



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Acting Commissioner

FINAL DECISION

February 28, 2012 Government Records Council Meeting

George F. Burdick, Jr.  
Complainant

Complaint No. 2009-150

v.

New Jersey Office of Administrative Law  
Custodian of Record

At the February 28, 2012 public meeting, the Government Records Council (“Council”) considered the February 21, 2012 *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 provided the GRC with a legal certification and nine (9) copies of the unredacted record requested for the *in camera* inspection on June 7, 2010. The Custodian’s Counsel further noted that the Office of Administrative Law provided no redaction index because no redactions were made to the requested backup recording. Therefore, the Custodian timely complied with the Council’s May 27, 2010 Interim Order.
2. The Custodian lawfully denied access to the requested backup recording because same is not the official record of the Office of Administrative Law’s hearing in Burdick v. Franklin Township Board of Education, OAL Docket No. GRC 4577-08 pursuant to *N.J.A.C. 1:1-2.1*. and because the backup recording is not an official record pursuant to O’Shea v. West Milford Board of Education, 391 *N.J. Super.* 534 (App. Div. 2007). Thus the GRC declines to perform an *in camera* review of the record at issue because it has determined that the record is exempt from disclosure under OPRA. Moreover, the GRC declines to determine whether the Custodian knowingly and willfully violated OPRA because the GRC determines that no violation has occurred.

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 28<sup>th</sup> Day of February, 2012

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Denise Parkinson Vetti, Esq., Secretary  
Government Records Council

**Decision Distribution Date: March 1, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
February 28, 2012 Council Meeting**

**George F. Burdick, Jr.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-150**

v.

**New Jersey Office of Administrative Law<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** A copy of the backup tape for Hearing Room No. 8 at the Office of Administrative Law's ("OAL") Quakerbridge Plaza complex dated March 5, 2009 between the hours of 9:00 a.m. and 4:00 p.m.

**Request Made:** April 1, 2009

**Response Made:** April 3, 2009

**Custodian:** Randye E. Bloom

**GRC Complaint Filed:** May 5, 2009<sup>3</sup>

**Background**

**May 27, 2010**

Government Records Council's ("Council") Interim Order. At its May 27, 2010 public meeting, the Council considered the May 20, 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, found that:

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested backup recording for Hearing Room No. 8 at the Office of Administrative Law's ... Quakerbridge Plaza complex dated March 5, 2009 between the hours of 9:00 am and 4:00 pm to determine the validity of the Custodian's assertion that the record contains information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
  
2. **The Custodian must deliver<sup>4</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see No. 2 above), a**

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

<sup>2</sup> Represented by Patricia Prunty, Esq., Assistant Director, Judicial Standards & Procedures (Trenton, NJ).

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

<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.

**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.**

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

### **June 1, 2010**

Council's Interim Order distributed to the parties.

### **June 7, 2010**

Certification of the Custodian in response to the Council's Interim Order attaching nine (9) copies of the unredacted backup recording of Burdick v. Franklin Township Board of Education, OAL Docket No. GRC 4577-08.<sup>7</sup>

The Custodian certifies that she received the Complainant's OPRA request on April 1, 2009. The Custodian certifies that she provided the Complainant with a CD copy of the official hearing recording on April 3, 2009. The Custodian certifies that she also informed the Complainant that the backup system existed solely as a fail-safe should the primary recording system fail. The Custodian certifies that she requested that the Complainant review the official hearing recording and advise whether he would still be interested in obtaining the backup recording. The Custodian certifies that in a letter dated April 8, 2009, the Complainant advised that his OPRA request sought a copy of the backup recording and not the official hearing recording. The Custodian certifies that the Complainant further advised that under OPRA, he is entitled to the record he specifically requested.

The Custodian certifies that the digital recording system used by OAL was installed in July 2008 and is the same system used by the New Jersey Superior Court ("Court"). The Custodian further certifies that this is the first time OAL has received an OPRA request for a backup recording. The Custodian certifies that prior to receiving this request, she contacted the New Jersey Administrative Office of the Courts to obtain their policy on disclosure of backup tapes. The Custodian certifies that the Courts advised that their provisional policy was to disclose the primary recording and only make backups available in the event of a failure of the primary recording system. The Custodian certifies that upon receipt of the Complainant's OPRA request, she confirmed with the Court that their policy had not changed.

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<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."

<sup>7</sup> The GRC caption is Burdick v. Franklin Township Board of Education, GRC Complaint No. 2007-74 (March 2009).

The Custodian certifies that she also consulted with staff counsel and senior administrative staff because of the substantial concerns that disclosure could divulge information deemed exempt as attorney-client privileged, confidential settlement negotiation or citizens' privacy issues. N.J.S.A. 47:1A-1 et seq.

The Custodian certifies that on April 14, 2009, she denied access to the requested record in writing and advised the Complainant of OAL's policy regarding backup tapes, which is consistent with the Court. The Custodian certifies that the Complainant filed this complaint on May 5, 2009, at which time she had a copy of the backup recording made in order to ensure preservation of the record.

The Custodian certifies that pursuant to the Council's May 27, 2010 Interim Order received on June 2, 2010, she is providing to the GRC for an *in camera* review nine (9) copies of the responsive recording.

Custodian's Counsel submits a letter brief in support of OAL's position. Counsel states that the GRC ordered an *in camera* review of the backup recording "to determine the validity of the Custodian's assertion that the record contains information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1." Counsel notes that in the interest of clarity, OAL has not asserted that the backup recording contains privileged or confidential information: OAL has no knowledge of whether the recording contains this type of information. Counsel states that OAL's position is that it provided the Complainant with the appropriate official recording of the hearing created by the primary recording system.

Counsel further states that she is concerned that prior to any determination by the GRC regarding privilege or confidentiality, the parties in Burdick should be given an opportunity to present their position on this issue. Counsel states that any privilege or confidentiality rights belong to the parties and not OAL. *See* N.J.R.E. 504(1)(the privilege for any conversations conducted between a lawyer and client belongs to the client and can be claimed by the lawyer on the client's behalf). Counsel states that any disclosure of the backup recording should occur after notice to the parties and individuals present in the hearing room during the hearing. Counsel thus requests that, in the instance that the GRC determines that the backup recording is a government record subject to disclosure, all parties be notified to ensure that such privileges are adequately protected. Counsel asserts that any existent privilege does not belong to OAL and thus cannot be waived by it.

Counsel further states that the Custodian did not submit a redaction index because OAL has not redacted any portion of the recording.

Counsel finally asserts that the Custodian could not have knowingly and willfully violated OPRA because this issue was one of first impression involving a new technology. Counsel states that the new recording system, which is also installed in the Court, creates a digital record of a hearing under the control and direction of the presiding administrative law judge. Counsel states that the recording system also creates a backup recording from 7:00 a.m. to 7:00 p.m. Counsel states that while ensuring there will never

be an instance in which no record is made, the backup system raised several issues since it may include recordings of privileged, confidential or personal conversations.

Counsel states that the Court recognized these issues and created the “Working Group on Implementation of Issues of Digital Recording/CourtSmart” to deal with issues similar to those in this complaint. Counsel states that the group issued recommendations calling for the establishment of clear, detailed and specific standards for releasing any portion of a backup recording: a backup recording only be disclosed in instances where the official recording has been destroyed, lost or cannot be produced due to a technical malfunction. “New Jersey State Bar Association’s Summary of Recommendations of Working Group on Implementation Issues Regarding Digital Recording/CourtSmart.”

Counsel states that the Custodian’s response to the Complainant’s OPRA request thus required a balance of two significant policies: the State’s goal of providing citizens access to government records under OPRA and the need for confidentiality of certain portions of the backup recording to include attorney-client privileged conversations, conversations protected by deliberative process, settlement negotiations and a citizen’s right of privacy.

Counsel states that prior to responding to the Complainant’s OPRA request, the Custodian did her due diligence in consulting the Court, staff counsel and administrative staff. Counsel states that the policy implemented by the Custodian is identical to that of the Court. Counsel asserts that under these circumstances, the Custodian could not have denied access with any knowledge that her actions were wrongful or that she had any conscious element of wrongdoing. Counsel thus argues that an imposition of a fine upon the Custodian would be inappropriate.

### **June 11, 2010**

Letter from the Complainant to the GRC.<sup>8</sup> The Complainant states that he is in receipt of Custodian Counsel’s letter brief dated June 7, 2010 and disputes same.

The Complainant disputes Counsel’s argument that at no time did OAL assert that the backup recording contained confidential or privileged material. The Complainant states that in the SOI, Counsel stated that the backup recording “... prior to redactions consists of the record already provided ... materials legally exempted from disclosure, and private conversations.” Counsel’s letter brief dated June 23, 2009, pg. 9. The Complainant contends that this statement clearly contradicts Counsel’s argument in her letter brief.

The Complainant further disputes Counsel’s argument that all parties should be notified and given the opportunity to present their positions. The Complainant

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<sup>8</sup> The Complainant also e-mailed the GRC a copy of the official transcript from the Burdick hearing. George F. Burdick, Jr. v. New Jersey Office of Administrative Law, 2009-150 – Supplemental Findings and Recommendations of the Executive Director

argues that OPRA does not permit third-party intervention in a GRC complaint.<sup>9</sup> The Complainant notes that he is mindful of the intervention issue because the GRC denied Quakertown Education Association (“QEA”) the opportunity to intervene in Burdick v. Franklin Township Board of Education, GRC Complaint No. 2007-74 (March 2009). The Complainant states that in Gill v. New Jersey Department of Banking and Insurance, 404 N.J. Super. 1 (App. Div. 2008), the Court noted that:

“... we are mindful that permitting intervention in the GRC proceeding will, to some degree, adversely affect the Legislature's goal of providing prompt access to government records. See N.J.S.A. 47:1A-5.i. Consequently, we do not intend that our decision be taken to mean that any affected nonparty may intervene in every instance. Each application for intervention is to be decided under its own particular circumstances.”  
*Id.* at 15.

The Complainant asserts that the intent of the Court’s holding in Gill was that the merits of “particular circumstances” determine the basis for intervention and not simply a request by any “affected party.”

The Complainant further argues that the Counsel’s suggestion that the parties be notified removes the onus of determining whether the backup recording should be disclosed from the GRC and places the burden on the parties. The Complainant asserts that Counsel’s suggestion directly opposes the holding in Jung & O’Halloran v. Borough of Roselle (Union), OAL Docket No. GRC 07137-08: “... the purpose of OPRA to make government records accessible to citizens would be subverted if a Custodian could defend her inaction by claiming that she was denied access to records by other officials.” *Id.* The Complainant argues that this statement taken to an extreme would allow a public agency to subvert access by contacting every citizen of the State to confirm that a record is disclosable to a requestor.

The Complainant further disputes Counsel’s argument that any privilege does not belong to OAL and thus cannot be waived by it. The Complainant contends that the GRC has already deemed the backup recording to be a government record and that now it must determine what portion of the recording should be withheld from disclosure. The Complainant asserts that he was present for the entire recording except between 1:40 p.m. and 2:40 p.m.; thus, no portion of the backup recording for which the Complainant was present is confidential. The Complainant further contends that the beginning of the recording reveals that Administrative Law Judge Reba (“ALJ”) initially alerted the parties that the hearing room was being recorded constantly between 8:00 a.m. and 6:00

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<sup>9</sup> The precedent for acceptance of intervenors in the GRC adjudication process was set in Gill v. New Jersey Department of Banking & Insurance, GRC Complaint No. 2007-189 (May 2009). In Gill, GEICO requested to intervene as the records at issue were submitted by GEICO to the New Jersey Department of Banking and Insurance (“DOBI”). The GRC denied GEICO’s request, and GEICO requested a stay to appeal the GRC’s decision. On appeal, the Appellate Division determined that GEICO could intervene, reasoning that the GRC relied only on OPRA and its regulations while failing to conform to regulations for hearings by a state agency in contested cases pursuant to N.J.S.A. 47:1A-7.e. and N.J.A.C. 5:105-2.7. which indicate that third parties may participate.

p.m. The Complainant asserts that the ALJ cautioned that any side conversations between attorneys and clients should be taken into the hallway.

The Complainant contends that the responsive record is a government record regardless of whether the Legislature contemplated disclosure backup recordings, the system used to record the backup recording, what groups met and recommended policies and who the Custodian consulted prior to denying access to such recording.

The Complainant asserts that he is concerned that the Custodian has admitted to denying access to the responsive recording without first reviewing the record to determine whether “privileged or confidential” information was actually contained therein. The Complainant contends that the Custodian did not make a good faith effort to review the recording and instead chose to have discussions with several persons prior to denying access to the recording in its entirety. The Complainant asserts that although he believes the GRC will determine that the Custodian unlawfully denied access to the responsive recording, he cannot prove that she knowingly and willfully violated OPRA given OAL’s holding in DeLuca v. Town of Guttenberg, OAL Docket No. GRC 07724-07.<sup>10</sup>

#### **August 23, 2010**

Letter from the Custodian’s Counsel to the GRC, attaching New Jersey Directive No. 07-10. Counsel states that in her June 7, 2010 letter brief, she stated that the Custodian relied on the recommendations of the “New Jersey State Bar Association’s Summary of Recommendations of Working Group on Implementation Issues Regarding Digital Recording/CourtSmart” in denying access to the responsive recording. Counsel states that the Court adopted the recommendations of the group on August 3, 2010.

#### **August 25, 2010**

E-mail from the Complainant to the GRC. The Complainant states that he is in receipt of Custodian Counsel’s August 23, 2010 letter. The Complainant asserts that Counsel provides no evidence indicating that Directive No. 07-10 retroactively applies to before his OPRA request. The Complainant asserts that because of this, Directive No. 07-10 does not apply to this complaint.

The Complainant further argues that OAL falls under the Executive Branch of State government and not the Judiciary. The Complainant states that he is aware that the Judiciary is exempt from OPRA; thus, the Custodian must bear the burden of proving that Judiciary directives affect the Executive Branch as well.

### **Analysis**

#### **Whether the Custodian complied with the Council’s May 27, 2010 Interim Order?**

At its May 27, 2010 public meeting, the Council determined that because the Custodian asserted that the requested records were lawfully denied because the backup

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<sup>10</sup> The GRC caption is DeLuca v. Town of Guttenberg, GRC Complaint No. 2006-102 (May 2008).  
George F. Burdick, Jr. v. New Jersey Office of Administrative Law, 2009-150 – Supplemental Findings and Recommendations of the Executive Director



tape is not the official hearing record and may contain information which is exempt from disclosure 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).

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted record, 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 record provided is the record 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 June 8, 2010.

The Custodian provided the GRC with a legal certification and nine (9) copies of the unredacted record requested for the *in camera* inspection on June 7, 2010. The Custodian's Counsel further noted that OAL provided no redaction index because no redactions were made to the requested backup recording. Therefore, the Custodian timely complied with the Council's May 27, 2010 Interim Order.

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

The Custodian asserted that she lawfully denied the Complainant access to the requested backup recording because it is not a public record and may contain information that is confidential under OPRA. The Custodian's Counsel reinforced this argument in the SOI, contending that OPRA does not require disclosure of the backup recording because the Complainant already has the official hearing record and asserting that the backup recording is not a public record. Counsel further contended that disclosure of the backup recording would not further the purposes of OPRA.

Conversely, the Complainant contended that the backup recording is a government record subject to access under OPRA. The Complainant argued that he was present for the entire recording except between 1:40 p.m. and 2:40 p.m.; thus, no portion of the backup recording for which the Complainant was present is confidential. The Complainant asserted that the Custodian failed to make a good faith effort to review the backup tape to confirm whether any confidential information existed, instead opting to speak with several colleagues and Counsel prior to denying access to the responsive record in its entirety.

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.

The Administrative Procedures Act (“APA”) defines the “record” of an OAL proceeding to include “all decisions and rulings of the judge and all of the testimony, documents and arguments presented before, during and after the hearing and accepted by the Judge for consideration in the rendering of a decision.” *N.J.A.C.* 1:1-2.1. The APA also provides that the proceedings shall be recorded verbatim either by stenographic reporter or by sound recording devices, and that all discussions off the record, no matter how brief, except settlement discussions and mediations, shall be summarized for the record. *N.J.A.C.* 1:1-14.1(a). The APA further provides that “[t]o protect the attorney-client privilege and the effective right to counsel, there shall be no recording of conferences between attorneys and their clients or between counsel and the judge at the bench.” *N.J.A.C.* 1:1-14.1(d).

Thus, it is only the evidentiary hearings and proceedings before an administrative law judge that constitute the record in an OAL proceeding. These hearings and proceedings are what the APA requires to be contained in a verbatim transcript; such transcript may be obtained by any person, including the parties. *N.J.A.C.* 1:1-14.11. The APA also specifically provides that any such transcript “that is required by law to be filed with a Clerk, shall be considered a public document which is available upon request for copying, as required by the [OPRA].” Because the APA only identifies the verbatim transcript as a “public record” for OPRA purposes, backup recordings of the proceedings are not a public record under OPRA. *See N.J.A.C.* 1:1-2.1.

However, the APA also provides access to unofficial recordings of such a proceeding. *N.J.A.C.* 1:1-14(b) provides that “[a]n unofficial copy of a sound recorded proceeding may be obtained by making a request to the Clerk accompanied by a blank standard cassette of appropriate length.” This suggests that a requestor can obtain a copy of an unofficial recording to facilitate the production of an official transcript of the record, which is a public record under OPRA. That is, the requestor is not entitled to more information contained on a recording than can be obtained from the official transcript of the proceeding, which is a public record. Additionally, it does not appear that “unofficial copy of a sound recording” as contemplated in this regulation is analogous with the requested backup recording.

As previously argued by the Custodian’s Counsel in the SOI and under this regulatory scheme, the Court’s decision in O’Shea v. West Milford Board of Education, 391 N.J. Super. 534 (App. Div. 2007), is controlling. In O’Shea, the Court determined that the handwritten notes taken by the Board Secretary during an executive session were not “government records” within the meaning of OPRA because it was the formal

minutes of the meeting that constituted the “public record” and not the Secretary’s handwritten notes. Similarly, in this complaint, it is the official recording and the verbatim transcript of the evidentiary hearing conducted by Judge Reba that is the “public record” and not the backup recording maintained by OAL for convenience purposes, which captures communications that are not considered part of the official record of the proceeding.

Even assuming that the backup recording is a “government record,” the denial of access is proper under N.J.S.A. 47:1A-5.g. That is, the recording would have to be redacted to permit access to only those items recognized by the APA as constituting the appropriate “record” of the proceeding. Thus, the Complainant would have access to very same material that exists on the official recording. Moreover, it would presumably substantially disrupt agency operations if the Custodian were required to listen to an eleven (11) hour recording for the purpose of redacting conversations and communications that are not subject to disclosure, especially when the very same information is already available on the official recording.

Thus, the Custodian lawfully denied access to the requested backup recording because same is not the official record of OAL’s hearing in Burdick pursuant to *N.J.A.C.* 1:1-2.1. and because the backup recording is not an official record pursuant to O’Shea. Thus the GRC declines to perform an *in camera* review of the record at issue because it has determined that the record is exempt from disclosure under OPRA. Moreover, the GRC declines to determine whether the Custodian knowingly and willfully violated OPRA because the GRC determines that no violation of OPRA has occurred.

Additionally, the Custodian’s Counsel notes that contrary to the GRC’s *in camera* order, OAL has never asserted that the responsive record definitively contained privileged or confidential information. Counsel contended that OAL has no knowledge of whether the recording contains this type of information; rather, the Complainant was provided with the appropriate public record that is disclosable under OPRA.

The Complainant refuted Counsel’s argument and quoted Counsel’s statement in the SOI that “prior to redactions consists of the record already provided ... materials legally exempted from disclosure, and private conversations” as evidence.

A review of the evidence of record indicates that OAL does not definitively deny access to the backup recording on the basis that it contains privileged information. The Custodian’s response only alludes to the possibility that the backup recording contains information which is exempt from disclosure under OPRA. The evidence of record indicates that OAL’s basis for its denial of access to the responsive record is that that backup recording is not a public record “that *may* contain information ... not part of an official hearing record ...” (Emphasis added.) Council’s May 27, 2010 Interim Order, pg. 15.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian provided the GRC with a legal certification and nine (9) copies of the unredacted record requested for the *in camera* inspection on June 7, 2010. The Custodian's Counsel further noted that the Office of Administrative Law provided no redaction index because no redactions were made to the requested backup recording. Therefore, the Custodian timely complied with the Council's May 27, 2010 Interim Order.
  
2. The Custodian lawfully denied access to the requested backup recording because same is not the official record of the Office of Administrative Law's hearing in Burdick v. Franklin Township Board of Education, OAL Docket No. GRC 4577-08 pursuant to *N.J.A.C. 1:1-2.1*. and because the backup recording is not an official record pursuant to O'Shea v. West Milford Board of Education, 391 *N.J. Super.* 534 (App. Div. 2007). Thus the GRC declines to perform an *in camera* review of the record at issue because it has determined that the record is exempt from disclosure under OPRA. Moreover, the GRC declines to determine whether the Custodian knowingly and willfully violated OPRA because the GRC determines that no violation has occurred.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

February 21, 2012



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

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
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LORI GRIFA  
Acting Commissioner

INTERIM ORDER

May 27, 2010 Government Records Council Meeting

George F. Burdick, Jr.  
Complainant

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New Jersey Office of Administrative Law  
Custodian of Record

At the May 27, 2010 public meeting, the Government Records Council ("Council") considered the May 20, 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. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested backup recording for Hearing Room No. 8 at the Office of Administrative Law's ("OAL") Quakerbridge Plaza complex dated March 5, 2009 between the hours of 9:00 am and 4:00 pm to determine the validity of the Custodian's assertion that the record contains information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see No. 2 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.**

<sup>1</sup> The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

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

<sup>3</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."



3. The 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 27<sup>th</sup> Day of May, 2010

Robin Berg Tabakin, Chair  
Government Records Council

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

Charles A. Richman, Secretary  
Government Records Council

**Decision Distribution Date: June 1, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
May 27, 2010 Council Meeting**

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Complainant**

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**New Jersey Office of Administrative Law<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** A copy of the backup tape for Hearing Room No. 8 at the Office of Administrative Law's ("OAL") Quakerbridge Plaza complex dated March 5, 2009 between the hours of 9:00 am and 4:00 pm.

**Request Made:** April 1, 2009

**Response Made:** April 3, 2009

**Custodian:** Randye E. Bloom

**GRC Complaint Filed:** May 5, 2009<sup>3</sup>

**Background**

**April 1, 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 3, 2009**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the second (2<sup>nd</sup>) business day following receipt of such request. The Custodian states that she is in receipt of the Complainant's OPRA request. The Custodian further states that she has enclosed a compact disc ("CD") containing a copy of the official hearing record for Hearing Room No. 8 on March 5, 2009. The Custodian requests that the Complainant review the record to determine whether he is still interested in obtaining the requested backup recording.

The Custodian states that the sole purpose of the backup recording system is to ensure that there is an official hearing record should the primary recording system fail for any reason. The Custodian advises that access to the backup recording can only be obtained by making a formal request to the Director and Chief Administrative Law Judge

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

<sup>2</sup> Represented by Patricia Prunty, Esq., Assistant Director, Judicial Standards & Procedures (Trenton, NJ).

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

of OAL and only when the complete record cannot be obtained from the primary recording system.

The Custodian requests that if the Complainant is satisfied with the primary recording, the Complainant send back an unused CD in exchange for the enclosed CD. The Custodian states that if the Complainant is not satisfied with the primary recording, he must send a specific request for additional information to the Honorable Laura Sanders.<sup>4</sup> The Custodian notes that she will not consider the Complainant's OPRA request closed until the Complainant informs her that the official hearing record is satisfactory.

#### **April 8, 2009**

Letter from the Complainant to the Custodian. The Complainant acknowledges receipt of the Custodian's letter dated April 3, 2009.

The Complainant states that the provisions of OPRA provide that a custodian must respond in writing to a requestor's OPRA request either granting access, denying access citing to a specific lawful basis for such, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days. The Complainant states that he made an OPRA request for a specific identifiable government record on April 1, 2009. The Complainant states that the Custodian acknowledged receipt of the request and purveyed an understanding that the request was for the backup recording for Hearing Room No. 8 at the Office of Administrative Law's ("OAL") Quakerbridge Plaza complex dated March 5, 2009 between the hours of 9:00 am and 4:00 pm.

The Complainant states that he believes his request was clearly for a copy of the backup recording and not the official hearing record. The Complainant states that the Custodian directed the Complainant to obtain approval from the Director and Chief Administrative Law Judge and only when a complete record cannot be obtained from the primary recording system. The Complainant avers that OPRA contains no provisions under which a requestor must seek such additional approval in order to obtain a requested record. The Complainant states that in Jung & O'Halloran v. Borough of Roselle (Union) (OAL Docket No. GRC07137-08 & GRC07138-08), the court held that:

“... the purpose of OPRA to make government records accessible to citizens would be subverted if a Custodian could defend her inaction by claiming that she was denied access to records by other officials.”

The Complainant states that in a telephone conversation on April 6, 2009, the Custodian stated that the backup recording is a government record that includes everything that is said in a hearing room, both on and off the record; thus, this record is more expansive than the official hearing record provided.<sup>5</sup> The Custodian states that he is essentially requesting a specific basis for being denied access to the request recording.

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<sup>4</sup> The Custodian provides a mailing address and fax number to the Complainant.

<sup>5</sup> The Complainant notes that the Custodian states in her letter dated April 3, 2009 that “I hope that the information you seek is available on this record.” The Complainant notes that OPRA does not recognize George F. Burdick, Jr. v. New Jersey Office of Administrative Law, 2009-150 – Findings and Recommendations of the Executive Director



The Complainant states that during the telephone conversation with the Custodian on April 6, 2009, the Custodian mentioned the “confidential” nature of the backup recording. The Complainant avers that he cannot accept confidentiality as a lawful basis because the Complainant was present in Hearing Room No. 8 all day on March 5, 2009 (with the exception of a lunch break from 1:40 pm to 2:40 pm). The Complainant states that he is completely aware of the contents of the recording and at no time was he informed that the backup recording was confidential nor did the Complainant give consent to make such confidential.

The Complainant states that the Custodian also mentioned “attorney-client privilege” as a possible basis for denying access to the requested backup recording. The Complainant states that N.J.S.A. 2A:84A-20 provides that:

“[a] communication made in the course of relationship between lawyer and client shall be presumed to have been made in professional confidence *unless knowingly made within the hearing of some person whose presence nullified the privilege.*” (Emphasis added.)

The Complainant argues that no clients were in the room for the first two (2) hours of the recording. Additionally, the Complainant argues that even if a client was present, any communication between an attorney and client which presumably would have been loud enough to be recorded and for the Complainant to hear would nullify the attorney-client privilege pursuant to N.J.S.A. 2A:80A-20. The Complainant respectfully rejects the Custodian’s claim that the backup recording is protected under the guise of “attorney-client privilege.”

The Complainant states that the Custodian further mentioned “settlement negotiations” as a possible basis for denying access to the requested backup recording. The Complainant asserts that the purpose of the hearing was for fact finding and not settlement negotiations. The Complainant avers that the backup recording will confirm that no settlement offer, negotiation or acceptance of such occurred; therefore, the Complainant respectfully rejects the Custodian’s claim that the backup recording is protected under the guise of “settlement negotiations.”

The Complainant states that the court held in Serrano v. South Brunswick Township, 358 N.J. Super. 352, 817 A.2d (2004) that “[a] government record does not become cloaked with confidentiality simply because (the prosecutor) declares it so.” *Id.* at 367. The Complainant states that he further respectfully rejects any claims that OAL may argue in the future that the backup recording constitutes advisory, consultative or deliberative (“ACD”) material. The Complainant argues that in order for the ACD exemption to be lawful, a fiduciary relationship between the “consultant and client” must be established which cannot be done in the instant situation.<sup>6</sup>

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requests for “information,” but specific, identifiable government records. The Complainant reiterates that his request for the backup recording is a request for a specific identifiable government record.

<sup>6</sup> The Complainant asserts that Administrative Law Judge Reba was a not consultant nor was the Complainant the client of Administrative Law Judge Reba.

The Complainant avers that he hopes this letter clarifies his position regarding his OPRA request for the backup recording. The Complainant requests that OAL either grant or deny access to the Complainant's OPRA request.<sup>7</sup>

#### **April 14, 2009**

Letter from the Custodian to the Complainant attaching the Complainant's April 1, 2009 OPRA request with the Complainant's signature thereon. The Custodian states that she is in receipt of the Complainant's letter April 8, 2009.<sup>8</sup> The Custodian states that, as was discussed in the telephone conversation on April 6, 2009, OAL believes that the backup recording is not a public record and is only made available if there is a failure of the primary recording system. The Custodian avers that she provided the Complainant with examples of the types of information that may be on the backup recording that are not part of the official hearing record, including settlement discussions, attorney-client privileged discussions and any other discussions about the case that are off the record. The Custodian avers that these types of information are not considered part of a public record and therefore exempt under OPRA.

The Custodian states that OAL is not required to make or maintain a backup recording; only the official hearing record is required by statute. The Custodian states that the sole purpose of the backup recording system is to ensure that there is a complete record of a hearing if the primary recording system fails. The Custodian avers that although the backup recording is a single channel as opposed to a four-channel recording and there are some technical differences in the process of maintaining and retrieving the recording, the backup recording serves its specific purpose.

The Custodian states that she is returning the Complainant's OPRA request form with an indication that the OPRA request is denied. The Custodian states that it appears that this matter is one of first impression since she believes that prior requests for backup recordings made to the Judiciary were denied with no further action taken.<sup>9</sup>

#### **April 28, 2009**

Letter from the Complainant to the Custodian. The Complainant states that he is in receipt of the Custodian's April 14, 2009 letter. The Complainant states that based on the Custodian's response, the Complainant is filing a Denial of Access Complaint with the GRC. The Complainant states that his position will be that OAL has failed to bear their burden of proving a lawful denial of access to the requested backup recording because no legal citations were given in support of the Custodian's decision.

The Complainant states that the Custodian stated in her letter dated April 14, 2009 that the sole purpose of the backup recording is to ensure that there is a complete record of a case in the instant that the primary recording system fails. The Complainant states that OPRA defines a government record as:

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<sup>7</sup> The Complainant states that he has enclosed an unused CD in replacement of the official hearing record CD provided by the Custodian on April 3, 2009.

<sup>8</sup> The Custodian states that she is returning the Complainant's unused CD since the official recording provided will not satisfy the Complainant's request.

<sup>9</sup> The GRC has no jurisdiction over requests made to the Judiciary. *See N.J.S.A. 47:1A-7.g.*

“... 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 ...” N.J.S.A. 47:1A-1.1.

Further, the Complainant states that in Doe v. Poritz, 142, N.J. 1 (1995), the New Jersey Supreme Court held that:

“New Jersey specifically guarantees public access to all court records, including criminal records. R. 1:38; Executive Order No. 123 (1985). In most New Jersey counties, it is possible to go to the courthouse and request an individual’s criminal record within that vicinage, providing only the individual’s name and address. N.J.S.A. 53:1-20.6, enacted in 1994, provides that, upon adoption of implementing rules, any person may obtain a complete criminal history from the State Police by providing a name and either date of birth or social security number and paying a fifteen dollar fee.” *Id* at 79.

Additionally, the Complainant states that in Higgins v. Township of Hopewell Police Department, Appellate Division Docket No. A-5490-04T55490-04T5, the court ruled as follows:

“[t]he need for confidentiality during a law enforcement investigation does not survive the closing of the case. Keddie v. Rutgers, 148 N.J. 36, 54 (1997); Shuttleworth v. City of Camden, 258 N.J. Super. 573, 585 (App. Div.), certif. denied, 133 N.J. 429 (1992).”

The Complainant states that the Custodian previously alleged that the backup recording contains both “on the record” and “off the record” material. The Complainant argues that as such, any claims of confidentiality (if proven to be a valid exemption) can only be made for a portion of the recording and not the entire record. The Complainant states that since he was present in Hearing Room No. 8 during the entire “off the record” recording and at no time gave consent to keep confidential anything said or heard in the room, the Complainant believes that his argument is compelling enough to sustain a balancing test.

The Complainant advises that he will make it clear in the Denial of Access Complaint that the Custodian requested additional time to respond to the Complainant’s OPRA request, which the Complainant verbally granted on April 6, 2009. The Complainant states that he believes the Custodian fully adhered to the statutory time frame in which a custodian is required to respond under OPRA.

### **May 5, 2009**

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

- Complainant's OPRA request dated April 1, 2009.
- Letter from the Custodian to the Complainant dated April 3, 2009.
- Letter from the Complainant to the Custodian dated April 8, 2009.
- Letter from the Custodian to the Complainant dated April 14, 2009.
- Letter from the Complainant to the Custodian dated April 28, 2009.

The Complainant states that he submitted an OPRA request via facsimile to the Custodian on April 1, 2009. The Complainant states that the Custodian confirmed receipt of the request via telephone later that day.

The Complainant states that he received a letter dated April 3, 2009 and a CD copy of the official hearing record from the Custodian on April 6, 2009. The Complainant states that the Custodian advised in the letter that the backup recording could only be obtained by making a formal request to the Director and Chief Administrative Law Judge of OAL and only when a complete record cannot be obtained from the primary recording system, from which the official hearing record is created. The Complainant states that the Custodian further requested that the Complainant forward a new, blank CD as a replacement for the one provided to the Complainant if the official hearing record satisfied the Complainant's OPRA request.

The Complainant states that he telephoned the Custodian on April 6, 2009. The Complainant states that during the conversation, the Custodian requested an extension of two (2) weeks to respond to the Complainant's OPRA request, which was granted. The Complainant states that the Custodian further reiterated her position regarding the requested backup recording. The Complainant states that the Custodian confirmed that the backup recording contains both "on the record" and "off the record" conversations. The Complainant states that he reiterated to the Custodian that the requested backup recording was of a fact finding hearing in which the Complainant was a participant and was present for the entire recording (except during a lunch break from 1:40 pm to 2:40 pm). The Complainant states that the Custodian advised that there is potential for confidential information to be included in the "off the record" portion of the backup recording, including attorney-client privileged conversations, settlement negotiations and conversations deemed to be ACD material. The Complainant states that he rejected all of these potential exemptions on the basis of his participation in the hearing.

The Complainant states that pursuant to the April 6, 2009 telephone conversation with the Custodian, the Complainant composed and sent a letter to the Custodian on April 8, 2009. The Complainant states that he advised that OPRA does not require a requestor to seek approval for access to a government record from anyone other than the custodian of record; therefore, the Complainant declined to seek the approval of the Director and Chief Administrative Law Judge of OAL.<sup>10</sup> The Complainant states that he advised the Custodian that he did not at any time agree to keep any of the conversations during the hearing confidential; therefore, he rejected the Custodian's potential exemptions. The

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<sup>10</sup> The Complainant reiterates that he informed the Custodian that OPRA does not support the gathering of information and that his request for the backup recording is a request for a specific identifiable government record.

Complainant states that he requested that the Custodian either grant or deny access to the requested backup recording.<sup>11</sup>

The Complainant states that, on April 16, 2009, he received a letter from the Custodian dated April 14, 2009 denying access to the requested backup recording. The Complainant states that the Custodian advised that she believed the backup recording was not a public record and is only available if there was a failure of the primary recording system.<sup>12</sup>

The Complainant states that he sent a letter to the Custodian on April 28, 2009 informing the Custodian that he would file a Denial of Access Complaint with the GRC. The Complainant states that he cited to N.J.S.A. 47:1A-1.1., Doe v. Poritz, 142, N.J. 1 (1995) and Higgins v. Township of Hopewell Police Department, Appellate Division Docket No. A-5490-04T55490-04T5 in support of his denial of access complaint.<sup>13</sup>

The Complainant does not agree to mediate this complaint.

#### **June 16, 2009**

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

#### **June 23, 2009**

Custodian’s SOI with the following attachments:

- Complainant’s April 1, 2009 OPRA request with the Complainant’s signature thereon
- CourtSmart Request for Proposal (RFP) No. 06-X-3879 dated June 20, 2006.
- New Jersey State Bar Association (“NJSBA”) Trustees Report regarding the installation of CourtSmart digital recording system in Family Division courtrooms dated March 27, 2009.

The Custodian certifies that no records 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 (“DARM”).<sup>14</sup>

The Custodian certifies that she received the Complainant’s OPRA request on April 1, 2009. The Custodian certifies that she initially responded on April 3, 2009 and subsequently on April 14, 2009 after the Complainant verbally agreed to an extension of time for the Custodian to respond.

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<sup>11</sup> The Complainant also noted that he provided an unused CD as requested by the Custodian in her letter to the Complainant dated April 3, 2009.

<sup>12</sup> The Complainant notes that the Custodian also returned his unused CD.

<sup>13</sup> The Complainant notes that his letters to the Custodian dated April 8, 2009 and April 28, 2009 and the Custodian’s letter to the Complainant dated April 14, 2009 were forwarded to the GRC prior to the filing of this complaint.

<sup>14</sup> The Custodian did not certify as to the search undertaken to locate the requested backup recording, but does note that the recording is available.

The Custodian's Counsel submitted a legal brief in support of OAL's position regarding the instant complaint. Counsel states that the Complainant asserts in this complaint that OAL (which already provided the Complainant with the official hearing record of Hearing Room No. 8 on March 5, 2009) is compelled to also create and provide a copy of the backup recording. Counsel states that it is the position of OAL that OPRA does not require disclosure of the backup recording because the Complainant already has the official hearing record, the backup recording is not a public record and disclosure of the backup recording would not further the purposes of OPRA.

Counsel states that a hearing in the matter of Burdick v. Franklin Township Board of Education, GRC 4577-08 was held on March 5, 2009 in Hearing Room No. 8 at OAL in Mercerville, NJ, to which the Complainant was a party. Counsel states that the Complainant subsequently made an OPRA request on April 1, 2009 for the backup recording of Hearing Room No. 8 on March 5, 2009 between 9:00 am and 4:00 pm. Counsel states that the Custodian responded on April 3, 2009 providing access to a CD copy of the official hearing record and requested that the Complainant inform OAL whether this record would satisfy his request.<sup>15</sup>

Counsel states that the Complainant declined to accept the official hearing record as responsive to his OPRA request and reiterated that he did not request the official hearing record, but the backup recording. Counsel states that OAL responded again on April 14, 2009 denying access to the requested backup recording.

Counsel states that the issue presented is whether a requestor can require OAL to provide a copy of the backup recording of events occurring in an OAL hearing room when a true, accurate, and complete record of the hearing is available and has been provided. Counsel states that a description of OAL's recording system is essential to understanding the nature of this request. Counsel states that OAL installed a new audio recording system ("CourtSmart") in its hearing rooms in July 2006.<sup>16</sup>

Counsel states that CourtSmart provides a dual tracking system. Counsel states that the primary recording system creates a digital record of the proceeding and is activated by the presiding judge once he/she begins the proceeding. Counsel states that the judge also controls the recording system when necessary in order to go on or off the record. Counsel states it is this recording that creates the official hearing record. Counsel states that OAL agrees that the official hearing record is a public record subject to disclosure under OPRA. Counsel states that OAL frequently receives requests for official hearing records and provides such routinely, as the Custodian did in the instant complaint.

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<sup>15</sup> Counsel asserts that the Complainant was advised that if the official recording did not satisfy his OPRA request, the Complainant must explain why he believed the primary recording was insufficient. Further, Counsel footnotes that OAL understands that a requestor is not required to provide a purpose for or the intended use of records requested when the requestor is not provided with a copy of a record. However, review of the Custodian's letter dated April 3, 2009 shows that the Custodian only asked that the Complainant contact the Honorable Laura Sanders to request the backup recording.

<sup>16</sup> Counsel states that the system was obtained under the state contract for the New Jersey Superior Court and is identical to the system being installed in courtrooms throughout the State. See RFP No. 06-X-38479. George F. Burdick, Jr. v. New Jersey Office of Administrative Law, 2009-150 – Findings and Recommendations of the Executive Director

Counsel states that CourtSmart also includes a backup system which remains on in all hearing rooms from 8:00 am until 7:00 pm. Counsel states that the recordings made by the backup system will include not only hearing proceedings but any conversations which take place in the hearing room to include settlement negotiations, attorney-client consultations and even casual conversations. Counsel states that the backup recording system is in place for the rare instances that the primary recording system fails.<sup>17</sup> Counsel states that OAL does not use a backup recording unless there is a defect in the primary recording system.

Counsel avers that the backup recording is not identical to the official hearing record in several ways. Counsel states that the official hearing record is tracked in such a way that it is possible to easily identify the various speakers, which does not exist on the backup recording. Counsel states that, more significantly, the backup recording can be overly inclusive of conversations considered confidential, such as attorney-client conversations pursuant to *N.J.A.C. 1:1-15.4* and *N.J.R.E. 504*, settlement negotiations pursuant to *N.J.A.C. 1:1-15.10* and casual conversations occurring before or after the hearing or during breaks.

Counsel states that concerns about the use of CourtSmart in Superior Court, specifically concerns about the use of backup recordings, recently caused the Chief Justice of the Supreme Court to appoint a committee called Working Group on Implementation Issues Regarding Digital Recording/CourtSmart to identify and address issues raised by the installation of CourtSmart. Counsel states that the Working Group is currently considering recommendations from the NJSBA concerning the availability of backup recordings, which include the following:

- “(1) Establish clear administrative directives setting standards to be applied by the Assignment Judge prior to consideration of a request for the release of any portion of a secondary recording;
- (2) standards that are instituted must be more detailed and specific than “good cause;”
- (3) all parties must be provided with notice of a request for release...
- (4) access may only be provided for purposes of recreating the primary record in the event such record has been destroyed, lost or cannot be produced due to technical malfunctions in the primary ... recording system;
- (5) any communications on the backup ... recording beyond the scope of the primary record shall not be disclosed...” See NJSBA Trustees Report dated March 27, 2009.

Counsel states that these recommendations illustrate the substantial legal issues concerning confidentiality and privilege that may exist in backup recordings. Counsel states that the Complainant asserts a right to the backup recording even though there were no issues with the primary recording system and a complete official hearing record was created and subsequently provided to the Complainant in response to his OPRA request.

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<sup>17</sup> Counsel states that the reasons for a failure of the primary recording system could result from a technical malfunction or user error.  
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Counsel avers that while no confidential or privileged information may exist on the backup recording, as the Complainant asserts, a precedent holding that such recordings are public records subject to disclosure is not within the intent of OPRA. Counsel provides the following legal argument:

**OAL provided the official hearing record in compliance with OPRA:**

Counsel states that 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 ... The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.” N.J.S.A. 47:1A-1.1.

Counsel states that a record of a contested case hearing is a public record. Counsel states that *N.J.A.C. 1:1-14.1* provides that with limited exceptions, all evidentiary hearing shall be conducted as public hearings and:

“shall be recorded verbatim either by a stenographic reporter or by sound recording devices ... The record of all hearings shall be open to public inspection, but the judge may, for good cause shown, order the sealing of the record or any part thereof.” *Id.*

Counsel states that OAL has provided the Complainant with a copy of the official hearing record; however, the Complainant advised that the official hearing record does not satisfy his request for the backup recording. Counsel argues that the Complainant does not assert that the official hearing record was technically deficient nor does the Complainant assert any other problems resulting in an inaccuracy of the official record. Counsel argues that the Complainant simply asserts that he is entitled under OPRA to receive the backup record. Counsel contends that no provision in OPRA entitles a requestor to receive not only an official record but also the backup documents.

**A recording on the secondary or backup recording system is not a public record:**

Counsel asserts that the Complainant relies on the literal language of OPRA, asserting that he is entitled to the backup recording because it exists. Counsel states that in O’Shea v. West Milford, 391 N.J. Super. 534 (App. Div. 2007), the court noted that not every “yellow-sticky note penned by a government official,” constitutes a public record. Counsel contends that the requested backup recording is similar to handwritten notes taken by a Board secretary to assist in the creation of the official record, as was the case in O’Shea, or audio tapes of a meeting used to assist in creation of meeting minutes. See Atlantic City Convention Center Authority v. South Jersey Publishing Company, 135 N.J. 53 (1994).<sup>18</sup> Counsel argues that because the primary recording system creates the

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<sup>18</sup> This case predates the inception of OPRA, which came into effective in July, 2002. George F. Burdick, Jr. v. New Jersey Office of Administrative Law, 2009-150 – Findings and Recommendations of the Executive Director



official hearing record, the backup recording is intended for use only in the limited circumstance that the official hearing record is incomplete and could not be used as the official record without substantial review and redaction.

Counsel asserts that OAL could not simply disclose backup recordings without carefully reviewing such to determine whether any privileged information subject to redaction exists. Counsel asserts that this review must be done by an employee with the expertise to recognize exempt information. Counsel argues that after the redactions were completed, the resulting record would be a duplication of the official hearing record, perhaps with the inclusion of some private conversations.

Counsel asserts that based on the above, the backup recording is a work in progress rather than a completed draft and cannot be characterized as a government record pursuant to O'Shea, supra. Counsel reiterates that OAL's position is that the official hearing record is the only record available to the Complainant under OPRA.

**The Legislative intent of OPRA is not furthered by disclosure of the backup recording:**

Counsel states that New Jersey has a history of commitment to public participation in government, favoring the public's right to be informed about governmental actions. South Jersey Publishing Company v. New Jersey Expressway Authority, 124 N.J. 478 (1991). Counsel states that OPRA provides that "government records shall be readily accessible for inspection, copying, or examination by the citizens of the state..." N.J.S.A. 47:1A-1. Counsel argues that OAL has complied with OPRA in the instant complaint by providing the official hearing record to the Complainant. Counsel asserts that the Complainant has no legitimate interest in obtaining the backup record requested.

Counsel asserts that the official hearing record provided to the Complainant contains the complete record of the entire proceeding that occurred in Hearing Room No. 8 on March 5, 2009 from the moment the judge went on the record until the conclusion of the hearing. Counsel notes that the Complainant does not argue otherwise.

Counsel reiterates that the backup recording may contain privileged information exempt from disclosure under OPRA. Counsel further argues that the legislative intent of OPRA is not furthered by the disclosure of information otherwise privileged that may be included in the backup recording. Counsel states that OAL has, "a responsibility and an obligation to safe guard from public access a citizen's personal information ..." N.J.S.A. 47:1A-1. Counsel asserts that the intent of OPRA is to provide the public with access to government records, not a mechanism to attempt to eavesdrop on private individuals.

Counsel argues that the unredacted backup recording consists of the record already provided to the Complainant, yet also includes materials legally exempt from disclosure and private conversations. Counsel reiterates that following any applicable redactions, the record would be identical to the official hearing record taken from the primary recording system; therefore, the intent of OPRA is not advanced by the time

consuming and expensive exercise of essentially creating a duplicate record through redaction.

Counsel asserts that for all of the reasons above, the GRC should deny the Complainant access to the requested backup recording where the official record of the hearing exists in a complete form and was provided to the Complainant.

**July 1, 2009**

The Complainant's response to the Custodian's SOI. The Complainant states that he is in receipt of the Custodian's SOI and Custodian Counsel's supplemental legal brief. The Complainant requests that the GRC allow him to respond to issues raised by Counsel's legal brief and submit what the Complainant believes is new evidence regarding this complaint.

The Complainant states that he did not request a copy of the official hearing record, as stated by Counsel in her legal brief. The Complainant states that he specifically identified in his request that the official hearing record was not the record being requested. The Complainant notes that the evidence of record reflects that he made an effort to return the official hearing record, but was essentially told to retain it. The Complainant argues that he specifically requested the backup recording of the March 5, 2009 hearing; therefore, OAL must cease trying to provide a record that was not requested as an acceptable substitute for the backup recording.

The Complainant argues that whether OAL is required to make and maintain a backup recording is irrelevant. The Complainant asserts that the type of equipment used to create the backup recording, its specifications, installation date and all other information regarding the equipment known as CourtSmart is irrelevant. The Complainant further argues that the issue before the GRC is not whether a requestor can require OAL to provide a copy of the backup recording requested.

The Complainant argues that the issue is that the backup recording exists; thus, OAL must bear the burden of proving that the backup recording, in part or whole, is exempt from disclosure under OPRA. The Complainant states that OPRA compels OAL to provide a copy of the backup recording to any person making a formal OPRA request for same.

The Complainant asserts that if information contained in the backup recording is in fact privileged, Counsel must state specifically what legal basis exempts from disclosure the actual contents of the recording. The Complainant notes that because OAL has already acknowledged that the requested backup recording includes the official hearing record, this portion at least of the requested recording should be subject to disclosure. Further, the Complainant avers that OPRA does not require a requestor to provide a reason for the request for government records; therefore, Counsel's assertion that the Complainant did not assert that a technical deficiency or other problem existed with the official hearing record is irrelevant.

Additionally, the Complainant notes that Counsel cited to Atlantic City Convention Center Authority v. South Jersey Publishing Company, 135 N.J. 53 (1994) in

support of OAL’s assertion that the requested backup recording is exempt under OPRA. The Complainant contends that contrary to Counsel’s assertion, the court actually held that:

“[m]edia representatives are entitled to access to audio tape recordings of a public bodies’ closed executive session meetings during which personnel matters are discussed, subject before disclosure to the removal of any confidential or privileged information that may be withheld under principles of common law access to public records or related principles of the Open Public Meetings Act.” *Id.* at 57.

The Complainant further disputes Counsel’s assertion that the Complainant had no legitimate interest in obtaining the requested backup record. The Complainant reiterates that he is not required to provide a reason for requesting the backup recording. The Complainant asserts that because Counsel continues to press for a reason, he requested the backup recording because he feels the judge presiding over the hearing in Burdick v. Franklin Township Board of Education, GRC 4577-08, failed to follow the Canons of Judicial Conduct during the March 5, 2009 hearing. The Complainant asserts that in order to provide a convincing argument to the Honorable Laura Sanders, he must be able to provide clear cut evidence to support the allegations. The Complainant argues that in order to provide such evidence, the Complainant needs access to the backup recording, which memorialized what was said by the judge between his arrival in the hearing room at 9:05 am and when the judge officially went on the record at 11:10 am.<sup>19</sup>

The Complainant asserts he is compelled to provide a reason for requesting the backup recording in order to comply with the common law balancing established by Doe v. Poritz, 142 N.J. 1 (1995):

| Need For Access Question                           | Complainant’s Response   |
|--|--|
| 1. Why do you need the requested records?          | The Complainant states that he needs the backup recording in order to provide a convincing argument to the Honorable Laura Sanders in connection with a complaint against the judge presiding over the hearing in <u>Burdick</u> . |
| 2. How important are the requested records to you? | The Complainant states that the backup recording is extremely important based on the above reason.   |
| 3. Do you plan to redistribute the requested       | The Complainant states that he will distribute the record only in connection with a complaint filed with the   |

<sup>19</sup> The Complainant states that OAL’s website states that, “[a]n administrative law judge (“ALJ”) presides over contested cases which are conducted according to the hearing rules established by statute and by the OAL. The ALJ provides a neutral forum where the evidence of all parties ... is presented.” <http://www.state.nj.us/oal/general.html>. The Complainant recounts his experience at OAL and asserts that he withdrew his Denial of Access Complaint based on the actions of the judge. The Complainant states that although he withdrew his Denial of Access Complaint, he is not precluded from seeking action against the presiding judge.

|  |   |
|--|---|
| records?   | Honorable Laura Sanders regarding the Administrative Law Judge's failure to comply with the Canons of Judicial Conduct. |
| 4. Will you use the requested records for unsolicited contact of the individuals named in the records? | The Complainant states that he will not use the backup recording for unsolicited contact.                               |

The Complainant asserts that his belief that OAL is not familiar with the requisite provisions of OPRA was substantiated by OAL's failure to provide a specific lawful basis for denying access to the requested backup recording. *See N.J.S.A. 47:1A-6 and Paff v. NJ Dept. of Labor, 392 N.J. Super 334 (App. Div. 2007).* The Complainant reiterates that his OPRA request specifically sought the backup recording from Hearing Room No. 8 on March 5, 2009 between the hours of 9:00 am and 4:00 pm; however, OAL attempted to provide a record that was not the backup recording and failed to provide a specific lawful basis for denying access to such.<sup>20</sup>

Finally, the Complainant argues that his presence in Hearing Room No. 8 between 9:00 am and 4:00 pm and his knowledge of what was discussed precludes any claim of confidentiality on the part of OAL. The Complainant asserts that he believes that OAL has failed to bear their burden of proving a lawful denial of access because the backup recording is a government record that, in part or whole, is subject to disclosure pursuant to OPRA. The Complainant requests that, in the absence of OAL's description of any specific details regarding whether confidential information is contained within the record at issue, the GRC order disclosure of the requested backup recording.

### Analysis

#### **Whether the Custodian unlawfully denied access to the requested backup recording?**

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*

<sup>20</sup> The Complainant summarizes what he believes will be contained on the backup recording between the hours of 9:00 am and 11:10 am.

*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 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 in this complaint denied access to the requested backup recording on April 14, 2009, stating that the backup recording may contain information that is not part of an official hearing record including settlement discussions, attorney-client privileged discussions and other off-the-record discussions about a case. The Custodian stated that these types of information are not considered part of a public record and are therefore exempt under OPRA.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC<sup>21</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.”

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<sup>21</sup> Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005). George F. Burdick, Jr. v. New Jersey Office of Administrative Law, 2009-150 – Findings and Recommendations of the Executive Director

Further, the court stated that:

“[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.”

Therefore, pursuant to Paff, *supra*, the GRC must conduct an *in camera* review of the requested backup recording for Hearing Room No. 8 at the Office of Administrative Law’s (“OAL”) Quakerbridge Plaza complex dated March 5, 2009 between the hours of 9:00 am and 4:00 pm to determine the validity of the Custodian’s assertion that the record contains information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

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

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

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested backup recording for Hearing Room No. 8 at the Office of Administrative Law’s (“OAL”) Quakerbridge Plaza complex dated March 5, 2009 between the hours of 9:00 am and 4:00 pm to determine the validity of the Custodian’s assertion that the record contains information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver<sup>22</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see No. 2 above), a document or redaction index<sup>23</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>24</sup>, that the document provided is the document requested by the Council for the *in camera***

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<sup>22</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>23</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

<sup>24</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."

**inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

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

Prepared By: Frank F. Caruso  
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Approved By: Catherine Starghill, Esq.  
Executive Director

May 20, 2010