



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

FINAL DECISION

February 23, 2010 Government Records Council Meeting

Donna Antonucci
Complainant

Complaint No. 2009-125

v.

City of Hoboken (Hudson)
Custodian of Record

At the February 23, 2010 public meeting, the Government Records Council (“Council”) considered the February 16, 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 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. Because the evidence of record indicates that the record requested by the Complainant contains Councilman Russo’s “suggested” budget cuts, which were proposed at the November 5, 2008 Council meeting prior to the adoption of the City’s Fiscal Year 2009 budget on or about March 25, 2009, the requested record is therefore both pre-decisional and deliberative and is exempt from disclosure under OPRA as advisory, consultative or deliberative (ACD) material. N.J.S.A. 47:1A-1.1; In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000).
3. Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, because the requested record is both pre-decisional and deliberative and is exempt from disclosure under OPRA as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1, 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.



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 23rd Day of February, 2010

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: March 2, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 23, 2010 Council Meeting**

**Donna Antonucci¹
Complainant**

GRC Complaint No. 2009-125

v.

**City of Hoboken (Hudson)²
Custodian of Records**

Records Relevant to Complaint: Copy of Councilman Russo's \$26 million budget cut suggestions that he reviewed verbally at one of the October 2008 Council meetings and sent to Judy.³

Request Made: April 2, 2009

Response Made: April 16, 2009

Custodian: Mike Mastropasqua

GRC Complaint Filed: April 17, 2009⁴

Background

April 2, 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.

April 16, 2009

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the ninth (9th) business day following receipt of such request. The Custodian states that access to the requested record is denied because the record requested is exempt from disclosure under OPRA as advisory, consultative and deliberative ("ACD") material. N.J.S.A. 47:1A-1.1. The Custodian also states that while the City of Hoboken Clerk's Office does not have the authority to disclose the record requested, Councilman Russo may voluntarily waive the ACD privilege. The Custodian further states that the Complainant may contact Councilman Russo directly as to whether he is willing to waive the ACD privilege.

April 17, 2009

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

¹ No legal representation listed on record.

² Represented by Steven W. Kleinman, Esq. (Hoboken, NJ).

³ The Custodian has indicated that he understood this to refer to Fiscal Control Officer Judy Tripodi.

⁴ The GRC received the Denial of Access Complaint on said date.

- Complainant’s OPRA request dated April 2, 2009;
- Letter from the Custodian to the Complainant dated April 16, 2009.

The Complainant states that Councilman Russo reviewed and distributed a written list of budget cut suggestions in October 2008 at the City of Hoboken Council meeting. The Complainant states that Councilman Russo publicly stated that he shared this list with Judy Tripodi, the City of Hoboken’s (“City”) State-appointed monitor. The Complainant argues that Councilman Russo waived the ACD privilege applicable to the record by sharing the record requested with the public and sending it to Judy Tripodi.

The Complainant does not agree to mediate this complaint.

May 28, 2009

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

May 29, 2009

E-mail from the Custodian’s Counsel to the GRC. The Custodian’s Counsel states that pursuant to a conversation with the GRC, he will provide the SOI on or before June 10, 2009.

June 10, 2009

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated April 2, 2009;
- Letter from the Custodian to the Complainant dated April 16, 2009.

The Custodian certifies that he provided a formal written response to the Complainant’s OPRA request on or about April 16, 2009. The Custodian certifies that he is not sure whether the record requested exists. The Custodian certifies that the Fiscal Control Officer advised that she has been unable to locate the record sought.

The Custodian contends that he properly denied the Complainant’s request because the record sought was not a government record subject to OPRA. The Custodian states that N.J.S.A. 47:1A-1.1 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 by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.”

The Custodian argues that the ACD exemption is applicable to the requested record and therefore the GRC must dismiss this complaint. The Custodian argues that in Education Law Center v. New Jersey Dept. of Educ., 198 N.J. 274 (2009), Justice La Vecchia, writing for a unanimous court, explained that the rationale for the exception is “built on powerful logic ... the privilege is necessary to ensure free and uninhibited communication within governmental agencies so that the best possible decisions can be reached.” *Id.* at 286.

The Custodian contends that the New Jersey Supreme Court then established a two-part test for application of the ACD exemption. The Custodian states that the first part of the test is to determine whether the record sought is a part of the process leading to the formulation of an agency’s decision. The Custodian states that the second part of the test is to determine the material’s ability to reflect or to expose the deliberative aspects of that process. *Id.* at 295. The Custodian argues that in this analysis, the Court opined that the “privilege recognizes the importance of promoting government’s full and frank discussion of ideas when developing new policies, or in examining existing policies and procedures, and further recognizes that such activities constitute a process of policy examination and evaluation.” *Id.*

The Custodian further argues that the record requested satisfies both prongs of the two-part test. The Custodian certifies that the record sought consists of written suggestions from one member of the City Council regarding ways to effectuate possible budget cuts. The Custodian argues that the ACD exemption from disclosure is designed to allow records which are necessary to a decision to circulate freely within the government. The Custodian argues that if the GRC were to order disclosure of the record sought, it would have a dramatic chilling effect on the ability of officials to offer unvarnished opinions, knowing that such opinions would be subject to public release. The Custodian argues that the record sought is a deliberative record and the GRC must find that it is not subject to disclosure pursuant to OPRA

June 11, 2009

The Complainant’s response to the Custodian’s SOI. The Complainant argues that because the record was publicly discussed, disclosure of the record sought cannot have the “dramatic and chilling” effect asserted by the Custodian. The Complainant states that if Judy Tripodi has misplaced, destroyed or otherwise cannot find the record sought, the GRC should demand a copy from Councilman Russo. The Complainant further states that if Councilman Russo refuses to provide the record sought, the GRC should require written documentation of the refusal and Councilman Russo should be fined for allowing the destruction of a public document.

November 20, 2009

E-mail from the GRC to the Custodian. The GRC requests that the Custodian provide a certification detailing the events surrounding Councilman Russo’s budget cut suggestions and the status of the budget at the time of the Complainant’s request.

November 23, 2009

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel requests an extension of time until December 2, 2009 to prepare the certification as it will require a review of the relevant records from several months and take some time to complete.

December 2, 2009

Certification from the Custodian to the GRC. The Custodian certifies that he has not been able to locate the record requested. The Custodian further certifies that he reviewed the video recordings of all Council meetings during the month of October. The Custodian also certifies that he was unable to find any reference to such a document. However, the Custodian certifies that when he reviewed the recording of the November 5, 2008 Council meeting, he noted that Councilman Russo made reference to \$17 million in possible budget cuts and appeared to hand out a document relating to those budget cuts to the other members of the Council. The Custodian certifies that Councilman Russo did not provide copies of the handout to the general public. The Custodian also certifies that the City's Fiscal Year 2009 budget was adopted by the City Council on or about March 25, 2009.

January 6, 2010

E-mail from the GRC to the Custodian. The GRC indicates that it is not clear what attempt was made to procure the record from Councilman Russo. The GRC requests that the Custodian provide a certification detailing the efforts made to procure the record from Councilman Russo, the results of said efforts and whether the record requested exists.

January 12, 2010

Facsimile transmission of the Custodian's certification. The Custodian certifies that Councilman Russo advised the Custodian that he did not retain any copies of the record requested nor did Councilman Russo know where a copy of such record may be obtained. The Custodian further certifies that despite his inquiries with the various City offices that may have received a copy of the record requested, including the office of Fiscal Control Officer Judith Tripodi, none of the offices were able to provide the Custodian with a copy.

February 9, 2010

E-mail from the Complainant to the GRC. The Complainant disputes the assertions made in the Custodian's certification dated January 12, 2010. The Complainant asserts that the Councilman Russo stated on videotape of the Hoboken City Council meetings that copies of the requested record are available on the City's website and, moreover, that Councilman Russo stated that he sent a copy of the requested record to Judy Tripodi. The Complainant questions the veracity of Councilman Russo's assertions to the Custodian. The Complainant asserts that Councilman Russo has a vested interest in not disclosing the requested record. The Complainant asserts that she believes the city is responsible for not collecting a record that was distributed and discussed at a public meeting on the dais.

The Complainant further asserts that Councilman Russo's answers are not reliable in part because of his family and political connections. The Complainant contends that Councilman Russo has a vested interest in denying the Complainant the requested record because he does not want to be accountable for what it says, as well as making sure the City is not admonished for not collecting the requested record because the Clerk could be required to collect such presentations in the future and then Councilman Russo cannot claim to have a proposal without submitting the document for public access when he shared it with the Council and discussed it in public. The Complainant asserts that the public deserves to see the requested record.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides:

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

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

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

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

The Custodian responded in writing to the Complainant's OPRA request on the ninth (9th) business day stating that access to the requested record is denied because the record requested is exempt from disclosure under OPRA as "advisory, consultative and deliberative" ("ACD") material. N.J.S.A. 47:1A-1.1.

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.⁵ 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).

Therefore, the Custodian's failure to respond in writing to the 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).

In the complaint currently before the Council, the Complainant sought access to a copy of budget cut suggestions prepared by City of Hoboken Councilman Russo. The Custodian denied the Complainant's request on the basis that the record requested was exempt from disclosure as ACD material.

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).

⁵ It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

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

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

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

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

“[t]he initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials

overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.” In Re Liquidation of Integrity, *supra*, 165 N.J. at 88, *citing McClain, supra*, 99 N.J. at 361-62.

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

- (1) The initial burden falls on the government agency to establish that matters are both *pre-decisional* and *deliberative*.
 - a. Pre-decisional means that the records were generated before an agency adopted or reached its decision or policy.
 - b. Deliberative means that the record contains opinions, recommendations, or advice about agency policies or decisions.
 - i. Deliberative materials do not include purely factual materials.
 - ii. Where factual information is contained in a record that is deliberative, such information must be produced so long as the factual material can be separated from its deliberative context.
 - c. The exemption covers recommendations, draft documents, proposals, suggestions, and other subjective documents *which reflect the personal opinions of the writer rather than the policy of the agency*.
 - d. Documents which are protected by the privilege are those which *would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is only a personal position*.
 - e. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves *whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency*.
- (2) Please note that if an *in camera* inspection were conducted by the courts, the process would include the following:

Once it has been determined that a record is deliberative, there is a presumption against disclosure and the party seeking the document has the burden of establishing his or her compelling or substantial need for the record.

- a. That burden can be met by a showing of:

- i. the importance of the information to the requesting party,
- ii. its availability from other sources **and**
- iii. the effect of disclosure on frank and independent discussion of contemplated government policies.

In the matter before the Council, the Complainant requested a copy of Councilman Russo's budget cut suggestions. The Custodian has certified that Councilman Russo made reference to \$17 million in possible budget cuts at the November 5, 2008 Council meeting and handed out a document relating to those suggested budget cuts to the other members of the Council. The Custodian also certified that Councilman Russo did not provide copies of the handout to the general public. The Custodian further certified that the City's Fiscal Year 2009 budget was adopted by the City Council on or about March 25, 2009. The evidence of record therefore indicates that the record requested by the Complainant contains Councilman Russo's "suggested" budget cuts, which were proposed at the November 5, 2008 Council meeting prior to the adoption of the City's Fiscal Year 2009 budget on or about March 25, 2009. The requested record is therefore both pre-decisional and deliberative pursuant to In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000).

Because the evidence of record indicates that the record requested by the Complainant contains Councilman Russo's "suggested" budget cuts, which were proposed at the November 5, 2008 Council meeting prior to the adoption of the City's Fiscal Year 2009 budget on or about March 25, 2009, the requested record is therefore both pre-decisional and deliberative and is exempt from disclosure under OPRA as ACD material. N.J.S.A. 47:1A-1.1; In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000).

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

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 provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, because the requested record is both pre-decisional and deliberative and is exempt from disclosure under OPRA as advisory, consultative or deliberative (ACD) material pursuant to N.J.S.A. 47:1A-1.1, 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’s failure to respond in writing to the 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).
2. Because the evidence of record indicates that the record requested by the Complainant contains Councilman Russo’s “suggested” budget cuts, which were proposed at the November 5, 2008 Council meeting prior to the adoption of the City’s Fiscal Year 2009 budget on or about March 25, 2009, the requested record is therefore both pre-decisional and deliberative and is exempt from disclosure under OPRA as advisory, consultative or deliberative (ACD) material. N.J.S.A. 47:1A-1.1; In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000).
3. Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, because the requested record is both pre-decisional and deliberative and is exempt from disclosure under OPRA as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1, 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 By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

February 16, 2010