requested audit plans represent what will be the completed plans and is a normal document in the audit profession. The Complainant asserts that the requested records are essential to showing the public on what Rowan University is spending its public funds. The Complainant contends that it seems odd that Rowan University spent in excess of \$250,000 to have Accume Partners create audit plans yet no plans or cover letters for completed assignments exist.

Additionally, the Complainant contends that he does not believe that the person who responded to the OPRA request is the actual custodian of record for Rowan University.

The Complainant agrees to mediate this complaint.

**August 14, 2008**

Offer of Mediation sent to both parties.

**August 20, 2008**

The Custodian agrees to mediate this complaint.

**August 22, 2008**

Complaint referred to mediation.

**October 3, 2008**

Complaint referred back from mediation.

**October 8, 2008**

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

**October 17, 2008**

E-mail from the Custodian’s Counsel to the GRC. Counsel states that this e-mail serves as written notification that the GRC has granted an extension of time until October 24, 2008 to submit the SOI.

**October 27, 2008**

Custodian’s SOI with the following attachments:

- Complainant's OPRA request dated July 16, 2008 with the Custodian's notes thereon.
- Certification of the Custodian dated October 1, 2008.

The Custodian certifies 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").<sup>5</sup>

The Custodian certifies that she was the designated custodian of record at the time of the Complainant's OPRA request. The Custodian certifies that she received the Complainant's request on October 16, 2008 and responded to the Complainant on October 22, 2008 stating that the requested audit plans responsive to request Item No. 1 are considered ACD material pursuant to N.J.S.A. 47:1A-1.1. Further, the Custodian certifies that she informed the Complainant that no records responsive to request Item No. 2 exist.

The Custodian's Counsel states that Rowan University's internal auditor, Accume Partners, prepared an Audit Risk Assessment & Recommended Audit Plan in June 2006 at the direction of Rowan's administration. Counsel avers that the purpose of the plan was to provide pre-decisional advice to Rowan's president and vice president of the Administration and Finance Divisions for their consideration and action. Counsel contends that the plan is exempt in its entirety from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1.

Counsel states that in a recent GRC decision, Bellan-Boyer v. New Jersey Department of Community Affairs, GRC Complaint No. 2007-143 (July 2008), the GRC provided an analysis regarding the ACD exemption. Counsel states that in that complaint, the GRC stated that N.J.S.A. 47:1A-1.1 excludes ACD material from the definition of a government record, which is intended to exclude records that are subject of the "deliberative process privilege." Counsel states that the GRC cited to O'Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006)(in which the GRC examined the deliberative process privilege for guidance in implementing the ACD exemption) and In Re: Liquidation of Integrity Insurance Co., 165 N.J. 75,84 (2000).

Counsel asserts that the Audit Risk Assessment & Recommended Audit Plan was prepared by Accume Partners for the purpose of providing pre-decisional advice to the president and vice president of the Administration and Finance Divisions, who, in turn, made recommendations to the Audit Committee. Counsel avers that the audit plan provided recommendations and reasons therefor to audit particular programs. Counsel avers that Rowan University would then render a decision on which programs would be audited based on such recommendations. Counsel contends that based on the above, the requested Audit Risk Assessment & Recommended Audit Plan is clearly pre-decisional and deliberative in nature.

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<sup>5</sup> The Custodian does not certify as to the search undertaken for the requested records.  
Frank Amoresano v. Rowan University, 2008-168 – Findings and Recommendations of the Executive Director

**August 10, 2009**

E-mail from the GRC to the Custodian's Counsel. The GRC states that it has reviewed the evidence of record and has additional questions. The GRC requests that the Custodian provide a legal certification responding to the following:

1. What is the general nature of the requested audit reports, as prepared by Accume Partners, i.e., are the audits considered performance evaluations, as in Meaders v. William Patterson University, GRC Complaint No. 2005-131 (June 2007)?
2. To what extent are said audits used in performance evaluations and/or employee assessments?
3. Whether Rowan University took any formal action based on the audits prepared by Accume Partners?

The GRC requests that the Custodian respond to each question as thoroughly as possible and provide the requested legal certification by close of business on August 14, 2009.

**August 12, 2009**

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension until August 21, 2009 to respond because she will need to personally review the records responsive in order to prepare an accurate legal certification.

**August 12, 2009**

E-mail from the GRC to the Custodian's Counsel. The GRC grants an extension until August 21, 2009 to provide the requested legal certification.

**August 20, 2009**

Legal certification of the Custodian. The Custodian states that she received the Complainant's OPRA request for all audit plans prepared by Accume Partners for the period March 31, 2006 through July 15, 2008 on July 16, 2008 and responded in writing to the Complainant on July 22, 2008.

The Custodian certifies that Accume Partners prepared an audit risk assessment at the request of the Audit Committee. The Custodian certifies that the audit risk assessment included an organization-wide analysis consisting of a broad set of business risk assessment procedures and activities that identified high risk areas of Rowan University.

The Custodian certifies that Accume Partners presented its findings to Rowan University in a report entitled Audit Risk Assessment & Recommended Audit Plan, which is the record requested in the instant complaint. The Custodian certifies that the report included recommendations on which areas of Rowan University should be audited. The Custodian certifies that the report was reviewed by management and then submitted to the Audit Committee for approval. The Custodian certifies that management may have selected areas to audit in lieu of those identified in the report.

The Custodian certifies that the requested Audit Risk Assessment & Recommended Audit Plan was pre-decisional advice to management and the Audit Committee for their consideration and action. Further, the Custodian certifies that the

Audit Committee took action based on recommendations made by Accume Partners. The Custodian certifies that Accume Partners conducted said interviews after the Audit Committee approved the Audit Risk Assessment & Recommended Audit Plan.

### **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.

In the instant complaint, the Custodian contends that the Audit Risk Assessment & Recommended Audit Plan is ACD material not subject to disclosure pursuant to N.J.S.A. 47:1A-1.1. The Custodian contends that the report, prepared by Accume Partners, contained recommendations on which areas of Rowan University should be audited and that the Audit Committee took action based on said recommendations. Conversely, the Complainant argues that the audit plan would give taxpayers a clear indication of how Rowan University is using public funds.

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>6</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. 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 requested Audit Risk Assessment & Recommended Audit Plan prepared in 2006 to determine the validity of the Custodian’s assertion that the record constitutes inter-agency or intra-agency advisory, consultative and deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Additionally, in Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded, stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant’s request existed. The GRC determined that, because the Custodian certified

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<sup>6</sup> Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).  
Frank Amoresano v. Rowan University, 2008-168 – Findings and Recommendations of the Executive Director

that no records responsive to the request existed, there was no unlawful denial of access to the requested records.

Similarly, in this complaint, the Custodian certified in the SOI that she responded in writing to the Complainant advising that no cover letters responsive to the Complainant's request Item No. 2 existed at the time of the Complainant's request, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, the Custodian has not unlawfully denied access to the requested records pursuant to Pusterhofer, *supra*.

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

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. 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 requested Audit Risk Assessment & Recommended Audit Plan prepared in 2006 to determine the validity of the Custodian's assertion that the record constitutes inter-agency or intra-agency advisory, consultative and deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver<sup>7</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see No. 1 above), a document or redaction index<sup>8</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>9</sup>, 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 Custodian certified in the Statement of Information that she responded in writing to the Complainant advising that no cover letters responsive to the Complainant's request Item No. 2 existed at the time of the Complainant's request, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, the Custodian has not unlawfully denied

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<sup>7</sup> The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

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

<sup>9</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."

access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

4. 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  
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Approved By: Catherine Starghill, Esq.  
Executive Director

October 21, 2009