



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Commissioner

**FINAL DECISION**

**June 29, 2010 Government Records Council Meeting**

Neil Yoskin  
Complainant

Complaint No. 2009-117

v.

New Jersey Department of Environmental Protection  
Custodian of Record

At the June 29, 2010 public meeting, the Government Records Council (“Council”) considered the June 22, 2010 *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 April 8, 2010 Interim Order by providing the Council with all records set forth in Paragraph 6 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.
3. Although the Custodian’s failure to respond in writing to the Complainant’s February 20, 2009 OPRA request resulted in a deemed denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007), the Custodian did timely comply with the Council’s April 8, 2010 Interim Order and the *in camera* review revealed that the Custodian lawfully denied access to the Highlands Council Applicability Determination Review and Checklist and Comments to the New Jersey Department of Environmental Protection dated May 5, 2008 because that record is exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. 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.



Record Number	Record Name/Date	Description of Record	Custodian's Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination <sup>1</sup>
28	Highlands Council Applicability Determination Review and Checklist and Comments to NJ DEP dated May 5, 2008	Record consists of recommendations made by Highlands Council staff to DEP staff regarding a Highlands exemption application (4 pages).	Record exempt from disclosure as an inter-agency deliberative record pursuant to <u>N.J.S.A. 47:1A-1.1</u>	The record is exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. Specifically, the record contains recommendations and opinions of Highlands Council staff regarding whether the applicant should be granted a Highlands exemption. The record is used in the deliberative process which culminates in a summary of findings that outlines additional information required of the applicant, as well as things to be considered by

<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.

				DEP staff before a determination as to whether a Highlands exemption may be granted.
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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 29<sup>th</sup> Day of June, 2010

Robin Berg Tabakin, Chair  
Government Records Council

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

Stacy Spera, Secretary  
Government Records Council

**Decision Distribution Date: July 13, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
June 29, 2010 Council Meeting**

**Neil Yoskin<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-117**

v.

**New Jersey Department of Environmental Protection<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** On site examination and copies of any and all records concerning the granting of a Highlands Exemption to Jersey Central Power and Light for the construction of an electrical substation on Lot 2, Block 17 in Tewksbury Township, Hunterdon County, New Jersey (New Jersey Department of Environmental Protection [“NJDEP”] No. CSD070030).

**Request Made:** February 20, 2009

**Response Made:** March 4, 2009

**Custodian:** Matthew J. Coefer

**GRC Complaint Filed:** April 16, 2009<sup>3</sup>

**Records Submitted for *In Camera* Examination:** Highlands Council Applicability Determination Review and Checklist and Comments to NJ DEP dated May 5, 2008

**Background**

**April 8, 2010**

Government Records Council’s Interim Order. At the April 8, 2010 public meeting, the Government Records Council (“Council”) considered the April 1, 2010 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. The Custodian’s failure to respond in writing to the Complainant’s February 20, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

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

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

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

2. The Custodian did not unlawfully deny the Complainant access to any of the requested records by failing or refusing to determine that any such record was responsive to the Complainant's request pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
3. Pursuant to N.J.S.A. 47:1A-1.1, the Custodian has carried his burden of proving a lawful denial of access to an unredacted copy of First Energy Corporation's check dated October 15, 2007.
4. Because the Complainant's request fails to seek specifically identifiable government records and requires the Custodian to conduct research to ascertain the records responsive to the request, said request, with the exception of Record No. 28, is invalid under OPRA 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. NJ Council on Affordable Housing, 390 N.J. Super. 166 (App Div.), *certif. denied* 190 N.J. 394 (2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
5. 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 Record No. 28, the "Highlands Council Applicability Determination Review Checklist and Comments to New Jersey Department of Environmental Protection dated May 5, 2008," to determine the validity of the assertion by the Custodian that the record was not unlawfully withheld from disclosure.
6. **The Custodian must deliver<sup>4</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record described in paragraph #5 above, a document or redaction index<sup>5</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>6</sup> that the 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.**
7. 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.

**April 12, 2010**

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

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<sup>4</sup> The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

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

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

## **April 16, 2010**

Certification of the Custodian in response to the Council's Interim Order attaching the responsive record (Highlands Council Applicability Determination Review and Checklist and Comments to NJ DEP dated May 5, 2008<sup>7</sup>) for the *in camera* review and a document index. The Custodian certifies that he is the Chief Records Custodian for the Office of Record Access within the NJ Department of Environmental Protection ("DEP"). The Custodian also certifies that he has personal knowledge of the matters of this complaint. The Custodian further certifies that the responsive record consists of internal recommendations made by Highlands Council staff to DEP staff regarding a Highlands exemption application. The Custodian certifies that it is his position that this record is an inter-agency deliberative record exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1.

The Custodian also certifies that a review of another record<sup>8</sup> could assist the Council in its *in camera* review as it would provide context and further support for DEP's position that the responsive record for the *in camera* review is an inter-agency deliberative record, and will be provided to the Council upon request.

### **Analysis**

#### **Whether the Custodian complied with the Council's April 8, 2010 Interim Order?**

At its April 8, 2010 public meeting, the Council determined that because the Custodian asserted that access to the responsive record was lawfully denied because it is exempt from disclosure as an inter-agency deliberative record pursuant to N.J.S.A. 47:1A-1.1, the Council must determine whether the legal conclusion(s) asserted by the Custodian is/are properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC ordered an *in camera* review of the record responsive to the Complainant's OPRA request to determine the validity of the Custodian's assertion that the responsive 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 documents, 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 documents provided are the documents 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 April 19, 2010.

The Custodian provided the GRC with a legal certification, the unredacted record responsive for the *in camera* inspection on April 19, 2010, and a document index. Therefore, the Custodian timely complied with the Council's April 8, 2010 Interim Order.

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<sup>7</sup> Record No. 28 of the Custodian's document index provided to the Council with the Custodian's Statement of Information.

<sup>8</sup> Record No. 31 of the Custodian's document index provided to the Council with the Custodian's Statement of Information.

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

The Custodian asserts that he lawfully denied the Complainant access to the responsive record (Highlands Council Applicability Determination Review and Checklist and Comments to NJ DEP dated May 5, 2008<sup>9</sup>) because it is exempt from disclosure as an inter-agency deliberative record pursuant to N.J.S.A. 47:1A-1.1.

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’ [ACD] 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

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<sup>9</sup> Record No. 28 of the Custodian’s document index provided to the Council with the Custodian’s Statement of Information.

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:

<b>Record Number</b>	<b>Record Name/Date</b>	<b>Description of Record</b>	<b>Custodian's Explanation/ Citation for Non-disclosure</b>	<b>Findings of the <i>In Camera</i> Examination<sup>10</sup></b>

<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  
Neil Yoskin v. NJ Department of Environmental Protection, 2009-117 – *In Camera* Findings and Recommendations of the Executive Director 5



28	Highlands Council Applicability Determination Review and Checklist and Comments to NJ DEP dated May 5, 2008	Record consists of recommendations made by Highlands Council staff to DEP staff regarding a Highlands exemption application (4 pages).	Record exempt from disclosure as an inter-agency deliberative record pursuant to <u>N.J.S.A. 47:1A-1.1</u>	The record is exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. Specifically, the record contains recommendations and opinions of Highlands Council staff regarding whether the applicant should be granted a Highlands exemption. The record is used in the deliberative process which culminates in a summary of findings that outlines additional information required of the applicant, as well as things to be considered by DEP staff before a determination as to whether a Highlands exemption may be granted.
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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. Specifically, the record contains recommendations and opinions of Highlands

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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.

Council staff regarding whether the applicant should be granted a Highlands exemption. The record is used in the deliberative process which culminates in a summary of findings that outlines additional information required of the applicant, as well as observations to be considered by DEP staff before a determination as to whether a Highlands exemption may be granted. Therefore, the record is exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.

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

OPRA states that:

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

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

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

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’s failure to respond in writing to the Complainant’s February 20, 2009 OPRA request resulted in a deemed denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007), the Custodian did timely comply with the Council’s April 8, 2010 Interim Order and the *in camera* review revealed that the Custodian lawfully denied access to the Highlands Council Applicability Determination Review and Checklist and Comments to DEP dated May 5, 2008 because that record is exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. 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.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council's April 8, 2010 Interim Order by providing the Council with all records set forth in Paragraph 6 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.
3. Although the Custodian's failure to respond in writing to the Complainant's February 20, 2009 OPRA request resulted in a deemed denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007), the Custodian did timely comply with the Council's April 8, 2010 Interim Order and the *in camera* review revealed that the Custodian lawfully denied access to the Highlands Council Applicability Determination Review and Checklist and Comments to the New Jersey Department of Environmental Protection dated May 5, 2008 because that record is exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. 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.

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

June 22, 2010



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

CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

LORI GRIFA  
*Acting Commissioner*

**INTERIM ORDER**

**April 8, 2010 Government Records Council Meeting**

Neil Yoskin  
Complainant

Complaint No. 2009-117

v.

New Jersey Department of Environmental Protection  
Custodian of Record

At the April 8, 2010 public meeting, the Government Records Council (“Council”) considered the April 1, 2010 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’s failure to respond in writing to the Complainant’s February 20, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. The Custodian did not unlawfully deny the Complainant access to any of the requested records by failing or refusing to determine that any such record was responsive to the Complainant’s request pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
3. Pursuant to N.J.S.A. 47:1A-1.1, the Custodian has carried his burden of proving a lawful denial of access to an unredacted copy of First Energy Corporation’s check dated October 15, 2007.
4. Because the Complainant’s request fails to seek specifically identifiable government records and requires the Custodian to conduct research to ascertain the records responsive to the request, said request, with the exception of Record No. 28, is invalid under OPRA 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. NJ Council on Affordable Housing*, 390 N.J. Super. 166 (App Div.), *certif. denied* 190 N.J. 394 (2007) and *Schuler v. Borough of Bloomsbury*, GRC Complaint No. 2007-151 (February 2009).

5. 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 Record No. 28, the “Highlands Council Applicability Determination Review Checklist and Comments to New Jersey Department of Environmental Protection dated May 5, 2008,” to determine the validity of the assertion by the Custodian that the record was not unlawfully withheld from disclosure.
6. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record described in paragraph #5 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.**
7. 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 8<sup>th</sup> Day of April, 2010

Robin Berg Tabakin, Chair  
Government Records Council

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

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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."

Harlynn A. Lack, Secretary  
Government Records Council

**Decision Distribution Date: April 12, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 8, 2010 Council Meeting**

**Neil Yoskin<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-117**

v.

**New Jersey Department of Environmental Protection<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** On site examination and copies of any and all records concerning the granting of a Highlands Exemption to Jersey Central Power and Light for the construction of an electrical substation on Lot 2, Block 17 in Tewksbury Township, Hunterdon County, New Jersey (New Jersey Department of Environmental Protection [“NJDEP”] No. CSD070030).

**Request Made:** February 20, 2009

**Response Made:** March 4, 2009

**Custodian:** Matthew J. Coefer

**GRC Complaint Filed:** April 16, 2009<sup>3</sup>

**Background**

**February 20, 2009**

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.

**March 4, 2009**

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the eighth (8<sup>th</sup>) business day following receipt of such request. The Custodian states that access to part of the requested records is denied because such records are deliberative pursuant to N.J.S.A. 47:1A-1.1., which exempts from disclosure inter-agency or intra-agency advisory, consultative or deliberative (“ACD”) material.

**April 16, 2009**

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:<sup>4</sup>

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

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

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

<sup>4</sup> Additional documents were attached to the Denial of Access Complaint but were not specifically referenced by the Complainant.

- Complainant's OPRA request dated February 20, 2009
- Custodian's response to the OPRA request dated March 4, 2009
- Four (4) page "Privilege Log" prepared by NJDEP, undated

The Complainant states that the Custodian asserted that all documents in the file were exempt from disclosure. The Complainant further states that the Custodian asserted that most of the documents were exempt from disclosure because they constituted ACD material.

The Complainant contends that that his request sought records used by the NJDEP to support its grant of a Highlands Exemption to Jersey Central Power and Light, including a finding that the activity is consistent with the goals and purposes of the Highlands Act. The Complainant argues that the NJDEP would have violated State law if it did not make a finding of fact in support of its decision to grant a Highlands Exemption to Jersey Central Power and Light.<sup>5</sup> The Complainant further argues that such fact finding records, which he states must surely exist, would not be exempt from disclosure as ACD material and must therefore be disclosed under OPRA.

The Complainant does not agree to mediate this complaint.

**April 16, 2009**

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

**April 21, 2009**

E-mail from Custodian's Counsel to the GRC. Counsel puts his appearance on record and requests an extension of time for the Custodian to prepare and submit the SOI.

**April 21, 2009**

E-mail from the Complainant to the GRC. The Complainant objects to an extension of time for the Custodian to prepare and submit the SOI.

**April 21, 2009**

E-mail from the GRC to the Custodian's Counsel. The GRC grants a five (5) business day extension of time for the Custodian to prepare and submit the SOI.

**April 30, 2009**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated February 20, 2009
- E-mail from the Custodian to the Complainant dated February 20, 2009
- Custodian's response to the OPRA request dated March 4, 2009
- NJDEP Visitor's Sign In Log dated March 30, 2009

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<sup>5</sup> The majority of the Complainant's legal argument for disclosure of the denied records centers upon the legal authority which requires the NJDEP to make a finding of fact in support of its decision to grant a Highlands Exemption.  
Neil Yoskin v. New Jersey Department of Environmental Protection, 2009-117 – Findings and Recommendations of the Executive Director



The Custodian certifies that the NJDEP received the Complainant’s OPRA request on February 20, 2009. The Custodian further certifies that his search for the requested records involved having the employee who maintains tracking information on the appropriate category of records determine the status of the records. The assigned employee determined that several records responsive to the Complainant’s request existed but that some of the records contained ACD material. The Custodian also certifies that the response to the Complainant’s OPRA request dated March 4, 2009 indicated that part of the requested records was denied and asked the Complainant to contact the Custodian. The Custodian avers that the Complainant contacted the Custodian on March 16, 2009 and scheduled an on site record review that eventually took place on March 30, 2009. The Custodian certifies that on March 30, 2009, the Custodian disclosed to the Complainant numerous copies of unredacted records, several copies of redacted records and a “Privilege Log” referencing the records that were either entirely or partially privileged and therefore exempt from disclosure.

The Custodian certifies that the records responsive to the request must be retained for five (5) years and that no records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management for record series 0005-000.

The Custodian certifies that the records listed in Table A below are the records responsive to the Complainant’s request and were disclosed as indicated.<sup>6</sup>

**TABLE A<sup>7</sup>**

<b>No.</b>	<b>Description of Record</b>	<b>Disclosed</b>	<b>Disclosed Redacted</b>	<b>Denied</b>
1	Check in payment of application fee.		<b>X</b>	
2	Highlands Applicability Determination Application Submittal (Matlick and Scherer) dated October 25, 2007.	<b>X</b>		
3	NJDEP Highlands Applicability and Water Quality Management Plan Consistency Determination Application Form dated October 29, 2007.	<b>X</b>		
4	Bureau of Watershed Regulations Transmittal Sheet dated October 29, 2007.	<b>*</b>		

<sup>6</sup> The Custodian certified that seventeen (17) pages of records responsive to the request were mistakenly withheld from disclosure but were subsequently disclosed to the Complainant on May 1, 2009. These records are indicated with an asterisk in Table A.

<sup>7</sup> The Custodian certified that he delivered a “Privilege Log” to the Complainant on March 30, 2008 which contained a list of records that were determined to be responsive to the Complainant’s request but were alleged to be exempt from disclosure under OPRA. Upon comparing the “Privilege Log” with the document index (Item 9 of the SOI), four (4) additional records were discovered that were not listed on the document index. These records have been added to this table and are identified as numbers 1, 39, 41 and 73.

5	Internal Administrative Completeness Checklist dated November 1, 2007.	*		
6	NJDEP Notice of Administrative Completeness Letter to Applicant dated November 2, 2007.	X		
7	NJDEP Bulletin concerning notice of public comment period dated November 21, 2007.	X		
8	E-mail between Bede Portz and Terry Pilawski which included e-mails between Bede Portz and Tom Micai dated December 5, 2007 and December 6, 2007.	X		
9	E-mail from Terry Pilawski to Barry Miller dated December 5, 2007.			X
10	E-mail exchange between Barry Miller and Jennifer Dufine dated December 10, 2007 including e-mails between Bede Portz and Tom Micai dated December 5, 2007 and December 6, 2007.		X	
11	Public comment response to NJDEP from George David and Clair Weiss dated December 18, 2007.	X		
12	Public comment response to NJDEP from Gerald and Mary Kall dated December 18, 2007.	X		
13	Public comment response to NJDEP from Geoffrey and Deborah Close dated December 18, 2007.	X		
14	Public comment response to NJDEP from Jonathan and Julia Lowe dated December 18, 2007.	X		
15	Public comment response to NJDEP from Jonathan and Angela Holt dated December 19, 2007.	X		
16	Public comment response to NJDEP from Stephen and Gloria Hernick dated December 19, 2007.	X		
17	Public comment response to NJDEP from Upper Raritan Watershed Association dated December 20, 2007.	X		
18	Public comment response to NJDEP from Residents Alliance for Neighborhood Preservation, Inc., dated December 20, 2007.	X		

19	Letter to NJDEP Jenifer Dufine from Neil Yoskin dated January 7, 2008.	<b>X</b>		
20	E-mail from Jon Holt to Jennifer Dufine dated January 15, 2008.	<b>X</b>		
21	E-mail from Robin Love to Jennifer Dufine dated January 18, 2008.	<b>X</b>		
22	E-mail chain between Jennifer Dufine and Jill Neall dated February 6, 2008, February 13, 2008 and February 14, 2008.			<b>X</b>
23	E-mail exchange between Jennifer Dufine and Terry Pilawski dated February 8, 2008.	<b>X</b>		
24	E-mail exchange between Bede Portz and Terry Pilawski dated February 19, 2008 and February 21, 2008.	<b>X</b>		
25	NJDEP Summary of Public Comments and Responses dated April 29, 2008.	<b>X</b>		
26	Internal NJDEP Executive Correspondence Transmittal Sheet and Comments dated April 29, 2008.		*	
27	Internal NJDEP Executive Correspondence Transmittal Sheet dated April 29, 2008, November 5, 2008 and November 6, 2008.		*	
28	Highlands Council Applicability Determination Review Checklist and Comments to NJDEP dated May 5, 2008.			<b>X</b>
29	E-mail exchange between Jennifer Dufine and Paula Dees dated May 6, 2008.		*	
30	E-mail between Eileen Swan and Terry Pilawski forwarding e-mail between Barry Miller, Terry Pilawski and Jennifer Dufine dated May 7, 2008.			<b>X</b>
31	E-mail between Eileen Swan and Terry Pilawski dated May 7, 2008.			<b>X</b>
32	E-mail exchange between Terry Pilawski and Jennifer Dufine dated May 14, 2008, which includes e-mail exchange between Terry Pilawski and Bede Portz dated May 5, 2008, May 6, 2008, May 12, 2008 and May 14, 2008.		<b>X</b>	

33	Draft Internal NJDEP Executive Correspondence Transmittal Sheet dated May 16, 2008.		*	
34	E-mail from Steven Jacobus to Bureau of Watershed Regulation staff dated June 26, 2008.			X
35	E-mail from Jon Holt to Jennifer Dufine dated July 24, 2008.	X		
36	E-mail exchange between Jennifer Dufine and Terry Pilawski dated July 24, 2008 and July 25, 2008.	*		
37	Internal meeting notes from Barry Miller for meeting with Larry Baier to Jennifer Dufine dated August 8, 2008.			X
38	E-mail from Jon Holt to Jennifer Dufine dated August 11, 2008.	X		
39	E-mail from Terry Pilawski to Jennifer Dufine dated August 18, 2008.			X
40	E-mail exchange between Barry Miller, Larry Baier and Jennifer Dufine dated August 18, 2008, August 19, 2008 and August 20, 2008.	*		
41	Notes from meeting between Larry Baier, Jennifer Dufine and Barry Miller dated August 21, 2008.			X
42	E-mail exchange between Larry Baier, Mark Mauriell and Jennifer Dufine dated August 21, 2008.			X
43	E-mail exchange between Barry Miller and Jennifer Dufine dated August 27, 2008 which includes an e-mail from Larry Baier dated August 27, 2008 and an e-mail exchange between Larry Baier, Tom Micai and Bebe Portz dated August 26, 2008.		X	
44	Internal NJDEP Executive Correspondence Transmittal Sheet dated August 27, 2008.	*		
45	NJDEP letter to Bede Portz concerning administrative completeness of application and request for additional information dated August 28, 2008.	X		
46	E-mail exchange between Terry Pilawski and Bede Portz dated September 19, 2008 and September 24, 2008.	X		

47	Response to NJDEP letter dated August 28, 2008, including a revised site plan dated September 25, 2008.	<b>X</b>		
48	E-mail exchange between Terry Pilawski and Bede Portz dated September 23, 2008, September 24, 2008 and September 26, 2008 which includes an e-mail from Bede Portz to Larry Baier dated September 19, 2008.	<b>X</b>		
49	NJDEP letter regarding a request for a Letter of Interpretation to verify jurisdictional boundary of fresh water wetlands and waters on the referenced property dated October 6, 2008.	<b>X</b>		
50	Follow-up e-mails from commenters dated October 8, 2008.	<b>X</b>		
51	Internal NJDEP Executive Correspondence Transmittal Sheet dated October 8, 2008, November 5, 2008 and November 6, 2008.	<b>*</b>		
52	E-mail from Jon Holt to Jennifer Dufine dated October 8, 2008 with attached Cingular Wireless W-P17 site letter from the NJDEP to Gerald and Mary Kalb dated May 17, 2005.	<b>X</b>		
53	E-mail from Jennifer Dufine to Irene Knicos dated October 10, 2008.			<b>X</b>
54	E-mail from Jennifer Dufine to Bede Portz dated October 13, 2008.	<b>X</b>		
55	Note from Barry Miller to Jennifer Dufine dated October 23, 2008.	<b>*</b>		
56	E-mail from Jennifer Dufine to Barry Miller dated October 24, 2008.	<b>*</b>		
57	Comment response to NJDEP from Friends of the Fairmount Historic District dated October 28, 2008.	<b>X</b>		
58	E-mail from Jon Holt to Jennifer Dufine dated October 28, 2008.	<b>X</b>		
59	E-mail exchange between Barry Miller, Jennifer Dufine and Terry Pilawski dated October 28, 2008 and October 29, 2008.		<b>*</b>	
60	E-mail with attached revised project description from Bede Portz to Jennifer Dufine dated November 4,	<b>X</b>		

	2008.			
61	E-mail exchange between Bede Portz to Jennifer Dufine dated November 4, 2008 and November 5, 2008.	<b>X</b>		
62	E-mail exchange between Jennifer Dufine and Terry Pilawski dated November 5, 2008.			<b>X</b>
63	Final Response Letter to applicant approving requested Highlands Act Exemption dated November 6, 2008.	<b>X</b>		
64	NJDEP fax coversheet from Terry Pilawski to Tom Micai dated November 6, 2008.	<b>X</b>		
65	Internal NJDEP Highlands Applicability and Water Quality Management Plan Consistency Determination Review Summary Sheet dated November 8, 2008.			<b>X</b>
66	Administrative Hearing Request from Neil Yoskin dated November 11, 2008.	<b>X</b>		
67	“Privilege Log” dated March 30, 2009.	<b>X</b>		
68	Address Document: “People Outside DEP to Send Copy of Letter to”, undated.	<b>X</b>		
69	Geographic Information Systems Maps, undated.	<b>X</b>		
70	Draft letter from Terry Pilawski to Bede Portz, undated.			<b>X</b>
71	Photograph documents and a Special Regulated Area map, undated.	<b>X</b>		
72	Internal writing on scrap paper, undated.	<b>*</b>		
73	Note from Terry Pilawski to Jennifer Dufine, undated.			<b>X</b>

The Custodian certifies that one (1) record identified as Record No. 1 in Table A contained a redaction of the account number pursuant to N.J.S.A. 47:1A-1., which provides that a public agency has a responsibility and an obligation to safeguard from access a citizen’s personal information. The Custodian further certifies that the balance of the records that were disclosed with redactions or denied in their entirety, which numbered twenty-three (23), were redacted or denied because they contained ACD material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. The Custodian avers that those records denied in their entirety were of the nature of internal e-mails, notes, checklists and a transmittal sheet containing recipient comments.

**May 1, 2009**

Letter from the Custodian to the Complainant. The Custodian forwards to the Complainant seventeen (17) pages of records responsive to the Complainant's request that the Custodian initially determined were exempt from disclosure because they constituted ACD material. The Custodian states that after further scrutinizing said records he determined that they can be disclosed to the Complainant.

**May 2, 2009**

The Complainant's response to the Custodian's SOI. The Complainant states that the Custodian's document index contains records that are described as having been disclosed to the Complainant, but the Complainant asserts that said records were not in the files when he conducted his on site examination. The Complainant also states that the Custodian certified that seventeen (17) pages of records are being provided that were initially withheld from disclosure because they were determined to have been privileged; however, the Complainant contends that, contrary to the Custodian's certification, the records were never provided to the Complainant. The Complainant states that he has discussed this complaint with the Custodian's Counsel and emphasizes that he is only seeking the document or documents that explain the basis upon which NJDEP concluded that the proposed substation that is the subject of the Highlands Exemption is consistent with the goals and purposes of the Highlands Act.

**May 4, 2009**

E-mail from the Complainant to the Custodian and the GRC. The Complainant states that he received and reviewed the seventeen (17) additional pages of disclosed records. The Complainant states that there was nothing within the records that he needs and again contends that he is seeking records that form the basis for the NJDEP's conclusion that the proposed substation is consistent with the goals and purposes of the Highlands Act.

**May 4, 2009**

E-mail from the Custodian to the Complainant. The Custodian contends that he has disclosed all of the records responsive to the Complainant's request but offers to grant the Complainant another on site record examination.

**May 4, 2009**

E-mail from the Complainant to the Custodian. The Complainant states that he would like to reexamine the file and schedules an appointment with the Custodian to do so.

**June 8, 2009**

Letter from the Complainant to the Custodian's Counsel and the GRC. The Complainant provides a brief overview of the status of this matter since he filed his Denial of Access Complaint. The Complainant states that he again reviewed the file containing the records that the Custodian alleged were responsive to his request and obtained some additional records. The Complainant further states that, based upon a reexamination of the file, it appears that the Highlands Council rendered recommendations to the NJDEP but no such record can be found and there is not even a reference to such a record in the "Privilege Log." The Complainant cites to numerous

passages from some of the disclosed records to support his argument that comments from the Highlands Council exist, and for this reason, the Complainant contends that the Custodian has continued to unlawfully deny him access to the records he requested.

**June 10, 2009<sup>8</sup>**

E-mail from the GRC to the Complainant. The GRC informs the Complainant that, in view of the issue he raised in his letter to the Custodian's Counsel and the GRC dated June 8, 2009, he should amend his complaint to narrow and refine the scope of the records he is seeking.

**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.

Furthermore, OPRA provides that:

"...a public agency has a responsibility and an obligation to safeguard from access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy..." 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.

However, OPRA notes that:

"...[a] government record shall not include ... *financial information obtained from any source...*" (Emphasis added) N.J.S.A. 47:1A-1.1.

OPRA states that:

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<sup>8</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.  
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“...[a] custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record. If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

OPRA also states that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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

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

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.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Here, the parties are in agreement that the Complainant’s OPRA request was received by the Custodian on February 20, 2009 and that the Custodian responded to the OPRA request on March 4, 2009, which is the eighth (8<sup>th</sup>) business day following receipt of such request.

Accordingly, the Custodian's failure to respond in writing to the Complainant's February 20, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

The Complainant stated in his Denial of Access Complaint that his request "...sought documents used by the DEP to support its grant of a Highlands Exemption to Jersey Central Power and Light, including its finding that 'the activity is consistent with the goals and purposes of the Highlands Act...'" The Complainant also stated "[t]he DEP replied that all documents in the file were exempt from disclosure." There is no evidence in the record to support either of these statements. The Complainant did not frame his February 20, 2009 OPRA request with the specificity that he quotes in his complaint and the Custodian, in his response, did not state that all records responsive to the request were exempt from disclosure.<sup>9</sup>

The Complainant's OPRA request seeks "...any and all records concerning the granting of a Highlands Exemption to Jersey Central Power and Light for the construction of an electrical substation..." In the Records Denied List of the Denial of Access Complaint the Complainant wrote "see attached privilege log" and he attached the "Privilege Log" the Custodian gave him on March 30, 2009, during the Complainant's NJDEP on site inspection of the requested records.

In his response to the Custodian's SOI dated May 2, 2009, the Complainant asserted that he is seeking only the record or records that explain the basis upon which NJDEP concluded that the Highlands Exemption is consistent with the goals and purposes of the Highlands Act. The Complainant repeated this assertion in correspondence to the Custodian and the GRC dated May 4, 2009 and June 8, 2009. In his latter correspondence, the Complainant also stated that after twice reviewing the NJDEP file it appeared to him that the Highlands Council provided recommendations to the NJDEP but that no record of such activity could be found. The Complainant made it clear that this is the type of record he is seeking, that information obtained from some of the records he reviewed supported its existence and that the Custodian continued to unlawfully deny him access to it.

Because the Complainant had conducted an on site examination of NJDEP records on two (2) occasions since he filed his complaint, and because these examinations yielded records that the Complainant stated enabled him to narrow his request, the GRC by e-mail dated June 10, 2009, offered the Complainant an opportunity to amend his complaint by narrowing and refining the scope of the records sought. The Complainant never replied to the GRC regarding its suggestion that the Complainant amend his complaint.

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<sup>9</sup> Because the Custodian failed to respond within the required seven (7) business days, however, there was a "deemed" denial of access pursuant to N.J.S.A. 47:1A-5.i.  
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The Custodian certified that, following the Complainant's March 30, 2009 on site inspection of the requested records, all records responsive to the Complainant's request were disclosed except for those listed in the "Privilege Log." The Custodian certified that one (1) record listed in the "Privilege Log" was alleged to be exempt from disclosure pursuant to the privacy provisions of N.J.S.A. 47:1A-1. and the remainder of the records listed in the "Privilege Log" were alleged to be exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1. The Custodian certified that he mistakenly failed to disclose seventeen (17) pages of records that were listed on the "Privilege Log" as ACD material but upon re-evaluation determined that the records could be disclosed, albeit some with redactions. As a result of the Custodian's re-evaluation he disclosed to the Complainant the seventeen (17) pages of records on May 1, 2009.

The Complainant's OPRA request left it up to the Custodian to determine what, if any, records were responsive to the request. Apart from the Custodian's "deemed" denial, the Custodian certified that the seventy-three (73) records listed in Table A above are the records determined to be responsive to the Complainant's request and that all but twenty-four (24) of said records have been disclosed to the Complainant in their entirety. The Custodian further certified that the Complainant was denied access to fifteen (15) of the twenty-four (24) records because they constitute ACD material. The Custodian certified that the remaining nine (9) records were disclosed with redactions.

There is no evidence in the record which indicates the Custodian failed or refused to make a determination that a record of the Highlands Council comments to the NJDEP was responsive to the Complainant's request, and therefore, that the Custodian unlawfully denied the Complainant access to it. To the contrary, the evidence of record reveals that the Custodian determined that such a record was responsive to the Complainant's request. This record was identified by the Custodian as the Highlands Council Applicability Determination Review Checklist and Comments to NJDEP dated May 5, 2008 and is listed as Record No. 28 on Table A. The Custodian certified that the record was exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1.

Regardless of whether or not the Complainant believes the NJDEP had more records that may have been responsive to his request, the Council has held that when a custodian certifies that no other records responsive to the request exist, then the custodian has met his or her burden of proving that all records in existence responsive to the request were provided to the Complainant.<sup>10</sup> In Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the custodian stated in the SOI that a single record responsive to the complainant's OPRA request was disclosed to the complainant and that no other records responsive to her request existed. The complainant contended that she believed more records responsive did, in fact, exist. The custodian certified that the record provided to the complainant was the only record responsive to the request. The GRC held that:

"[t]he Custodian certified that the Complainant was in receipt of all [records] responsive to the request. The Custodian has met the burden of

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<sup>10</sup> OPRA provides that if a custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore. See N.J.S.A. 47:1A-5.g.  
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proving that all records in existence responsive to the request were provided to the Complainant. Therefore there was no unlawful denial of access.”

Similarly, in the instant matter the Custodian certified that he advised the Complainant during the Complainant’s on site examination of the requested records that all of the records responsive to his request, not otherwise exempt, were being disclosed to him, including some records that contained redactions of what the Custodian alleged was privileged material. The Custodian further certified that he provided the Complainant with a “Privilege Log” that listed all records responsive to the Complainant’s request that were either entirely or partially exempt from disclosure. Further, there is no credible evidence in the record to refute the Custodian’s certification.

As such, the Custodian did not unlawfully deny the Complainant access to any of the requested records by failing or refusing to determine that any such record was responsive to the Complainant’s request pursuant to Burns, *supra*.

One of the nine (9) records the Custodian certified he disclosed with redactions is a check that the Custodian certified he disclosed with the account number redacted in order to safeguard from access the maker’s personal information. This check is identified as Record No. 1 in Table A. The Custodian cited N.J.S.A. 47:1A-1. as legal authority for redacting the account number. N.J.S.A. 47:1A-1. provides in relevant part “...a public agency has a responsibility and an obligation to safeguard from access a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy...”

A description of the check was not included in the Custodian’s document index. The record was described, however, in the “Privilege Log” as an application fee check from First Energy Corporation to the New Jersey Department of Treasury dated October 15, 2007. Although N.J.S.A. 47:1A-1. applies to a *citizen’s* personal information, in New Jersey a corporate entity enjoys many of the same citizenship rights as an individual. *See Techniscan Corp. v. Passaic Valley Water Com*, 218 N.J. Super. 226 (App.Div. 1987)(holding that corporations have the right to search the records of public agencies under the Right to Know Law, because the law was enacted to protect the public interest by providing all citizens, whether private or commercial, unfettered access to public records without the need to establish the purpose for which the records were sought).<sup>11</sup>

Additionally, the Council takes notice to the need to redact financial information of this nature since its disclosure may lead to improprieties or theft, and because disclosure of this type of personal (or corporate) information provided by citizens to public agencies does not further the purpose of OPRA which is to shed light on the functioning of government. *See United States v. Clark*, 208 Fed. Appx. 137 (3d Cir. N.J. 2006)(affirming conviction and sentence of defendant who orchestrated a scheme to withdraw funds illegally from bank accounts by misappropriating bank account information). Therefore, the Custodian has properly redacted the bank account number on the corporate check pursuant to N.J.S.A. 47:1A-1.1.

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<sup>11</sup> OPRA succeeded the Right to Know Law in 2002.  
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As such, pursuant to N.J.S.A. 47:1A-1.1, the Custodian has carried his burden of proving a lawful denial of access to an unredacted copy of First Energy Corporation's check dated October 15, 2007.

The Custodian has withheld from disclosure, either in part or in whole, twenty-three (23) records because the Custodian certified that these records constitute ACD material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. The twenty-three (23) withheld records are listed in Table B below.

**TABLE B**

<b>No.<sup>12</sup></b>	<b>Description of Record</b>	<b>Disclosed</b>	<b>Redacted</b>	<b>Denied</b>
9	E-mail from Terry Pilawski to Barry Miller dated December 5, 2007.			<b>X</b>
10	E-mail exchange between Barry Miller and Jennifer Dufine dated December 10, 2007 including e-mails between Bede Portz and Tom Micai dated December 5, 2007 and December 6, 2007.	<b>X</b>		
22	E-mail chain between Jennifer Dufine and Jill Neall dated February 6, 2008, February 13, 2008 and February 14, 2008.			<b>X</b>
26	Internal NJDEP Executive Correspondence Transmittal Sheet and Comments dated April 29, 2008.	<b>X</b>		
27	Internal NJDEP Executive Correspondence Transmittal Sheet dated April 29, 2008, November 5, 2008 and November 6, 2008.	<b>X</b>		
28	Highlands Council Applicability Determination Review Checklist and Comments to NJDEP dated May 5, 2008.			<b>X</b>
29	E-mail exchange between Jennifer Dufine and Paula Dees dated May 6, 2008.	<b>X</b>		
30	E-mail between Eileen Swan and Terry Pilawski forwarding e-mail between Barry Miller, Terry Pilawski and Jennifer Dufine dated May 7, 2008.			<b>X</b>
31	E-mail between Eileen Swan and Terry Pilawski dated May 7, 2008.			<b>X</b>
32	E-mail exchange between Terry Pilawski and Jennifer Dufine dated May 14, 2008, which includes e-mail exchange between Terry Pilawski and Bede Portz dated May 5, 2008, May 6, 2008, May 12, 2008 and May 14, 2008.	<b>X</b>		

<sup>12</sup> To avoid confusion, the identifying numbers used in Table A are also used in this table for the corresponding records.

33	Draft Internal NJDEP Executive Correspondence Transmittal Sheet dated May 16, 2008.	<b>X</b>	
34	E-mail from Steven Jacobus to Bureau of Watershed Regulation staff dated June 26, 2008.		<b>X</b>
37	Internal meeting notes from Barry Miller for meeting with Larry Baier to Jennifer Dufine dated August 8, 2008.		<b>X</b>
39	E-mail from Terry Pilawski to Jennifer Dufine dated August 18, 2008.		<b>X</b>
41	Notes from meeting between Larry Baier, Jennifer Dufine and Barry Miller dated August 21, 2008.		<b>X</b>
42	E-mail exchange between Larry Baier, Mark Mauriell and Jennifer Dufine dated August 21, 2008.		<b>X</b>
43	E-mail exchange between Barry Miller and Jennifer Dufine dated August 27, 2008 which includes an e-mail from Larry Baier dated August 27, 2008 and an e-mail exchange between Larry Baier, Tom Micai and Bebe Portz dated August 26, 2008.	<b>X</b>	
53	E-mail from Jennifer Dufine to Irene Knicos dated October 10, 2008.		<b>X</b>
59	E-mail exchange between Barry Miller, Jennifer Dufine and Terry Pilawski dated October 28, 2008 and October 29, 2008.	<b>X</b>	
62	E-mail exchange between Jennifer Dufine and Terry Pilawski dated November 5, 2008.		<b>X</b>
65	Internal NJDEP Highlands Applicability and Water Quality Management Plan Consistency Determination Review Summary Sheet dated November 8, 2008.		<b>X</b>
70	Draft letter from Terry Pilawski to Bede Portz, undated.		<b>X</b>
73	Note from Terry Pilawski to Jennifer Dufine, undated.		<b>X</b>

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.

The Custodian has asserted that fifteen (15) of the records listed in Table B are exempt from access in their entirety as ACD material and that another eight (8) records were disclosed with ACD material redacted. The Appellate Division has held that “...the GRC has and should exercise its discretion to conduct *in camera* review when necessary...” *See Paff v. NJ Department of Labor, Board of Review*, 379 N.J. Super. 346 (App. Div. 2005). Here, however, it is not necessary for the GRC to conduct an *in camera* review of all twenty-three (23) records because twenty-two (22) of those records are not encompassed by OPRA in that the Complainant’s request did not specifically describe the records.

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>13</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>14</sup>

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<sup>13</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>14</sup> As stated in Bent, *supra*.



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)."

Despite the fact the Custodian determined that numerous records were encompassed by the Complainant's request, the GRC finds that the Complainant's request is overly broad and therefore invalid. With one (1) exception, the Complainant failed to *specifically identify* the documents sought, as required under MAG, supra, Bent, supra, and New Jersey Builders Association, supra. Rather, the Complainant requested "...copies of any and all records concerning the granting of a Highlands Exemption to Jersey Central Power and Light for the construction of an electrical substation..." This request is tantamount to "simply requesting all of an agency's documents" generated during a particular application process and is improper. See Bent, supra, at 37.

Because the Complainant's request fails to seek specifically identifiable government records and requires the Custodian to conduct research to ascertain the records responsive to the request, said request, with the exception of Record No. 28 discussed *infra*, is invalid under OPRA pursuant to MAG, supra, Bent, supra, New Jersey Builders Association, supra, and Schuler, supra.

The one (1) record that the Complainant did describe with sufficient specificity, due to his supplemental description of the document, was a record of recommendations provided by the Highlands Council to the NJDEP which the Complainant stated could serve to explain the basis upon which NJDEP concluded that the Highlands Exemption is consistent with the goals and purposes of the Highlands Act. The Complainant described this record not only in his response to the Custodian's SOI dated May 2, 2009, but also in correspondence to the Custodian and the GRC dated May 4, 2009 and June 8, 2009. The Complainant alleged, however, that no such record could be found and that there is no reference to it in the Custodian's "Privilege Log." In fact, the record was identified by the Custodian as the "Highlands Council Applicability Determination Review Checklist and Comments to NJDEP dated May 5, 2008." The record is set forth as Record No. 28 on the above tables and it is one of the eight (8) records the Custodian certified to be

exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1. As such, it will be necessary for the GRC to examine the record *in camera* to confirm the Custodian's legal conclusion that the denied record contains ACD material.

In Paff, *supra*, the Complainant appealed a final decision of the GRC<sup>15</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, the GRC must conduct an *in camera* review of Record No. 28, the “Highlands Council Applicability Determination Review Checklist and Comments to NJDEP dated May 5, 2008,” to determine the validity of the assertion by the Custodian that the record was not unlawfully withheld from disclosure.

**Whether the Custodian’s delay in access to the requested records, and/or the Custodian’s failure to disclose seventeen (17) pages of records responsive to the request until May 1, 2009, rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?**

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<sup>15</sup> Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).  
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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. The Custodian's failure to respond in writing to the Complainant's February 20, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. The Custodian did not unlawfully deny the Complainant access to any of the requested records by failing or refusing to determine that any such record was responsive to the Complainant's request pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
3. Pursuant to N.J.S.A. 47:1A-1.1, the Custodian has carried his burden of proving a lawful denial of access to an unredacted copy of First Energy Corporation's check dated October 15, 2007.
4. Because the Complainant's request fails to seek specifically identifiable government records and requires the Custodian to conduct research to ascertain the records responsive to the request, said request, with the exception of Record No. 28, is invalid under OPRA 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. NJ Council on Affordable Housing, 390 N.J. Super. 166 (App Div.), *certif. denied* 190 N.J. 394 (2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
5. 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 Record No. 28, the "Highlands Council Applicability Determination Review Checklist and Comments to New Jersey Department of Environmental Protection dated May 5, 2008," to determine the validity of the assertion by the Custodian that the record was not unlawfully withheld from disclosure.
6. **The Custodian must deliver<sup>16</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record described in paragraph #5**

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<sup>16</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.

above, a document or redaction index<sup>17</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>18</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.

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

Approved By: Catherine Starghill, Esq.  
Executive Director

April 1, 2010

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<sup>17</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

<sup>18</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."