



**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**

David Dalesky  
Complainant

Complaint No. 2008-61

v.

Borough of Raritan (Somerset)  
Custodian of Record

At the November 18, 2009 public meeting, the Government Records Council (“Council”) considered the November 10, 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. Because N.J.S.A. 40A:14-118 provides for the creation and establishment of a police force, and because nothing contained within that statute prevents the appointment by the governing body of committees or commissions to conduct investigations of the operation of the police force, and because the Borough of Raritan’s citizen police committee was appointed by the governing body to conduct an investigation of the operations of the Borough Police Department, the citizen police committee is a duly formed agency of the Borough and is subject to the provisions of OPRA pursuant to N.J.S.A. 47:1A-1.1.
2. Because the Special Police Committee Report requested by the Complainant in his request dated July 10, 2007 is still a draft document, and because draft documents in their entirety comprise advisory, consultative or deliberative material, the Custodian has lawfully denied the Complainant access to the Special Police Committee Report pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-6, and the courts’ decisions in In re Readoption with Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004) and Jennifer Beck and Sean T. Kean v. Barbara O’Hare, Superior Court of New Jersey, Law Division – Mercer County, Docket No. MER-L-2411-07 (November 26, 2007).
3. Because Item #1 of the Complainant’s January 3, 2008 request is not a request for identifiable government records, and because the Custodian is not required to conduct research in response to a request, the request is invalid and the



Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

4. Because the Custodian certified that there were no records responsive to the Complainant's January 3, 2008 request for Item #2, Item #3 and Item #4, and because there is no credible evidence to refute the Custodian's certifications in the record, the Custodian did not unlawfully deny the Complainant access to the requested records pursuant to N.J.S.A. 47:1A-1.1. See Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).

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**

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

**David Dalesky<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-61**

v.

**Borough of Raritan (Somerset)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:<sup>3</sup>**

Request dated July 10, 2007

A copy of the Council-initiated study of the Raritan Police Department.

Request dated January 3, 2008

1. A copy of any and all resolutions, ordinances or other formal action taken by the Borough Council in establishing the citizen committee which recently completed a study of the police department, empowering the committee to take certain action on behalf of the Borough and selecting the individuals to serve on said committee.
2. A copy of the minutes of each and every meeting conducted by the citizen police committee.
3. A copy of each and every resolution adopted by the citizen police committee at its meetings.
4. A copy of the bylaws of the citizen police committee, if any.

**Request Made:** July 10, 2007 and January 3, 2008

**Response Made:** July 17, 2007 and January 8, 2008

**Custodian:** Pamela A. Huefner, RMC

**GRC Complaint Filed:** March 28, 2008<sup>4</sup>

**Background**

**July 10, 2007**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

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<sup>1</sup> Represented by David J. DeFillippo, Esq., of Klatsky, Sciarrabone & DeFillippo (Red Bank, NJ).

<sup>2</sup> Represented by Paul R. Rizzo, Esq., of DiFrancesco, Bateman, Coley, Yospin, Kunzman, Davis & Lehrer, P.C. (Warren, NJ).

<sup>3</sup> There were other records requested that are not relevant to this complaint.

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

**July 17, 2007**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fifth (5<sup>th</sup>) business day following receipt of such request. The Custodian states that access to the requested record is denied because the requested record, which is titled the Special Police Committee Report ("SPCR"), has not been released to the public and is therefore not available. The Custodian informs the Complainant that as soon as the Council has completed its discussion of the report it will be released. The Custodian further informs the Complainant that she will inform the Complainant when the record is available.

**August 9, 2007**

Letter from the Custodian to the Complainant. The Custodian returns check number 372 in the amount of ten dollars (\$10.00) to the Complainant and informs him that the check is being returned because she does not know when the requested record will be available. The Custodian states that she will inform the Complainant of the amount of the fee when the record becomes available.

**October 9, 2007**

Letter from the Complainant's Counsel to the Custodian's Counsel. The Complainant's Counsel informs the Custodian's Counsel that the Complainant had filed an OPRA request for the SPCR which was prepared by an informal committee comprised of certain Borough residents and concerned citizens. Counsel further contends that the Complainant has not yet received the SPCR, and if it is not forthcoming a complaint will be filed in Superior Court.<sup>5</sup>

**October 12, 2007**

Letter from the Custodian's Counsel to the Complainant's Counsel. The Custodian's Counsel informs the Complainant's Counsel that the report is not being prepared by an informal committee, but rather by a committee formed by the Borough Council, and that it is an agency of the Borough pursuant to N.J.S.A. 47:1A-1.1. Counsel further asserts the SPCR is exempt from disclosure as advisory, consultative or deliberative ("ACD") material pursuant to N.J.S.A. 47:1A-1.1.

**October 25, 2007**

Letter from the Complainant's Counsel to the Custodian's Counsel. The Complainant's Counsel disagrees with the Custodian's Counsel that the informal committee is an agency of the Borough, and therefore, disagrees with the Custodian's Counsel that the requested record is exempt from disclosure. The Complainant's Counsel further asserts that if the SPCR is ACD, the factual portion of the SPCR must be disclosed. Finally, the Complainant's Counsel requests that the Custodian's Counsel deliver several documents to the Complainant's Counsel.

**November 2, 2007**

Letter from the Custodian's Counsel to the Complainant's Counsel. The Custodian's Counsel informs the Complainant's Counsel that if the Complainant's Counsel requests records he must file an OPRA request. The Custodian's Counsel

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<sup>5</sup> Counsel also mentioned in the letter that he also asked the Borough's labor attorney, Steven Glickman, Esq., for the requested record but it was not forthcoming.  
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discloses to the Complainant's Counsel five (5) charts which the Custodian's Counsel states constitute the only factual material that was contained within the SPCR.

### **January 3, 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.

### **January 8, 2008**

Custodian's response to the OPRA request. The Custodian's Counsel responds in writing to the Complainant's OPRA request on the third (3<sup>rd</sup>) business day following receipt of such request. Counsel states that the draft copy of the SPCR and any committee meeting minutes or resolutions are exempt from disclosure as ACD material. Counsel further states that a resolution was passed at a meeting regarding the formation of the citizen police committee, but there is no written record responsive to the Complainant's request. Counsel states that he will provide a copy of the meeting minutes for the meeting when the resolution was passed if the Complainant so desires. Finally, Counsel states that no bylaws of the citizen police committee exist.

### **March 28, 2008**

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

- Complainant's OPRA request dated July 10, 2007
- Custodian's response to the OPRA request dated July 17, 2007
- Letter from the Custodian to the Complainant dated August 9, 2007
- Letter from the Complainant's Counsel to the Custodian's Counsel dated October 9, 2007
- Letter from the Custodian's Counsel to the Complainant's Counsel dated October 12, 2007
- Letter from the Complainant's Counsel to the Custodian's Counsel dated October 25, 2007
- Letter from the Custodian's Counsel to the Complainant's Counsel dated November 2, 2007
- Complainant's OPRA request dated January 3, 2008
- Custodian's response to the OPRA request dated January 8, 2008

The Complainant states that his OPRA request dated July 10, 2007 was denied because the Custodian claimed the requested record was not yet available to the general public because it was being discussed by the Council. The Complainant also states that an OPRA request submitted by the Complainant's Counsel dated October 9, 2007 was denied by the Custodian's Counsel in writing on October 12, 2007 because Counsel asserted the requested record was exempt from disclosure as ACD material. The Complainant further states that his OPRA request dated January 3, 2008 was denied by the Custodian's Counsel because Counsel asserted the requested records were exempt from disclosure as ACD material, except for a copy of the bylaws of the citizen police committee, which Counsel stated did not exist.

The Complainant argues that his requests should be granted because the citizen police committee is not a public body or other agency of the Borough of Raritan pursuant to N.J.S.A. 10:4-8(a) and the Supreme Court's decision in Times of Trenton Publishing Corp. v. Lafayette Yard Comm. Dev. Corp., 183 N.J. 519, 529-530 (2005). For this reason, the Complainant contends the requested records are not exempt under OPRA.

The Complainant further argues that, even if the citizen police committee was a public body or other agency of the Borough, the Custodian could only withhold from disclosure the portions of the SPCR that are ACD. The Complainant states that those parts of the SPCR which are ACD are restricted to segments which are pre-decisional and deliberative in nature. The Complainant contends that the Custodian's blanket refusal to disclose the SPCR violates OPRA.<sup>6</sup>

The Complainant agrees to mediate this complaint.

**April 7, 2008**

Offer of Mediation sent to the Custodian.

**April 11, 2008**

The Custodian agrees to mediate this complaint.

**April 11, 2008**

The complaint is referred for mediation.

**May 23, 2008**

The complaint is referred back from mediation to the GRC for adjudication.

**May 23, 2008**

Letter from the GRC to the Complainant. The GRC informs the Complainant that the matter has been referred back from mediation to the GRC for adjudication and offers the Complainant an opportunity to amend his complaint before adjudication commences.

**June 3, 2008**

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

**June 9, 2008**

Custodian's SOI without attachments. The Custodian certifies that she did not conduct a search for the requested records because she states that the records are readily identifiable and available. The Custodian also certifies that the records that may have been responsive to the request were not destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that in November 2006 the citizen police committee was formed pursuant to N.J.S.A. 40A:14-118 in order to evaluate the Borough Police Department. The Custodian further certifies that in June 2007 the citizen police

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<sup>6</sup> The Complainant only mentions the record requested in his July 10, 2007 OPRA request in his legal argument.

committee submitted a report that predominantly provided recommendations and suggestions concerning the operation of the Police Department. The Custodian avers that the Borough Council has been reviewing the report and considering implementations of some of the recommendations; however, they have not yet taken formal action.

The Custodian certifies that she received the Complainant's OPRA request on July 10, 2007 and that she responded to the request on July 17, 2007, informing the Complainant that the requested police study had not yet been released to the public and is therefore not available.<sup>7</sup> The Custodian further certifies that she informed the Complainant that as soon as the Borough Council completed their discussion of the report it would be released. The Custodian avers that she returned the Complainant's payment which the Complainant had submitted with the July 10, 2007 records request by cover letter dated August 9, 2007, wherein the Custodian states she again informed the Complainant that she would advise him when the requested record was available.

The Custodian certifies that there were communications between the Complainant's Counsel and the Custodian's Counsel in which the Complainant's Counsel stated that the SPCR was not yet provided to the Complainant and the Custodian's Counsel advised the Complainant's Counsel that the SPCR was exempt from disclosure as ACD material. The Custodian certifies that on November 2, 2007, the Custodian's Counsel disclosed five (5) charts which constituted the factual data contained in the SPCR.

The Custodian certifies that she received another OPRA request from the Complainant on January 2, 2008, requesting Items #1 through #4 of the records relevant to the complaint. The Custodian certifies that Custodian's Counsel responded to the request on January 8, 2007, informing the Complainant that his request for Item #1 through #3 of the records relevant to the complaint is denied because they are exempt from disclosure as ACD material. The Custodian avers that Counsel informed the Complainant that Item #4 of the records relevant to the complaint does not exist.

The Custodian certifies that the SPCR is pre-decisional and deliberative material and contains opinions, recommendations or advice about Borough policies. The Custodian certifies that, as such, the SPCR is exempt from disclosure as ACD material. In support of her argument the Custodian cites Education Law Center Ex Rel. Burke v. N.J. Department of Education, 396 N.J. Super. 634 (App. Div. 2007).

### **June 16, 2008**

Letter from the GRC to the Custodian's Counsel. The GRC informs Counsel that the Custodian's document index included in her SOI is defective because it does not list all of the records responsive to the Complainant's request. The GRC provides instructions for the completion of a conforming document index.

### **June 20, 2008**

Custodian's certification. The Custodian forwards as a supplement to her SOI a separate certification wherein the Custodian certifies that the citizen police committee did

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<sup>7</sup> The Custodian certifies that she attached a copy of the Complainant's OPRA request to the SOI, but a copy was not attached upon receipt of the SOI by the GRC.

not maintain minutes of its meetings and no documents exist responsive to Item #2 of the Complainant's request dated January 3, 2008.

**October 10, 2008**

Letter from the GRC to the Custodian. The GRC informs the Custodian that her SOI failed to include a copy of the Complainant's OPRA requests. The GRC also informs the Custodian that her SOI did not address all of the Complainant's requests. The GRC asks the Custodian to cure the deficiencies.

**October 29, 2008**

Letter from the Custodian's Counsel to the GRC.<sup>8</sup> Counsel submits to the GRC copies of the Complainant's two (2) OPRA requests dated July 10, 2007 and January 2, 2008. Counsel also submits to the GRC an updated SOI to address information missing from the originally submitted SOI. Counsel also submits to the GRC a copy of the minutes from the special meeting held on November 9, 2006 at which the citizen police committee was formed, as well as a letter outlining the function of said committee. Counsel fails to send the corrected document index which was requested by the GRC in its letter to the Custodian dated June 16, 2008.

**July 16, 2009**

Facsimile transmission from the GRC to the Complainant. The GRC requests that the Complainant notify the GRC if the Custodian has disclosed to the Complainant any of the records the Complainant requested in his July 10, 2007 or January 2, 2008 OPRA requests.

**October 2, 2009**

Telephone call from the GRC to the Custodian's Counsel. The GRC asks Counsel if he knew whether the citizen police committee attempted to pass any resolutions during their sessions. Counsel states that it is unlikely they did attempt to pass any resolutions and deferred to the Custodian for a definitive answer to the GRC's question.

**October 2, 2009<sup>9</sup>**

Custodian's certification to the GRC. The Custodian forwards as a supplement to her SOI a separate certification wherein the Custodian certifies that the citizen police committee did not have the authority to nor did they attempt to pass any resolutions and no documents exist responsive to Item #3 of the Complainant's request dated January 3, 2008.

**Analysis**

**Whether the citizen police committee is a public agency of the Borough of Raritan, and as such, subject to the provisions of OPRA?**

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<sup>8</sup> Counsel fails to send the corrected document index which was requested by the GRC in its letter to the Custodian dated June 16, 2008.

<sup>9</sup> Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.



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* in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, 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 also provides that:

“...all *government records* shall be subject to public access unless exempt from such access...” (Emphasis added.) N.J.S.A. 47:1A-1.

OPRA’s provisions apply only to records of a public agency. In the instant complaint; however, there was substantial disagreement between the parties concerning whether the citizen police committee was a public agency of the Borough. The Complainant was adamant that it was not. Conversely, the Custodian’s Counsel was emphatic that it was a public agency of the Borough and provided the GRC with documentation that the citizen police committee was appointed by the governing body to conduct an investigation of the operations of the police department. The Custodian certified that the citizen police committee was formed pursuant to N.J.S.A. 40A:14-118 in order to evaluate the Borough Police Department. N.J.S.A. 40A:14-118 provides, in relevant part:

“The governing body of any municipality, by ordinance, may create and establish, as an executive and enforcement function of municipal government, a police force, whether as a department or as a division, bureau or other agency thereof, and provide for the maintenance, regulation and control thereof...Nothing herein contained shall prevent the appointment by the governing body of committees or commissions to conduct investigations of the operation of the police force, and the delegation to such committees or commissions of such powers of inquiry as the governing body deems necessary or to conduct such hearing or investigation authorized by law...” N.J.S.A. 40A:14-118

Therefore, because N.J.S.A. 40A:14-118 provides for the creation and establishment of a police force, and because nothing contained within that statute prevents the appointment by the governing body of committees or commissions to conduct investigations of the operation of the police force, and because the Borough of Raritan’s citizen police committee was appointed by the governing body to conduct an investigation of the operations of the Borough Police Department, the citizen police committee is a duly formed subordinate board of the Borough and is subject to the provisions of OPRA pursuant to N.J.S.A. 47:1A-1.1.

## **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.

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’s Denial of Access Complaint is alleged by the Complainant to encompass three (3) denied OPRA requests dated July 10, 2007, October 9, 2007 and January 3, 2008.

### Records Request dated July 10, 2007 - a copy of the Council-initiated study of the Raritan Police Department.

The Complainant’s request dated July 10, 2007 sought a copy of one (1) record which the Complainant described as a Council-initiated study of the Raritan Police Department. The Custodian determined that the record responsive to the Complainant’s request was the SPCR prepared by the citizen police committee. The Custodian denied the Complainant access to the record because she stated it had not yet been released to the public and was therefore not available. The Custodian informed the Complainant that as soon as the Borough Council completed its discussion of the report it would be released. The Custodian’s Counsel subsequently informed the Complainant’s Counsel that the SPCR constituted ACD material and was exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

In the SOI, the Custodian certified that the SPCR was exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1 because it was pre-decisional and deliberative in nature, containing opinions and recommendations. The Custodian certified that all purely factual material contained in the SPCR was disclosed to the Complainant through his legal counsel. The Custodian also certified the SPCR predominantly provided recommendations and suggestions concerning the operation of the Police Department and that the Borough Council has been reviewing said report and

considering implementations of some of the recommendations; however, they had not yet taken formal action with respect to the document.

Although the SPCR is still under review by the Borough Council, the Custodian certified the Borough's intention is to release it to the public when complete. Clearly then, the SPCR is still a preliminary version of the requested record, *i.e.*, a draft document. As a general matter, draft documents are advisory, consultative and deliberative communications and 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.

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.

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

The New Jersey Appellate Division has also reached this conclusion with regard to draft documents. In Home News v. Board of Education of the Borough of Spotswood, 286 N.J. Super. 380 (App. Div. 1996), a reporter sought access to the Board’s 1994 budget workbook which the trial court characterized as “...worksheets reflecting presentations and analyses of budgetary information, gathered by the business administrator and others...” *Id.* at 387. The court in Home News, affirming the trial court’s holding that the newspaper was not entitled to disclosure of the workbook, noted “...[the workbook] was no more subject to disclosure than any other papers reflecting

work in progress toward the goal of producing a document that will eventually become a public record.” *Id.* at 387-88.

Draft documents were also discussed in the unreported section of In re Readoption, *supra*. Upon reviewing an OPRA request to the Department of Corrections (DOC) for draft regulations and draft statutory revisions, the court stated that these drafts were “all clearly pre-decisional and reflective of the deliberative process.” *Id.* at 18. It further held that:

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

More recently, in the unpublished opinion Jennifer Beck and Sean T. Kean v. Barbara O’Hare, Superior Court of New Jersey, Law Division – Mercer County, Docket No. MER-L-2411-07 (November 26, 2007), the court reviewed an action to challenge an OPRA request that was denied in part by the custodian because one of the records, a draft final report, was determined to be exempt from disclosure as inter-agency or intra-agency advisory, consultative or deliberative material (“ACD”). After finding that the withheld record was intra-agency, the court turned to the issue of whether the record fell within the ACD exemption. In considering this issue, the court found Home News relevant, observing “...Home News...support[s] the notion that preliminary or draft reports are exempt from disclosure.” *Id.* at 21.

In the instant complaint, the Custodian certified that the SPCR provided recommendations and suggestions concerning the operation of the Police Department and that the Borough Council was reviewing the record with the intention of releasing it to the public when complete; therefore it remains a draft document.

Accordingly, because the SPCR requested by the Complainant in his request dated July 10, 2007 is still a draft document, and because draft documents in their entirety comprise advisory, consultative or deliberative material, the Custodian has lawfully denied the Complainant access to the SPCR pursuant to N.J.S.A. 47:1A-1.1., N.J.S.A. 47:1A-6., and the courts’ decisions in In re Readoption, *supra* and Jennifer Beck, *supra*.

It should be noted that the Custodian certified that all the factual content of the SPCR was disclosed to the Complainant.

Records Request dated October 9, 2007 - a copy of the Council-initiated study of the Raritan Police Department.

The Complainant claims the Complainant's Counsel submitted a second OPRA request for the SPCR via a letter sent to the Custodian's Counsel dated October 9, 2007; however, the Complainant has erred. The Complainant's Counsel did send a letter dated October 9, 2007 to the Custodian's Counsel, but it was neither a request for government records pursuant to OPRA nor did it contain an OPRA request. The Complainant's Counsel informed the Custodian's Counsel that the Complainant had filed an OPRA request for the SPCR on July 10, 2007, but the record was never furnished by the Custodian to the Complainant. The Complainant's Counsel went on to inform the Custodian's Counsel that if the SPCR was not delivered forthwith, the Complainant would file a complaint in Superior Court. Further, the Custodian's Counsel understood the letter to be in the form of a warning that if the SPCR was not disclosed in response to the Complainant's July 10, 2007 OPRA request legal action would follow. The Custodian's Counsel's understanding of the letter was evident because the Custodian's Counsel replied to the Complainant's Counsel by letter dated October 12, 2007 wherein he said, in part, "...any complaint seeking to compel production would be frivolous, and we will seek fees pursuant to N.J.S.A. 2A:15-59.1 and the Rules of Court in the event the [Complainant] files such a complaint."

Whether or not Complainant's Counsel intended his October 9, 2007 letter to be an OPRA request is immaterial because it was not framed as an OPRA request and it was not understood by the recipient to be an OPRA request. As such, the GRC does not recognize Complainant's Counsel's letter dated October 9, 2007 to be an OPRA request.

Item #1 of Records Request dated January 3, 2008 - a copy of any and all resolutions, ordinances or other formal action taken by the Borough Council in establishing the citizen committee which recently completed a study of the police department, empowering the committee to take certain action on behalf of the Borough and selecting the individuals to serve on said committee.

Although not raised as a reason for denial of access by the Custodian in the SOI, the Complainant's request is overly broad in that it does not specify identifiable government records and therefore requires the Custodian to conduct research to determine which, if any, government records are responsive to the Complainant's request.

OPRA requests that fail to identify specific government records and requests that require the Custodian to conduct research have been deemed as invalid requests under OPRA. Specifically, the New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, *agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files.*" (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),<sup>10</sup> the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records “accessible.” “As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents.”<sup>11</sup>

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that “...when a request is ‘complex’ because it fails to specifically identify the documents sought, then that request is not ‘encompassed’ by OPRA...” The court also quoted N.J.S.A. 47:1A-5.g in that “[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” The court further stated that “...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency’s need to...generate new records...”

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that “[b]ecause the Complainant’s OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).”

In this complaint, the Complainant’s request is broad and unclear because it does not specifically identify a government record, therefore to fulfill the Complainant’s request the Custodian would have to conduct research which she is not obligated to do.

Accordingly, because Item #1 of the Complainant’s January 3, 2008 request is not a request for identifiable government records, and because the Custodian is not required to conduct research in response to a request, the request is invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG, supra, Bent, supra, NJ Builders, supra, and Schuler, supra.

Item #2 of Records Request dated January 3, 2008 - a copy of the minutes of each and every meeting conducted by the citizen police committee.

Item #3 of Records Request dated January 3, 2008 - a copy of each and every resolution adopted by the citizen police committee at its meetings.

Item #4 of Records Request dated January 3, 2008 - a copy of the bylaws of the citizen police committee, if any.

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<sup>10</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>11</sup> As stated in Bent, supra.

The Custodian submitted to the GRC a certification dated June 20, 2008, wherein the Custodian certified that the citizen police committee did not maintain minutes of its meetings and no documents exist responsive to Item #2 of the Complainant's request dated January 3, 2008.

The Custodian also submitted to the GRC a certification dated October 2, 2009, wherein the Custodian certified that the citizen police committee did not have the authority to nor did they attempt to pass any resolutions and no documents exist responsive to Item #3 of the Complainant's request dated January 3, 2008.

With respect to Item #4 of the Complainant's request dated January 3, 2008, the Custodian certified in the SOI that the Custodian's Counsel determined that no bylaws exist for the citizen police committee; however, the Custodian averred that a document which outlined the function of the committee was disclosed to the Complainant by the Custodian's Counsel.

Pursuant to N.J.S.A. 47:1A-1.1, a government record is only responsive to an OPRA request if it has "been made, maintained or kept on file...or has been received in the course of [the public agency's] official business ..."

The Council has held that if a custodian has sufficiently borne his/her burden of proving that there is no record responsive to the Complainant's request, the Custodian could not have unlawfully denied access. In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Complainant sought a copy of a telephone bill from the custodian in an effort to obtain proof that a phone call was made to him by an official from the Department of Education. The custodian provided a certification in his submission to the GRC that averred that the requested record was nonexistent. The Council subsequently determined that "[t]he Custodian has certified that the requested record does not exist. Therefore, the requested record can not (sic) be released and there was no unlawful denial of access."

Therefore, because the Custodian certified that there were no records responsive to the Complainant's January 3, 2008 request for Item #2, Item #3 and Item #4, and because there is no credible evidence to refute the Custodian's certifications in the record, the Custodian did not unlawfully deny the Complainant access to the requested records pursuant to N.J.S.A. 47:1A-1.1. See Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because N.J.S.A. 40A:14-118 provides for the creation and establishment of a police force, and because nothing contained within that statute prevents the appointment by the governing body of committees or commissions to conduct investigations of the operation of the police force, and because the Borough of Raritan's citizen police committee was appointed by the governing body to



conduct an investigation of the operations of the Borough Police Department, the citizen police committee is a duly formed agency of the Borough and is subject to the provisions of OPRA pursuant to N.J.S.A. 47:1A-1.1.

2. Because the Special Police Committee Report requested by the Complainant in his request dated July 10, 2007 is still a draft document, and because draft documents in their entirety comprise advisory, consultative or deliberative material, the Custodian has lawfully denied the Complainant access to the Special Police Committee Report pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-6, and the courts' decisions in In re Readoption with Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004) and Jennifer Beck and Sean T. Kean v. Barbara O'Hare, Superior Court of New Jersey, Law Division – Mercer County, Docket No. MER-L-2411-07 (November 26, 2007).
3. Because Item #1 of the Complainant's January 3, 2008 request is not a request for identifiable government records, and because the Custodian is not required to conduct research in response to a request, the request is invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
4. Because the Custodian certified that there were no records responsive to the Complainant's January 3, 2008 request for Item #2, Item #3 and Item #4, and because there is no credible evidence to refute the Custodian's certifications in the record, the Custodian did not unlawfully deny the Complainant access to the requested records pursuant to N.J.S.A. 47:1A-1.1. See Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).

Prepared By: John E. Stewart  
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.  
Executive Director

November 10, 2009