



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

July 26, 2011 Government Records Council Meeting

Robert J. Diaz
Complainant

Complaint No. 2009-171

v.

South Harrison Township (Gloucester)
Custodian of Record

At the July 26, 2011 public meeting, the Government Records Council (“Council”) considered the July 19, 2011 Supplemental 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, accepts the Administrative Law Judge’s Initial Decision dated June 24, 2011, with the modification to the Administrative Law Judge’s commentary at page 7 and 8 of the Initial Decision with respect to the exemption of draft documents as advisory, consultative or deliberative material under OPRA, as follows:

“The Council has consistently determined that draft documents are exempt from disclosure under OPRA as advisory, consultative and deliberative (“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).

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.*”

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 26th Day of July, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: July 28, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 26, 2011 Council Meeting**

Robert J. Diaz¹
Complainant

GRC Complaint No. 2009-171

v.

South Harrison Township (Gloucester)²
Custodian of Records

Record Relevant to Complaint: Copy of the document read by Mayor R. Campbell at a township meeting held on December 10, 2008, regarding the alleged racial basis for incidents in South Harrison Township.

Request Made: December 11, 2008

Response Made: December 22, 2008

Custodian: Nancy E. Kearns, RMC

GRC Complaint Filed: May 18, 2009³

Background

November 18, 2009

Government Records Council's ("Council") Interim Order. At its November 18, 2009 public meeting, the Government Records Council ("Council") considered the November 10, 2009 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed to submit to the GRC the unredacted documents, a document index and a certification that the documents provided are the documents requested by the Council for the *in camera* examination within the time period directed by the Council, as extended, the Custodian did not comply with the Council's August 11, 2009 Interim Order.
2. Because the Custodian repeatedly attempted to obtain a copy of the requested record from the holder of the record, Mayor Robert Campbell, in order to respond to the Complainant's OPRA request, and because the Custodian could not exercise independent judgment regarding the applicability of OPRA to the

¹ No legal representation listed on record.

² Represented by John Eastlack, Esq., of Holston, MacDonald, Uzdevinis, Eastlack, Ziegler & Lodge, P.A. (Woodbury, NJ).

³ The GRC received the Denial of Access Complaint on said date.

requested record because Mayor Campbell refused to deliver said record to the Custodian, and because the Custodian then acted on advice of Counsel in denying the Complainant access to the requested record, the Custodian has neither acted in a negligent and heedless manner nor, *a fortiori*, did the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Because Mayor Robert Campbell failed to provide for the safekeeping of the record responsive to the Complainant's request which resulted in the record not being delivered to the GRC for an *in camera* inspection, and consequently, may have resulted in the Complainant's denial of access to the redacted or unredacted record, it is possible that Mayor Campbell's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether Mayor Campbell knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

November 23, 2009

Council's Interim Order distributed to the parties.

June 24, 2010

Complaint forwarded to the Office of Administrative Law ("OAL").

May 11, 2011

E-mail from the Complainant to the GRC. The Complainant wants the GRC to tell him who will be representing the GRC at the OAL hearing scheduled for May 17, 2011. The Complainant states that he expects the GRC to provide a representative because the matter was sent to the OAL following an investigation by the GRC.

May 13, 2011

E-mail from the GRC to the Complainant. The GRC informs the Complainant that the GRC does not send any representatives from the GRC to OAL proceedings. The GRC further informs the Complainant that the GRC is the transmitting adjudicatory agency and is therefore not a party to the complaint and has no standing in the proceedings.

May 13, 2011

E-mail from the Complainant to the GRC. The Complainant wants to know if he can subpoena the GRC investigator to the OAL hearing to present the GRC findings.

May 13, 2011

E-mail from the GRC to the Complainant. The GRC informs the Complainant to direct any questions about OAL procedures to the OAL. The GRC provides the Complainant with contact information for the OAL.

June 24, 2011

Administrative Law Judge's Initial Decision. The Administrative Law Judge ("ALJ") found, *inter alia*, that:

"In the present matter, Mr. Diaz requested a copy of the paper from which Mayor Campbell read a statement concerning a topic of Campbell's concern regarding racial matters in the Township, which topic was itself no doubt one dealing with public issues and concerns that were within the purview of the mayor's public responsibilities. However, the speech that he spoke into the public record at the meeting on December 10, 2008, was the words that he verbalized. He never entered the typewritten, marked-up document into the record. According to his testimony, he shredded the paper that very night...I have no problem with determining that Campbell truthfully testified to the destruction of the typed version. As for the typed document itself, it apparently was a statement that the mayor chose to deliver at the meeting and not one that was made as a requirement of his official duties. Once he delivered the statement at the public meeting, that verbalized statement did become a part of the record and a part of the Council's official proceedings, and the recorded speech would be something that would be a "government record" stored on a sound-recording and as a part of the official business, kept and maintained by the Council. But the speaker's draft, which may or may not be an exact version of that that he later chose to speak into the record, (purportedly it was ninety-nine percent similar) is not a government record, for it was not prepared as a part of any official business, but at the instance of one who might or might not later choose to actually speak to the subject on the record. That a member of a public body might contemplate speaking on a matter and prepare a draft of the remarks he or she might eventually decide to verbalize cannot reasonably be understood to make the draft a government record available through OPRA. This is not to say that drafts of some types of documents may not actually fall within the definition of matters available under OPRA, and that such preliminary documents may have to be retained under retention policies that seek to assure the availability of government records. Drafts of documents that must, in their final form, be kept in the normal course of government business may indeed be themselves at times covered. But without attempting to delineate any such requirements here, it is enough to conclude that the preliminary, or even the final draft of a statement then actually read on to the recorded record at the discretion of a public official is not a "government record" under OPRA.

As for the relevance of the "deliberative process" privilege, specifically recognized in OPRA, that privilege does not really appear to be an appropriate basis upon which to conclude that the draft statement is not subject to OPRA...

The record does not suggest that the statement prepared and read by Mayor Campbell was a part of any deliberation concerning some

‘proposed course of governmental management’ or official ‘recommendation’ or part of a ‘deliberation’. As such, it does not seem to fall within the specific types of documents that the deliberative process privilege is intended to protect. Nevertheless, it is not a “government record” and as such, while such preliminary drafts of speeches and statements later delivered may be of interest to historians and students of government, they are not, at least in the context presented here, records that must be produced in response to an OPRA request. As such, it matters not why or when or for what purpose Mayor Campbell chose to destroy the draft. That said, I **FIND** that he did so without any intent to evade OPRA, that while he no doubt acted purposely to shred it, nevertheless, I **CONCLUDE** that he did not willfully or knowingly seek to deny the public something that they had any legal right to see. As such, the Complaint must be **DISMISSED**. It is so **ORDERED**.”

Whether the GRC should adopt, modify or reject the ALJ’s Initial Decision dated June 24, 2011?

The ALJ’s findings of fact are entitled to deference from the GRC because they are based upon the ALJ’s determination of the credibility of the parties.

“The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility.” In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), *certif. denied* 121 N.J. 615 (1990). The Appellate Division affirmed this principle, underscoring that, “under existing law, the [reviewing agency] must recognize and give due weight to the ALJ’s unique position and ability to make demeanor-based judgments.” Whasun Lee v. Board of Education of the Township of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. “When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ’s credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole.” Cavaliere v. Board of Trustees of Public Employees Retirement System, 368 N.J. Super. 527, 537 (App. Div. 2004).

The ultimate determination of the agency and the ALJ’s recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep’t of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings “is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor.” *Id.* at 443. Additionally, the sufficiency of evidence “must take into account whatever in the record fairly detracts from its weight”; the test is not for the courts to read only one side of the case and, if they find any evidence there, the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent’s Hospital v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

The ALJ fairly summarized the testimony and evidence, explaining how he weighed the proofs before him and explaining why he credited, or discredited, certain testimony. The ALJ's conclusions are clearly aligned and consistent with those credibility determinations. As such, the Council finds that it can ascertain which testimony the ALJ accepted as fact, and further, finds that those facts provide a reasonable basis for the ALJ's conclusions. The Council therefore accepts the ALJ's findings of fact and conclusions of law regarding the OPRA request which is the subject of this Denial of Access Complaint.

However, the Council hereby modifies the ALJ's Initial Decision as follows.

In the instant complaint, the GRC referred the instant matter to the OAL for a determination regarding characterization of the record, or whether said record was even a government record because the record was destroyed before it could be delivered to the GRC for an *in camera* examination. The ALJ found the requested record to be a speaker's draft to be read at the speaker's discretion, and therefore not a government record. However, the ALJ went on to state that:

"This is not to say that drafts of some types of documents may not actually fall within the definition of matters available under OPRA, and that such preliminary documents may have to be retained under retention policies that seek to assure the availability of government records. Drafts of documents that must, in their final form, be kept in the normal course of government business may indeed be themselves at times covered.... [T]he 'deliberative process' privilege, specifically recognized in OPRA...does not really appear to be an appropriate basis upon which to conclude that the draft statement is not subject to OPRA."

The Council has consistently determined that draft documents are exempt from disclosure under OPRA as advisory, consultative and deliberative ("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).

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*.
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 - 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*.

Accordingly, the Council should accept the ALJ’s Initial Decision dated June 24, 2011, with the modification to the ALJ’s commentary with respect to the exemption of draft documents as advisory, consultative or deliberative material under OPRA.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council should accept the Administrative Law Judge’s Initial Decision dated June 24, 2011, with the modification to the Administrative Law Judge’s commentary at page 7 and 8 of the Initial Decision with respect to the exemption of draft documents as advisory, consultative or deliberative material under OPRA, as follows:

“The Council has consistently determined that draft documents are exempt from disclosure under OPRA as advisory, consultative and deliberative (“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.”

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Prepared By: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.
Executive Director

July 19, 2011



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

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

November 18, 2009 Government Records Council Meeting

Robert J. Diaz
Complainant

Complaint No. 2009-171

v.

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1. Because the Custodian failed to submit to the GRC the unredacted documents, a document index and a certification that the documents provided are the documents requested by the Council for the *in camera* examination within the time period directed by the Council, as extended, the Custodian did not comply with the Council’s August 11, 2009 Interim Order.
2. Because the Custodian repeatedly attempted to obtain a copy of the requested record from the holder of the record, Mayor Robert Campbell, in order to respond to the Complainant’s OPRA request, and because the Custodian could not exercise independent judgment regarding the applicability of OPRA to the requested record because Mayor Campbell refused to deliver said record to the Custodian, and because the Custodian then acted on advice of Counsel in denying the Complainant access to the requested record, the Custodian has neither acted in a negligent and heedless manner nor, *a fortiori*, did the Custodian’s actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. Because Mayor Robert Campbell failed to provide for the safekeeping of the record responsive to the Complainant’s request which resulted in the record not being delivered to the GRC for an *in camera* inspection, and consequently, may have resulted in the Complainant’s denial of access to the redacted or unredacted record, it is possible that Mayor Campbell’s actions were



intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether Mayor Campbell knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 18th Day of November, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: November 23, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

Robert J. Diaz¹
Complainant

GRC Complaint No. 2009-171

v.

South Harrison Township (Gloucester)²
Custodian of Records

Record Relevant to Complaint: Copy of the document read by Mayor R. Campbell at a township meeting held on December 10, 2008, regarding the alleged racial basis for incidents in South Harrison Township.

Request Made: December 11, 2008

Response Made: December 22, 2008

Custodian: Nancy E. Kearns, RMC

GRC Complaint Filed: May 18, 2009³

Background

August 11, 2009

Government Records Council's ("Council") Interim Order. At its August 11, 2009 public meeting, the Government Records Council ("Council") considered the August 4, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, 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 record relevant to the complaint in order to determine the validity of the assertion by Custodian's Counsel that the record constitutes advisory, consultative or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see No. 1 above), a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the documents**

¹ No legal representation listed on record.

² Represented by John Eastlack, Esq., of Holston, MacDonald, Uzdavinis, Eastlack, Ziegler & Lodge, P.A. (Woodbury, NJ).

³ The GRC received the Denial of Access Complaint on said date.

provided are the documents 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 and/or Mayor Campbell knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending compliance with the Council's Interim Order.

August 12, 2009

Council's Interim Order distributed to the parties.

August 20, 2009

Letter from the Custodian's Counsel to the GRC. Counsel requests an extension of time for the Custodian to respond to the Interim Order.

August 21, 2009

Facsimile transmission from the GRC to the Custodian's Counsel. The GRC grants the Custodian a five (5) business day extension of time to respond to the Council's August 11, 2009 Interim Order.

August 27, 2009

Custodian's response to the Council's Interim Order. The Custodian's Counsel submits a letter to the GRC wherein Counsel states that because it is unclear which document the Complainant requested, Counsel had enclosed two (2) typed speeches which were printed from Mayor Robert Campbell's computer. One document is titled "South Harrison Re-Organization Meeting" and the other document is titled "Speech of Disgust." The Custodian's Counsel states that the original document, which may have had certain hand written notations on it, no longer exists. Counsel also states that the nonexistent original document was the basis for the Custodian's denial of access but because it no longer exists Counsel is providing copies of the two (2) enclosed documents to the Complainant.⁴ Counsel contends that no *in camera* review is necessary.

The Custodian fails to submit a certification or any of the documents ordered for production by the Council in its August 11, 2009 Interim Order.

Analysis

Whether the Custodian complied with the Council's August 11, 2009 Interim Order?

Pursuant to the Council's Interim Order, the Custodian was directed to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted document, a document index and a legal certification that the documents provided are the documents requested by the Council. The Interim Order further provided that the Custodian must

⁴The legal reason for denial of access was that the record constituted advisory, consultative or deliberative ("ACD") material and was therefore exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
Robert J. Diaz v. South Harrison Township (Gloucester), 2009-171 – Supplemental Findings and Recommendations of the Executive Director

deliver these documents to the GRC for an *in camera* inspection within five (5) business days from receipt of the Council's Interim Order. Although the Custodian requested, and was granted, a five (5) business day extension of time to respond to the Council's Interim Order, the Custodian failed to submit a certification, document index or the required number of documents ordered for production by the Council in its August 11, 2009 Interim Order. The only response to the Council's Interim Order was a letter from the Custodian's Counsel to the GRC dated August 27, 2009. In the letter, Counsel enclosed two (2) documents which he stated were printouts from the Mayor's computer because the requested record, which the Custodian withheld from disclosure as ACD material, no longer existed. Counsel further stated that he was providing copies of the printouts to the Complainant and that no *in camera* inspection was necessary.

Accordingly, because the Custodian failed to submit to the GRC the unredacted documents, a document index and a certification that the documents provided are the documents requested by the Council for the *in camera* examination within the time period directed by the Council, as extended, the Custodian did not comply with the Council's August 11, 2009 Interim Order.

Whether the Custodian's denial of access to the requested record 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)).

In this matter the Custodian certified that, despite repeated efforts to obtain a copy of the requested record, the Mayor refused to deliver a copy to the Clerk's Office. Further, the Custodian certified that neither she, nor any members of her office staff, had seen the requested record. The Custodian certified that Custodian's Counsel informed her that the record was ACD material and, as such, was exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Accordingly, the Custodian certified that she denied the Complainant access to the requested record and informed the Complainant that the Mayor refused to deliver a copy to the Clerk's Office after consulting with Counsel and concurring that the record was exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1.

The Custodian certified that because she never saw a copy of the requested record, she relied on the advice of Counsel in denying the Complainant's request for the record because it was determined by Counsel to be exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1. See Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008), where the court determined that a custodian's decision to act on advice of legal counsel was inconsistent with a knowing and willful violation of OPRA.

Therefore, because the Custodian repeatedly attempted to obtain a copy of the requested record from the last known holder of the record, Mayor Robert Campbell, in order to respond to the Complainant's OPRA request, and because the Custodian could not exercise independent judgment regarding the applicability of OPRA to the requested record because Mayor Campbell refused to deliver said record to the Custodian, and because the Custodian then acted on advice of Counsel in denying the Complainant access to the requested record, the Custodian has neither acted in a negligent and heedless manner nor, *a fortiori*, did the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Whether Mayor Robert Campbell's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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

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

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to

have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996).

The evidence of record reveals that on December 20, 2008, the Custodian’s Counsel sent an e-mail to the Custodian and Mayor Campbell informing them that the record is exempt from disclosure under OPRA because it comprises deliberative material. The evidence of record also reveals that on the same date by reply e-mail the Mayor informed Counsel and the Custodian that he was “very familiar with the OPRA provisions” and agreed that the record was exempt from disclosure as ACD material.

Council, in its Interim Order dated August 11, 2009, ordered the Custodian to deliver the requested unredacted document so that the GRC could conduct an *in camera* inspection to confirm the Custodian’s basis for denial. Subsequently, the Custodian’s Counsel informed the GRC that the original document requested by the Complainant “no longer exist[s].”

The evidence of record reveals that the Custodian gave a copy of the Complainant’s OPRA request to Mayor Campbell on December 11, 2008. The evidence of record also reveals that Mayor Campbell not only knew what record was responsive to the Complainant’s request, but that he concurred with Counsel that the record should be withheld from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1. The Mayor declared that he was “very familiar with the OPRA provisions;” therefore he knew, or should have known, that a Denial of Access Complaint could be filed in this matter. Notwithstanding the Mayor’s knowledge of the facts of the instant complaint, while the GRC was in the process of adjudicating the complaint, the Mayor failed to provide for the safekeeping of the record responsive to the request, which consequently led to the loss or destruction of said record.

Pursuant to the Superior Court’s decision in Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App.Div. 2007):

“...the agency to which the request is made shall be required to produce sworn statements by agency personnel setting forth in detail the following

information...(4) a statement of the agency's document retention/destruction policy *and* the last date on which documents that may have been responsive to the request were destroyed.” *Id.* at 341.

The statement that the Paff court requires is provided for by the GRC in the Statement of Information which is sent to the Custodian. In the instant matter, however, the Custodian certified that she could not provide such a statement because the requested document was never submitted to her office by Mayor Campbell. Further, the Custodian’s Counsel stated that the document no longer exists. As a result, the GRC was unable to perform its court-mandated duty under Paff, *supra*, which is to conduct an *in camera* examination of the record then “[a]fter its *in camera* review, the GRC shall...produce the following to the requesting party: (1) the redacted or unredacted documents responsive to the request...” *Id.* at 341-342. Therefore by failing to safe keep the record responsive to the Complainant’s request, the Mayor may have denied the Complainant access to a redacted or unredacted document.

Accordingly, because Mayor Robert Campbell failed to provide for the safekeeping of the record responsive to the Complainant’s request which resulted in the record not being delivered to the GRC for an *in camera* inspection and consequently may have resulted in the Complainant’s denial of access to the redacted or unredacted record, it is possible that Mayor Campbell’s actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether Mayor Campbell knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to submit to the GRC the unredacted documents, a document index and a certification that the documents provided are the documents requested by the Council for the *in camera* examination within the time period directed by the Council, as extended, the Custodian did not comply with the Council’s August 11, 2009 Interim Order.
2. Because the Custodian repeatedly attempted to obtain a copy of the requested record from the holder of the record, Mayor Robert Campbell, in order to respond to the Complainant’s OPRA request, and because the Custodian could not exercise independent judgment regarding the applicability of OPRA to the requested record because Mayor Campbell refused to deliver said record to the Custodian, and because the Custodian then acted on advice of Counsel in denying the Complainant access to the requested record, the Custodian has neither acted in a negligent and heedless manner nor, *a fortiori*, did the Custodian’s actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Because Mayor Robert Campbell failed to provide for the safekeeping of the record responsive to the Complainant's request which resulted in the record not being delivered to the GRC for an *in camera* inspection, and consequently, may have resulted in the Complainant's denial of access to the redacted or unredacted record, it is possible that Mayor Campbell's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether Mayor Campbell knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

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

Approved By: Catherine Starghill, Esq.
Executive Director

November 10, 2009



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

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

August 11, 2009 Government Records Council Meeting

Robert J. Diaz
Complainant

Complaint No. 2009-171

v.

South Harrison Township (Gloucester)
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council ("Council") considered the August 4, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the record relevant to the complaint in order to determine the validity of the assertion by Custodian's Counsel that the record constitutes advisory, consultative or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see No. 1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the documents provided are the documents 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 and/or Mayor Campbell knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending compliance with the Council's Interim Order.

¹ 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.

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

³ "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."



Interim Order Rendered by the
Government Records Council
On The 11th Day of August, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: August 12, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 11, 2009 Council Meeting**

Robert J. Diaz¹
Complainant

GRC Complaint No. 2009-171

v.

South Harrison Township (Gloucester)²
Custodian of Records

Record Relevant to Complaint: Copy of the document read by Mayor R. Campbell at a township meeting held on December 10, 2008, regarding the alleged racial basis for incidents in South Harrison Township.

Request Made: December 11, 2008

Response Made: December 22, 2008

Custodian: Nancy E. Kearns, RMC

GRC Complaint Filed: May 18, 2009³

Background

December 11, 2008

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

December 11, 2008

E-mail from Deputy Clerk Celeste Keen, RMC ("Deputy Clerk") to Mayor Robert Campbell. The Deputy Clerk informs the Mayor that she has received an OPRA request for a copy of the letter he read at a meeting on December 10, 2008. The Deputy Clerk requests the Mayor personally deliver or e-mail the letter to her by this date.

December 15, 2008

E-mail from the Deputy Clerk to Mayor Campbell. The Deputy Clerk informs the Mayor that she has received several OPRA requests for the record relevant to the complaint. The Deputy Clerk further informs the Mayor that she needs the record delivered to her as soon as possible because she is working under a time constraint.

¹ No legal representation listed on record.

² Represented by John Eastlack, Esq., of Holston, MacDonald, Uzdavinis, Eastlack, Ziegler & Lodge, P.A. (Woodbury, NJ).

³ The GRC received the Denial of Access Complaint on said date.

December 20, 2008

E-mail from the Custodian's Counsel to the Deputy Clerk and Mayor Campbell. The Custodian's Counsel informs the Deputy Clerk that the requested record is not subject to disclosure under OPRA because it constitutes advisory, consultative or deliberative ("ACD") material.

December 20, 2008

E-mail from Mayor Campbell to the Deputy Clerk and the Custodian's Counsel. The Mayor concurs with the Custodian's Counsel regarding non-accessibility of the requested record. The Mayor also states that requestors can obtain information regarding the requested record from the tapes of the meeting at which his speech was recorded.

December 22, 2008

Custodian's response to the OPRA request.⁴ The Custodian responds in writing to the Complainant's OPRA request on the seventh (7th) business day following receipt of such request. The Custodian states that access to the requested record is denied because the Custodian's Counsel has determined that the record is exempt from disclosure as ACD material.⁵

May 18, 2009

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

- Complainant's OPRA request dated December 11, 2008⁶
- Custodian's response to the OPRA request dated December 22, 2008

The Complainant states that he submitted his request for the record relevant to this complaint on a formal OPRA request form dated December 11, 2008. The Complainant further states that he received a denial of his OPRA request by letter dated December 22, 2008, which referenced the Custodian's Counsel as the person who denied the request as ACD material. The Complainant also states that Mayor Campbell concurred with Counsel in denying the request. The Complainant states that he received no further basis for the denial of his request.

The Complainant did not agree to mediate this complaint.

June 9, 2009

Request for the Statement of Information sent to the Custodian.

⁴ Deputy Clerk Celeste Keen, RMC, sent the response to the Complainant on behalf of the Custodian.

⁵ The Deputy Clerk did not cite to a section of OPRA; however, she informed the Complainant that the Mayor declined to submit the requested record because Counsel determined that it constituted ACD material.

⁶ The Complainant also included copies of two (2) e-mails this same date. One e-mail was from the Complainant to the Custodian forwarding his OPRA request. The second e-mail was from the Deputy Clerk acknowledging receipt of the Complainant's request. This e-mail correspondence does not further add to the substance of the complaint.

June 15, 2009

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until June 22, 2009 to complete and submit the Statement of Information to the GRC.

June 15, 2009

E-mail from the GRC to the Custodian. The GRC grants the Custodian's request for an extension of time until June 22, 2009 to complete and submit the Statement of Information to the GRC.

June 22, 2009

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated December 11, 2008
- E-mail from Deputy Clerk Celeste Keen, RMC ("Deputy Clerk") to Mayor Robert Campbell dated December 11, 2008
- E-mail from the Deputy Clerk to Mayor Campbell dated December 15, 2008
- E-mail from the Custodian's Counsel to the Deputy Clerk and Mayor Campbell dated December 20, 2008
- E-mail from Mayor Campbell to the Deputy Clerk and Custodian's Counsel dated December 20, 2008
- Custodian's response to the OPRA request dated December 22, 2008

The Custodian certifies that her search for the requested records involved the Deputy Clerk sending an e-mail dated December 11, 2008 to Mayor Campbell requesting a copy of the record responsive to the request. The Custodian further certifies that because the Mayor did not respond to the Deputy Clerk's e-mail, the Deputy Clerk sent a follow-up e-mail dated December 15, 2008, again requesting a copy of the record. The Custodian certifies that, despite the repeated attempts by the Clerk's Office staff to secure a copy of the requested record from the Mayor, the Mayor never provided the Custodian or her staff with a copy of the record. The Custodian states that consequently she cannot certify to the last date, if any, upon which the record that may have been responsive to the request was destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management. The Custodian certifies however, that she believes there was never a request for destruction of the record.

The Custodian certifies that the Custodian's Counsel sent an e-mail to the Deputy Clerk dated December 20, 2008, informing her that the record was exempt from disclosure as ACD material. The Custodian certifies that the Deputy Clerk read Counsel's e-mail on December 22, 2008, which is the date the Custodian denied the Complainant's OPRA request. The Custodian also certifies that after Custodian's Counsel sent the e-mail to the Deputy Clerk, the Mayor concurred with Counsel's opinion and stated that in the future it can be transcribed from the tapes of the meeting.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business...[t]he terms shall not include *inter-agency or intra agency advisory, consultative, or deliberative material.*” (Emphasis added.) N.J.S.A. 47:1A-1.1.”

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

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

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

In the instant matter, the Custodian certified that she and her office staff were unable to obtain a copy of the record relevant to the complaint from the putative author, Mayor Campbell. The Custodian further certified that Custodian’s Counsel rendered the determination that the requested record was exempt from disclosure. The Custodian certified that thereafter, the Mayor agreed with Counsel’s determination and commented that requestors can obtain information regarding the requested record from the tapes of the meeting at which his speech was recorded.

The Complainant states that the Custodian never provided him with a basis for the denial of his request. The Complainant further states that he only received a letter from the Custodian wherein Custodian’s Counsel determined the requested record was not disclosable because it constituted deliberative material. ACD material is exempt from

disclosure pursuant to N.J.S.A. 47:1A-1.1; however, neither the Custodian nor Custodian's Counsel cited a provision of OPRA to deny the Complainant access to the requested record.

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 GRC⁷ in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The court stated that:

“OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.”

The court also stated that:

“[t]he statute also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.”

Further, the court stated that:

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

Therefore, pursuant to Paff, *supra*, the GRC must conduct an *in camera* review of the record relevant to the complaint in order to determine the validity of the assertion by Custodian's Counsel that the record constitutes ACD material 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 record rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

⁷ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
Robert J. Diaz v. South Harrison Township (Gloucester), 2009-171 – Findings and Recommendations of the Executive Director

The Council defers analysis of whether the Custodian and/or Mayor Campbell knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending 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 record relevant to the complaint in order to determine the validity of the assertion by Custodian's Counsel that the record constitutes advisory, consultative or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see No. 1 above), a document or redaction index⁹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹⁰ that the documents provided are the documents 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 and/or Mayor Campbell knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending compliance with the Council's Interim Order.

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

Approved By: Catherine Starghill, Esq.
Executive Director

August 4, 2009

⁸ 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.

⁹ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹⁰ "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."