



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

July 26, 2011 Government Records Council Meeting

Stultz Taylor
Complainant

Complaint No. 2009-174

v.

Township of Downe (Cumberland)
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, finds that:

1. Because the current Custodian failed to provide the requested minutes of the Township’s January 5, 2009 and January 14, 2009 executive sessions to the Complainant within the extended deadline to comply with the Council’s Order and the current Custodian failed to provide the Executive Director certified confirmation of compliance within the extended deadline to do so, the current Custodian did not fully comply with the Council’s May 24, 2011 Interim Order. However, the current Custodian subsequently provided the minutes to the Complainant on June 17, 2011 and provided to the GRC certified confirmation of compliance on the same day.
2. Although the original Custodian violated N.J.S.A. 47:1A-5.g. by failing to provide a date certain upon which she would respond to the OPRA request and failed to bear her burden of proving a lawful denial of access to the requested meeting minutes pursuant to N.J.S.A. 47:1A-6, and the current Custodian failed to fully comply with the Council’s October 26, 2010 and May 24, 2011 Interim Orders, the evidence of record does not indicate that either Custodians’ violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodians’ actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the
Government Records Council
On The 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 27, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Stultz Taylor¹
Complainant**

GRC Complaint No. 2009-174

v.

**Township of Downe (Cumberland)²
Custodian of Records**

Records Relevant to Complaint:

1. Electronic recording of the executive session dated January 5, 2009 either on tape or compact disc (“CD”).
2. Electronic recording of the executive session dated January 14, 2009 either on tape or CD.
3. Copy of executive session minutes dated January 5, 2009.
4. Copy of executive session minutes dated January 14, 2009.

Request Made: May 6, 2009

Response Made: May 6, 2009

Custodian: Richard DeVillasanta³

GRC Complaint Filed: May 27, 2009⁴

Background

May 24, 2011

Government Records Council’s (“Council”) Interim Order. At its May 24, 2011 public meeting, the Council considered the April 20, 2011 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. Because it was the Custodian’s responsibility to ensure that the materials provided to the Council for its *in camera* review were usable for that purpose, and because the audible recording of the January 5, 2009 executive session was provided to the GRC on February 14, 2011, the Custodian did not fully comply with the Council’s October 26, 2010 Interim Order.

¹ No legal representation listed on record.

² Represented by John G. Carr, Esq., of Cresse and Carr Law Firm (Woodbury, NJ). Previously represented by Thomas P. Farnoly, Esq., of the Law Office of Thomas P. Farnoly, P.A. (Vineland, NJ).

³ The original Custodian of record was Diane Patterson.

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

2. The Custodian's disclosure of the unredacted recordings of the January 5, 2009 and January 14, 2009 executive session to the Complainant in Campbell v. Township of Downe (Cumberland), GRC Complaint No. 2009-219 on or about April 18, 2011 waived all privileges under OPRA which the Custodian claimed exempted the January 5, 2009 and January 14, 2009 executive session recordings from disclosure under OPRA in the matter now before the Council. Additionally, because the recordings are a verbatim account of the meetings held, the Township's waived privilege extends to the January 5, 2009 and January 14, 2009 executive session minutes, which reflect on paper those discussions held in executive session. Thus, it is not necessary to conduct an *in camera* review of the records requested herein to determine whether any privileges under the Open Public Meetings Act may render such records exempt from disclosure in this matter. **The Custodian shall disclose all records requested in this matter.**
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁵, to the Executive Director.⁶**
4. 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.

May 26, 2011

Council's Interim Order distributed to the parties.

June 3, 2011

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until June 8, 2011 to comply with the Council's May 24, 2011 Interim Order.

June 3, 2011

E-mail from the GRC to the Custodian. The GRC grants the Custodian an extension of time until June 8, 2011 to comply with the Council's May 24, 2011 Interim Order.

⁵ "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."

⁶ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

June 8, 2011

Custodian's response to the Council's Interim Order.⁷

June 14, 2011

E-mail from the GRC to the Custodian. The GRC states that it is in receipt of the Custodian's e-mail dated June 8, 2011; however, the Custodian's certified confirmation of compliance was not attached. The GRC requests that the Custodian re-send the certification via e-mail.

June 16, 2011

Custodian's certification of compliance. The Custodian certifies that he made available to the Complainant the requested recordings of the Township's January 5, 2009 and January 14, 2009 executive sessions.

June 17, 2011

E-mail from the GRC to the Custodian. The GRC states that it is in receipt of the Custodian's certified confirmation of compliance of the Council's May 24, 2011 Interim Order and found that it does not address whether the Custodian provided the Complainant with copies of the minutes of the Township's January 5, 2009 and January 14, 2009 executive sessions. The GRC states that these minutes, which were part of the Complainant's OPRA request, were also ordered to be disclosed to the Complainant in the Council's May 24, 2011 Interim Order.

The GRC requests that the Custodian provide the Complainant with the responsive minutes if he has not already done so and amend the certification of compliance to reflect the date on which the Custodian provided both the recordings and minutes to the Complainant. The GRC states that the Custodian may also supplement the certification by providing any written responses exhibiting compliance with the Council's order.

June 17, 2011

Custodian's amended certification of compliance. The Custodian certifies that the Complainant was provided with copies of the requested recordings on June 8, 2011.

The Custodian certifies that he overlooked providing access to the requested minutes of the Township's January 5, 2009 and January 14, 2009 executive sessions. The Custodian certifies that based on the foregoing, he is providing the Complainant with copies of the requested meeting minutes on this date.

Analysis

Whether the Custodian complied with the Council's May 24, 2011 Interim Order?

The Council's May 24, 2011 Interim Order specifically directed the Custodian to "...disclose all records requested in this matter." The records required to be disclosed were recordings and minutes of the Township's January 5, 2009 and January 14, 2009

⁷ The Custodian's e-mail did not contain an attachment.

executive sessions. Said order also directed the Custodian to provide certified confirmation of compliance to the GRC's Executive Director within five (5) business days of receipt of said order.

On June 3, 2011, or five (5) business days after receipt of the Council's Interim Order, the Custodian requested an extension of time until June 8, 2011 to comply with the Council's Interim Order. The GRC granted the Custodian an extension on the same day. The Custodian sent an e-mail to the GRC on June 8, 2011 stating that he had attached his certification of compliance; however, no attachment was received by the GRC. The GRC advised the Custodian on June 14, 2011 that no attachment was received. The Custodian re-sent his certification of compliance to the GRC on June 16, 2011. In said certification, the Custodian certified that he provided the Complainant with the requested recordings of the Township's January 5, 2009 and January 14, 2009 executive sessions. The certification did not address whether the Custodian also provided the requested minutes to the Complainant.

The GRC e-mailed the Custodian on June 16, 2011 acknowledging receipt of the Custodian's certified confirmation of compliance. The GRC further advised that the certification did not address whether the Custodian provided the Complainant with the requested minutes of the Township's January 5, 2009 and January 14, 2009 executive sessions. The GRC requested that the Custodian provide those minutes to the Complainant as per the Council's Order if he had not already done so and amend the certification of compliance to reflect the date on which the Custodian provided both the recordings and minutes to the Complainant.

The Custodian provided his amended certification of compliance to the GRC on June 17, 2011. The Custodian certified that the requested recordings were provided to the Complainant on June 8, 2011, but that the Custodian overlooked providing access to the requested minutes. The Custodian certified that those minutes were provided to the Complainant on June 17, 2011.

In order for the Custodian to be in compliance with the Council's May 24, 2011 Interim Order, the Custodian was required to provide the Complainant access to both the requested recordings and minutes of the Township's January 5, 2009 and January 14, 2009 executive sessions. The Custodian was also required to provide certified confirmation of compliance within the extended deadline to comply, or June 8, 2011.

The evidence of record indicates that the Custodian provided access to the requested recordings on June 8, 2011; however, the Custodian failed to provide access to the requested minutes until June 17, 2011. Additionally, although a technical error may have led to the GRC not receiving the Custodian's certification of compliance on June 8, 2011, the Custodian nonetheless failed to fully comply with the Council's Order by failing to provide the requested minutes until June 17, 2011.

Therefore, because the current Custodian failed to provide the requested minutes of the Township's January 5, 2009 and January 14, 2009 executive sessions to the Complainant within the extended deadline to comply with the Council's Order and the current Custodian failed to provide the Executive Director certified confirmation of

compliance within the extended deadline to do so, the current Custodian did not fully comply with the Council's May 24, 2011 Interim Order. However, the current Custodian subsequently provided the minutes to the Complainant on June 17, 2011 and provided to the GRC certified confirmation of compliance on the same day.

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

OPRA states that:

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

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

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

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

In the matter currently before the Council, the original Custodian violated N.J.S.A. 47:1A-5.g. by requesting an extension of time to respond to the Complainant's OPRA request but failing to provide a date certain upon which she would respond. Additionally, the Council held that the original Custodian failed to bear her burden of proving a lawful denial of access to the requested minutes of the Township's January 5, 2009 and January 14, 2009 executive sessions because both had been approved by the Township Council prior to receipt of the Complainant's OPRA request. The GRC further ordered that the minutes and recordings of the meetings be provided for an *in camera* review.

Following receipt of the Council's October 26, 2010 Interim Order, the current Custodian submitted the requested recordings and minutes in a timely manner, however, the January 5, 2009 recording provided to the GRC was not audible. The GRC subsequently requested that the current Custodian provide an audible copy of the January 5, 2009 recording to the GRC, which the current Custodian provided on February 14, 2011. Thus, the Council held that because it was the current Custodian's "responsibility to ensure that the materials provided to the Council for its *in camera* review were usable for that purpose, and because the audible recording of the January 5, 2009 executive session was provided to the GRC on February 14, 2011, the Custodian did not fully comply..." with the Council's Order.

Moreover, during the time that the GRC was conducting its *in camera* review, the records at issue here were also at issue in Campbell v. Township of Downe (Cumberland), GRC Complaint No. 2009-219. The GRC took judicial notice that in Campbell, supra, the current Custodian in this matter released unredacted copies of the January 5, 2009 and January 14, 2009 executive session recordings to the complainant in that complaint. Thus, the GRC determined that disclosure of the recordings by the Custodian in Campbell, supra, waived all privileges afforded by OPRA and that the Custodian had to disclose all records at issue in this complaint to the Complainant.

Following receipt of the Council's May 24, 2011 Interim Order, the current Custodian requested an extension of time to comply with the Council's Order; however, he failed to fully comply with said order within the extended deadline to comply.

Therefore, although the original Custodian violated N.J.S.A. 47:1A-5.g. by failing to provide a date certain upon which she would respond to the OPRA request and failed to bear her burden of proving a lawful denial of access to the requested meeting minutes pursuant to N.J.S.A. 47:1A-6, and the current Custodian failed to fully comply with the Council's October 26, 2010 and May 24, 2011 Interim Orders, the evidence of record does not indicate that either Custodians' violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodians' actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the current Custodian failed to provide the requested minutes of the Township's January 5, 2009 and January 14, 2009 executive sessions to the Complainant within the extended deadline to comply with the Council's Order and the current Custodian failed to provide the Executive Director certified confirmation of compliance within the extended deadline to do so, the current Custodian did not fully comply with the Council's May 24, 2011 Interim Order. However, the current Custodian subsequently provided the minutes to the Complainant on June 17, 2011 and provided to the GRC certified confirmation of compliance on the same day.

2. Although the original Custodian violated N.J.S.A. 47:1A-5.g. by failing to provide a date certain upon which she would respond to the OPRA request and failed to bear her burden of proving a lawful denial of access to the requested meeting minutes pursuant to N.J.S.A. 47:1A-6, and the current Custodian failed to fully comply with the Council's October 26, 2010 and May 24, 2011 Interim Orders, the evidence of record does not indicate that either Custodians' violations of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodians' actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Senior Case Manager

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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

INTERIM ORDER

May 24, 2011 Government Records Council Meeting

Stultz Taylor
Complainant

Complaint No. 2009-174

v.

Township of Downe (Cumberland)
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the April 20, 2011 *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. Because it was the Custodian’s responsibility to ensure that the materials provided to the Council for its *in camera* review were usable for that purpose, and because the audible recording of the January 5, 2009 executive session was provided to the GRC on February 14, 2011, the Custodian did not fully comply with the Council’s October 26, 2010 Interim Order.
2. The Custodian’s disclosure of the unredacted recordings of the January 5, 2009 and January 14, 2009 executive session to the Complainant in Campbell v. Township of Downe (Cumberland), GRC Complaint No. 2009-219 on or about April 18, 2011 waived all privileges under OPRA which the Custodian claimed exempted the January 5, 2009 and January 14, 2009 executive session recordings from disclosure under OPRA in the matter now before the Council. Additionally, because the recordings are a verbatim account of the meetings held, the Township’s waived privilege extends to the January 5, 2009 and January 14, 2009 executive session minutes, which reflect on paper those discussions held in executive session. Thus, it is not necessary to conduct an *in camera* review of the records requested herein to determine whether any privileges under the Open Public Meetings Act may render such records exempt from disclosure in this matter. **The Custodian shall disclose all records requested in this matter.**
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council’s Interim Order, and simultaneously provide**



certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.²

4. 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 24th Day of May, 2011

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: May 26, 2011

¹ "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."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
May 24, 2011 Council Meeting**

**Stultz Taylor¹
Complainant**

GRC Complaint No. 2009-174

v.

**Township of Downe (Cumberland)²
Custodian of Records**

Records Relevant to Complaint:

1. Electronic recording of the executive session dated January 5, 2009 either on tape or compact disc (“CD”).
2. Electronic recording of the executive session dated January 14, 2009 either on tape or CD.
3. Copy of executive session minutes dated January 5, 2009.
4. Copy of executive session minutes dated January 14, 2009.

Request Made: May 6, 2009

Response Made: May 6, 2009

Custodian: Richard DeVillasanta³

GRC Complaint Filed: May 27, 2009⁴

Background

October 26, 2010

Government Records Council’s Interim Order. At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the October 19, 2010 Executive Director’s Findings and Recommendations and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council therefore found that:

1. Because the Custodian has failed to establish in her motion for reconsideration of the Council’s July 27, 2010 Interim Order that the Council’s decision was 1) based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A

¹ No legal representation listed on record.

² Represented by John G. Carr, Esq., of Cresse and Carr Law Firm (Woodbury, NJ). Previously represented by Thomas P. Farnoly, Esq., of the Law Office of Thomas P. Farnoly, P.A. (Vineland, NJ).

³ The original custodian of record was Diane Patterson.

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

Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

2. Pursuant to the Council's July 27, 2010 Interim Order, the Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted CD electronic recordings and executive session meeting minutes dated January 5, 2009 and January 14, 2009, a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁷, that the records provided are 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. Pursuant to the Council's July 27, 2010 Interim Order, 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.

October 28, 2010

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

October 28, 2010

Letter from the Custodian's Counsel to the GRC. Counsel states that he is in receipt of the Council's October 26, 2010 Interim Order. Counsel states that the Township of Downe ("Township") can only provide the requested audio recordings in cassette form. Counsel states that based on the foregoing, Counsel is requesting additional time to comply with the Council's Interim Order.

October 28, 2010

E-mail from the Complainant to the GRC. The Complainant states that the original Custodian's legal certification dated May 10, 2010 claims that CDs do exist. The Complainant questions why the Township has instead asked for an extension of time to copy cassettes.

October 28, 2010

Letter from the Custodian's Counsel to the GRC. Counsel states that he is in receipt of the Complainant's e-mail to the GRC regarding the issue of CDs. Counsel states that the Custodian has advised that they are unable to produce CDs at this time. Counsel states that when the original Custodian was still with the Township, she was able to copy CDs; however, the current Custodian can only produce cassettes at this time. Counsel states that if

⁵ 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.

⁶ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

⁷ "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."

the current Custodian had the ability to duplicate CDs, it would certainly be easier for the Custodian to produce same for review.

November 1, 2010

E-mail from the GRC to the Custodian’s Counsel. The GRC states that the Custodian’s deadline to comply with the Council’s October 26, 2010 Interim Order was November 4, 2010. The GRC states that it will generally grant one extension of five (5) business days as a courtesy. The GRC states that because November 11, 2010 is observed by the State as a holiday, the GRC is granting Counsel an extension until November 12, 2010.

November 10, 2010

Certification of the Custodian in response to the Council’s Interim Order with the following attachments:

- Executive session minutes dated January 5, 2009.
- Executive session recording dated January 5, 2009.
- Executive session minutes dated January 14, 2009.
- Executive session recording dated January 14, 2009.
- Document Index.

The Custodian certifies that he is the current Municipal Clerk for the Township, but that he was not the Municipal Clerk at the time of the filing of the instant Denial of Access Complaint. The Custodian certifies that he has provided the records ordered to be provided to the GRC for an *in camera* review pursuant to the Council’s October 26, 2010 Interim Order. The Custodian certifies that he was unable to produce the recordings on CD but has submitted the requested recordings on cassette. The Custodian certifies that he has attached the document index as follows:

Record Requested	Lawful Basis for Denial of Access
Executive session minutes dated January 5, 2009 (2 pages)	<p><u>N.J.S.A.</u> 47:1A-9.a permits exemption from disclosure contained in other State's statutes to apply under OPRA.</p> <p><u>N.J.S.A.</u> 10:4-12(b) recites in follows:</p> <p>"b. A public body may exclude the public only from that portion of a meeting at which the public body discusses:</p> <p>(4) Any collective bargaining agreement, or the terms and conditions which are proposed for inclusion in any collective bargaining agreement, including the negotiation of the terms and conditions thereof with employees or representatives of employees of the public body....</p> <p>(7) Any pending or anticipated litigation</p>

	<p>or contract negotiation ... which the public body is, or may become a party.</p> <p>Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.</p> <p>(8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body..."</p>
<p>Executive session minutes dated January 14, 2009 (4 pages)</p>	<p><u>N.J.S.A. 47:1A-9.a</u> permits exemption from disclosure contained in other State's statutes to apply under OPRA.</p> <p><u>N.J.S.A. 10:4-12(b)</u> recites in follows:</p> <p>"b. A public body may exclude the public only from that portion of a meeting at which the public body discusses:</p> <p>(4) Any collective bargaining agreement, or the terms and conditions which are proposed for inclusion in any collective bargaining agreement, including the negotiation of the terms and conditions thereof with employees or representatives of employees of the public body.</p> <p>(7) Any pending or anticipated litigation or contract negotiation ... which the public body is, or may become a party.</p> <p>Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.</p> <p>(8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific</p>

	prospective public officer or employee or current public officer or employee employed or appointed by the public body..."
--	---------------------------------------------------------------------------------------------------------------------------

The Custodian further argues that for purposes of full disclosure, the minutes include discussion regarding a complaint that was filed on or about June 1, 2009 in the matter entitled Campbell v. Downe Township & Renee Blizzard, Superior Court of New Jersey, Law Division, Cumberland County, Docket No. CUM-L-000508-09, which relates to allegations resulting from the non-reappointment by the Mayor and Council of a Township employee. The Custodian argues that the matter is more particularly discussed in the January 14, 2009 executive session.

February 2, 2011

E-mail from the GRC to the Custodian. The GRC states that in the process of conducting an *in camera* review of the audio recordings provided by the Custodian in response to the Council's October 26, 2010 Interim Order, the GRC discovered that the cassette recording for the January 5, 2009 executive session was inaudible due to background noise. The GRC requests that the Custodian locate an audible copy of the recording and advise once the record is located.

February 14, 2011⁸

Custodian's legal certification attaching nine (9) CD copies of the audio recording of the Township's January 5, 2009 meeting.⁹ The Custodian certifies that he believes the audio recording being provided is audible.

February 17, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC states that this e-mail shall serve to recapitulate a conversation held on this day. The GRC states that it is in receipt of nine (9) copies of the audio recording of the Township's January 5, 2009 executive session on CD. The GRC states that these records were initially provided in response to an interim order for another complaint in which this record was at issue. The GRC states that it will accept the CDs provided in connection with this complaint and review the recording *in camera*. The GRC requests that Counsel amend the cover letter that accompanied the records to reflect the appropriate Denial of Access Complaint number.

Additionally, the GRC states that previous Counsel for the Township stated in a letter to the GRC dated October 28, 2010 that although the original Custodian was able to produce CDs, the current Custodian could only produce cassettes. The GRC requests that the Custodian certify to the following:

1. Whether the Custodian later obtained the ability to copy audio recordings on CD and on what date he obtained the ability to do so?

⁸ The GRC received notification that current Counsel would be overseeing this complaint on February 7, 2011.

⁹ Counsel sent a letter to the GRC attaching the above mentioned certification and additional records that are not relevant in this complaint in response to Robert G. Campbell v. Township of Downe (Cumberland), GRC Complaint No. 2009-219, in which an audio recording of the January 5, 2009 meeting was also at issue.

The GRC requests that the Custodian provide the requested legal certification by February 22, 2011.

February 22, 2011

E-mail from the Custodian's Counsel to the GRC. The Custodian's Counsel requests an extension of time until February 23, 2011 to submit the Custodian's legal certification because the Custodian is not in the office.

February 22, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension of time until February 23, 2011 to submit the Custodian's legal certification.

February 23, 2011

Custodian's legal certification. The Custodian certifies that he was only able to transfer audio recordings from cassette tapes to CDs after receiving training on the proper use of the recording system used by the Township.

April 18, 2011

E-mail from the Complainant in the matter of Campbell v. Township of Downe (Cumberland), GRC Complaint No. 2009-219 to the GRC. The Complainant therein states that he is in possession of an unredacted copy of the January 5, 2009 executive session recording requested pursuant to his OPRA request dated March 19, 2009, as well as an unredacted copy of a recording of a January 14, 2009 special and executive session recording.

Analysis

Whether the Custodian complied with the Council's October 26, 2010 Interim Order?

At its October 26, 2010 public meeting, the Council determined that because the Custodian has asserted that access to the requested records were lawfully denied because said records contained information exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-9.a and N.J.S.A. 10:4-12(b), the Council must determine whether the legal conclusions asserted by the Custodian are properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC ordered that the Custodian provide to the GRC the unredacted CD electronic recordings and executive session minutes dated January 5, 2009 and January 14, 2009 in order to conduct an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the requested records were properly denied.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records, 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 records provided are the records 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 November 4, 2010.

By letter dated October 28, 2010, the Custodian notified the GRC that he was unable to provide copies of CDs and requested an extension of time to provide copies of the requested recordings on audio cassette. The GRC granted a five (5) business day extension of time, and on November 10, 2010, the Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection and a document index. However, the GRC subsequently discovered that the cassette recording for the requested January 5, 2009 executive session was inaudible due to background noise, and so informed the Custodian by e-mail on February 2, 2011. The Custodian provided audible copies in CD form of the requested January 5, 2009 executive session on February 14, 2011. Because it was the Custodian's responsibility to ensure that the materials provided to the Council for its *in camera* review were usable for that purpose, and because the audible recording of the January 5, 2009 executive session was provided to the GRC on February 14, 2011, the Custodian did not fully comply with the Council's October 26, 2010 Interim Order.

Whether the Custodian unlawfully denied the Complainant access to the requested records?

In the matter before the Council, the Complainant requested a copy of the electronic recording of the executive session dated January 5, 2009 either on tape or CD, a copy of the executive session minutes dated January 5, 2009; an electronic recording of the executive session dated January 14, 2009 either on tape or CD, and a copy of the executive session minutes dated January 14, 2009. Although the Custodian responded in writing to the Complainant's May 6, 2009 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response failed to provide a date certain upon which she would either grant or deny access to the requested records and failed to respond to each request item individually contained in the request. In the SOI, the Custodian asserted that the requested records were exempt from disclosure based upon the Open Public Meetings Act ("OPMA"), which provides that:

"[a] public body may exclude the public only from that portion of a meeting at which the public body discusses...

(4) Any collective bargaining agreement, or the terms and conditions which are proposed for inclusion in any collective bargaining agreement, including the negotiation of the terms and conditions thereof with employees or representatives of employees of the public body....

(7) Any pending or anticipated litigation or contract negotiation other than in subsection b. (4) herein in which the public body is, or may become a party. Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.

(8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or

appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.” N.J.S.A.10:4-12(b).

The Custodian asserted in the SOI that both the January 5, 2009 and January 14, 2009 executive session minutes included discussions related to personnel and attorney-client privileged matters. Additionally, the Custodian asserted that access to the January 14, 2009 executive session records was denied because those records are exempt from disclosure because they contain discussions of pending or anticipated litigation (*i.e.*, Campbell v. Downe Township, et al., Docket No. CUM-L-000508-09).

In response to the Council’s Interim Order dated October 26, 2010, which required that the Custodian provide the requested materials for *in camera* review by the Council, as well as a document index, the Custodian stated that the following exemptions from disclosure under OPRA applied to the requested records:

Record Requested	Lawful Basis for Denial of Access
Executive session minutes dated January 5, 2009 (2 pages)	<p><u>N.J.S.A. 47:1A-9.a</u> permits exemption from disclosure contained in other State's statutes to apply under OPRA.</p> <p><u>N.J.S.A. 10:4-12(b)</u> recites in follows:</p> <p>"b. A public body may exclude the public only from that portion of a meeting at which the public body discusses:</p> <p>(4) Any collective bargaining agreement, or the terms and conditions which are proposed for inclusion in any collective bargaining agreement, including the negotiation of the terms and conditions thereof with employees or representatives of employees of the public body....</p> <p>(7) Any pending or anticipated litigation or contract negotiation ... which the public body is, or may become a party.</p> <p>Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.</p> <p>(8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific</p>

	prospective public officer or employee or current public officer or employee employed or appointed by the public body..."
Executive session minutes dated January 14, 2009 (4 pages)	<p><u>N.J.S.A. 47:1A-9.a</u> permits exemption from disclosure contained in other State's statutes to apply under OPRA.</p> <p><u>N.J.S.A. 10:4-12(b)</u> recites in follows:</p> <p>"b. A public body may exclude the public only from that portion of a meeting at which the public body discusses:</p> <p>(4) Any collective bargaining agreement, or the terms and conditions which are proposed for inclusion in any collective bargaining agreement, including the negotiation of the terms and conditions thereof with employees or representatives of employees of the public body.</p> <p>(7) Any pending or anticipated litigation or contract negotiation ... which the public body is, or may become a party.</p> <p>Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.</p> <p>(8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body..."</p>

On April 18, 2011, the Council was made aware that the Custodian in the instant matter released unredacted copies of the January 5, 2009 and January 14, 2009 executive session recordings at issue in this matter to the Complainant in Campbell v. Township of Downe (Cumberland), GRC Complaint No. 2009-219.

Pursuant to *N.J.A.C. 1:1-15.2(a)* and (b), official notice may be taken of judicially noticeable facts (as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence), as well as of generally recognized technical or scientific facts within the specialized knowledge of the agency or the judge. The Appellate Division has held that it was appropriate for an

administrative agency to take notice of an appellant's record of convictions, because judicial notice could have been taken of the records of any court in New Jersey, and appellant's record of convictions were exclusively in New Jersey. See Sanders v. Division of Motor Vehicles, 131 N.J. Super. 95 (App. Div. 1974).

Thus, the Council takes judicial notice of the fact that the Custodian in the instant matter released unredacted copies of the January 5, 2009 and January 14, 2009 executive session recordings at issue in this matter to the Complainant in Campbell v. Township of Downe (Cumberland), GRC Complaint No. 2009-219 on or about April 18, 2011.

Settled law requires a privilege holder to produce documents when the privilege has been waived by the disclosure of confidential communications. See Weingarten v. Weingarten, 234 N.J. Super. 318, 326-31 (App. Div. 1989) (requiring attorney to be deposed and produce documents after client waived attorney-client privilege); see also Weil v. Inv./Indicators Research & Mgmt., Inc., 647 F.2d 18, 23-25 (9th Cir. 1981) (finding that when corporate agent testified at deposition about corporate advice received from counsel, attorney-client privilege was waived, requiring client to respond to discovery requests); Smith v. Alyeska Pipeline Serv. Co., 538 F. Supp. 977, 979, 982 (D. Del. 1982) (ordering client to turn over documents once deemed privileged because of waiver of attorney-client privilege), *aff'd o.b.*, 758 F.2d 668 (Fed. Cir. 1984), *cert. denied*, 471 U.S. 1066, 105 S. Ct. 2142, 85 L. Ed. 2d 499 (1985); *cf.* State v. Guido, 40 N.J. 191, 200-01, 205-07, (1963) (stating that once defense psychiatric expert testified in criminal case, attorney-client privilege no longer protects prior report of expert contradicting his testimony). Moreover, as the Appellate Division has observed, “[a]ny partial waivers of the privileged communication [under the Open Public Meetings Act] could waive the entire privilege. Sicpa N. America Corp. v. Donaldson Enter. Inc., 179 N.J. Super. 56, 61-62 (App. Div. 1981).” Paff v. Perth Amboy City Council, 2006 N.J. Super. Unpub. LEXIS 1306 (App. Div. Unpub. 2006).

Therefore, the Custodian's disclosure of the unredacted recordings of the January 5, 2009 and January 14, 2009 executive session recordings to the Complainant in Campbell v. Township of Downe (Cumberland), GRC Complaint No. 2009-219 on or about April 18, 2011 waived all privileges under OPRA which the Custodian claimed exempted the January 5, 2009 and January 14, 2009 executive session recordings from disclosure under OPRA in the matter now before the Council. Additionally, because the recordings are a verbatim account of the meetings held, the Township's waived privilege extends to the January 5, 2009 and January 14, 2009 executive session minutes, which reflect on paper those discussions held in executive session. Thus, it is not necessary to conduct an *in camera* review of the records requested herein to determine whether any privileges under OPMA may render such records exempt from disclosure in this matter. The Custodian shall disclose all records requested in this matter.

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

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. Because it was the Custodian's responsibility to ensure that the materials provided to the Council for its *in camera* review were usable for that purpose, and because the audible recording of the January 5, 2009 executive session was provided to the GRC on February 14, 2011, the Custodian did not fully comply with the Council's October 26, 2010 Interim Order.
2. The Custodian's disclosure of the unredacted recordings of the January 5, 2009 and January 14, 2009 executive session to the Complainant in Campbell v. Township of Downe (Cumberland), GRC Complaint No. 2009-219 on or about April 18, 2011 waived all privileges under OPRA which the Custodian claimed exempted the January 5, 2009 and January 14, 2009 executive session recordings from disclosure under OPRA in the matter now before the Council. Additionally, because the recordings are a verbatim account of the meetings held, the Township's waived privilege extends to the January 5, 2009 and January 14, 2009 executive session minutes, which reflect on paper those discussions held in executive session. Thus, it is not necessary to conduct an *in camera* review of the records requested herein to determine whether any privileges under the Open Public Meetings Act may render such records exempt from disclosure in this matter. **The Custodian shall disclose all records requested in this matter.**
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹⁰, to the Executive Director.¹¹**
4. 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: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

April 20, 2011

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."

¹¹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

INTERIM ORDER

October 26, 2010 Government Records Council Meeting

Stultz Taylor
 Complainant

Complaint No. 2009-174

v.

Township of Downe (Cumberland)
 Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the October 19, 2010 *Reconsideration* 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 has failed to establish in her motion for reconsideration of the Council’s July 27, 2010 Interim Order that the Council’s decision was 1) based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. **Pursuant to the Council’s July 27, 2010 Interim Order, the Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted CD electronic recordings and executive session meeting minutes dated January 5, 2009 and January 14, 2009, a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4³, that the records**

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."



provided are 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. Pursuant to the Council's July 27, 2010 Interim Order, 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 26th Day of October, 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: October 28, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration

**Supplemental Findings and Recommendations of the Executive Director
October 26, 2010 Council Meeting**

**Stultz Taylor¹
Complainant**

GRC Complaint No. 2009-174

v.

**Township of Downe (Cumberland)²
Custodian of Records**

Records Relevant to Complaint:

1. Electronic recording of the executive session meeting dated January 5, 2009 either on tape or compact disc (“CD”).
2. Electronic recording of the executive session meeting dated January 14, 2009 either on tape or CD.
3. Copy of executive session meeting minutes dated January 5, 2009.
4. Copy of executive session meeting minutes dated January 14, 2009.

Request Made: May 6, 2009

Response Made: May 6, 2009

Custodian: Diane Patterson³

GRC Complaint Filed: May 27, 2009⁴

Background

July 27, 2010

Government Records Council’s (“Council”) Interim Order. At its July 27, 2010 public meeting, the Council considered the July 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. Although the Custodian responded in writing to the Complainant’s May 6, 2009 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because she failed to provide a date certain on which she would either grant or deny access to the requested records and failed to respond to each request item contained in the request individually. Therefore, the Custodian has violated

¹ No legal representation listed on record.

² Represented by Thomas P. Farnoly, Esq., of the Law Office of Thomas P. Farnoly, P.A. (Vineland, NJ).

³ Counsel notes in the motion for reconsideration that the Custodian is no longer an employee of the Township. The new Custodian is Richard DeVillasanta.

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

OPRA pursuant to N.J.S.A. 47:1A-5.g., Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).

2. Because the Township Committee approved the January 5, 2009 and January 14, 2009 executive session minutes on May 4, 2009 and March 18, 2009 respectively, said minutes no longer constituted advisory, consultative or deliberative (ACD) material at the time of the Complainant's request and were therefore disclosable with appropriate redactions for discussions exempt from disclosure under the Open Public Meetings Act pursuant to N.J.S.A. 47:1A-9.a. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the requested CD electronic recordings and executive session meeting minutes pursuant to N.J.S.A. 47:1A-6.
3. 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 CD electronic recordings and executive session meeting minutes dated January 5, 2009 and January 14, 2009 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-9.a and N.J.S.A. 10:4-12(b).
4. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 3 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁷, that the records provided are the records 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.**
5. 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.

July 28, 2010

Council's Interim Order distributed to the parties.

⁵ 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.

⁶ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

⁷ "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."

July 29, 2010

Letter from the Custodian's Council to the GRC. Counsel states that he is in receipt of the Council's July 27, 2010 Interim Order. Counsel notes that the order requires the Township of Downe ("Township") to take certain action within five (5) business days of the order or August 4, 2010.

Counsel requests an extension until April 13, 2010 to allow Counsel the opportunity to determine whether to request reconsideration, appeal to the Appellate Division or comply with the Council's order.

August 3, 2010

Letter from the GRC to the Custodian's Council. The GRC grants an extension until August 13, 2010 to comply with the Council's Interim Order.

August 9, 2010

Custodian Counsel's motion for reconsideration. Counsel requests that the GRC reconsider its July 27, 2010 Interim Order pursuant to *N.J.A.C. 5:105.2.10* based on a mistake and extraordinary circumstances.

Counsel states that the Township is not opposed to providing the requested records for an *in camera* review; however, Counsel takes issues with the GRC's findings and recommendations regarding whether the Custodian carried her burden of proving a lawful denial of access to the requested records and whether the Custodian's response was sufficient. Counsel submits that the Council should have decided on these two issues after the conclusion of the *in camera* review.

Counsel requests that the GRC amend its July 27, 2010 Interim Order with respect to the finding that the Custodian failed to bear her burden of proving a lawful denial of access until such time as the GRC has completed its *in camera* review. Counsel states that the GRC relied on its decision in Wolosky v. Vernon Township Board of Education, GRC Complaint No. 2009-57 (December 2009), which was rendered during the pendency of the instant complaint and not prior to the Custodian's alleged denial of access pursuant to the Open Public Meetings Act ("OPMA"). Counsel argues that the Custodian never asserted that the requested records were exempt from disclosure under OPRA as advisory, consultative or deliberative ("ACD") material but rather asserted that the records were exempt from disclosure under the exemptions provided at N.J.S.A.10:4-12 of OPMA. Counsel asserts that it appears that Wolosky is the only reported decision that specifically addresses the issue of whether executive session meeting minutes must await a secondary approval of a public agency for release to the public once the privilege or exception ceases to exist.

Counsel asserts that it would appear that there should be a mechanism for a public body to act to disclose such executive session minutes rather than to have the Custodian make a determination of whether the privilege or exception afforded in N.J.S.A.10:4-12 ceases to exist, thus allowing for the records access to be granted free of redaction. Counsel notes that two (2) attachments to the Custodian's Statement of Information ("SOI") show that efforts were being made to complete the review process for public body action.

Counsel reiterates his request that the Council withhold any findings regarding the Custodian's burden of proving a lawful denial until after the *in camera* review is complete. Additionally, Counsel requests that, because Wolosky was decided during the pendency of this complaint, the Custodian be given additional time to address the issue raised in Wolosky as it relates to the subject matter for a determination of further reconsideration by the GRC or appeal to the Appellate Division.

Additionally, Counsel asserts that extraordinary circumstances compel the GRC to reconsider its determination that the Custodian's response was legally insufficient because she failed to provide a date certain upon which she would respond to the Complainant's OPRA request. Counsel argues that the Custodian advised the Complainant in her May 6, 2009 written response that she would not be in the office for a few days based on a surgical procedure, which inferred that she could not give a definitive response date. Counsel requests that the Custodian be given an opportunity to explain the reason for her inability to give a date certain based on a surgical procedure. Further, Counsel requests that the Council reconsider its decision regarding the Custodian's response and determine that her response was legally sufficient because she ultimately provided a specific lawful basis for denying access to the requested records based upon N.J.S.A. 10:4-12.

Moreover, Counsel takes issue with the GRC's determination that the Custodian failed to respond to each request item individually. Counsel argues that a fair reading of the response would indicate that the Custodian had grouped the request items together as a whole. Counsel requests that, based on the foregoing, the GRC should reconsider its finding regarding the Custodian's response.

Finally, Counsel states that he is providing the motion for reconsideration prior to the August 13, 2010 deadline to comply with the Council's Interim Order, as granted by the GRC on August 3, 2010. Counsel states that unless otherwise directed by the GRC, Counsel will assume that the motion for reconsideration stays the Township's obligation to comply with the Council's July 27, 2010 Interim Order until such time as the GRC has decided on said motion.

August 10, 2010⁸

Complainant's objections to the motion for reconsideration. The Complainant states that the Counsel requests that the findings and recommendations at issue should await the conclusion of the GRC's *in camera* review and assumes the motion for reconsideration stays the Township's obligation to comply with the Council's order. The Complainant requests that the Township comply with the Council's order and produce the records for an *in camera* review by August 13, 2010. The Complainant argues that Counsel's contentions are inapposite to the provisions of OPRA.

⁸ The Complainant requested an update on the status of this case by e-mail to the GRC on August 26, 2010, but no other substantive submissions have been received by the GRC from either party since this date. *Stultz Taylor v. Township of Downe (Cumberland)*, 2009-174 – Supplemental Findings and Recommendations of the Executive Director 4

Analysis

Whether the Complainant has met the required standard for reconsideration of the Council's July 27, 2010 Interim Order?

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

In the matter before the Council, on July 29, 2010, Counsel requested an extension until August 13, 2010 to comply with the Council's July 27, 2010 Interim Order in order to allow Counsel the opportunity to determine whether to request reconsideration, appeal to the Appellate Division or comply with the Council's order. The GRC granted said extension on August 3, 2010. Counsel filed the motion for reconsideration of the Council's order on August 10, 2010, three (3) business days prior to the expiration of the extended deadline to comply.

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, *Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. *D'Atria*, *supra*, 242 N.J. Super. at 401. ‘Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.’ *Ibid.*” *In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey*, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of his motion for reconsideration, Custodian's Counsel disputes the GRC's findings and recommendations regarding whether the Custodian carried her burden of proving a lawful denial of access to the requested records and whether the Custodian's response was sufficient and argues that the Council should have decided on these two issues after the conclusion of the *in camera* review.

Counsel essentially states that the GRC's reliance on its decision in Wolosky v. Vernon Township Board of Education, GRC Complaint No. 2009-57 (December 2009) is erroneous because Wolosky was rendered during the pendency of the instant complaint and not prior to the Custodian's alleged denial of access; thus, the Custodian herein had no notice that the two-tiered approval process for executive session meeting minutes violated OPRA. Additionally, Counsel requests that because Wolosky was decided during the pendency of this complaint, the Custodian be given additional time to address the issue raised in Wolosky as it relates to the subject matter for a determination of further reconsideration by the GRC or appeal to the Appellate Division.

Counsel asserts that there should be a mechanism for a public body to act to disclose such executive session minutes rather than to have the Custodian make a determination of whether the privilege or exception afforded in N.J.S.A.10:4-12 ceases to exist, thereby allowing access to the record to be granted free of redaction. Counsel notes that two (2) attachments to the Custodian's Statement of Information ("SOI") show that efforts were being made to complete the review process for public body action.

Moreover, Counsel argues that the Custodian never asserted that the requested records were exempt from disclosure under OPRA as advisory, consultative or deliberative ("ACD") material but rather asserted that the records were exempt from disclosure under the exemptions provided at N.J.S.A.10:4-12 of OPMA.

Additionally, Counsel further asserts that extraordinary circumstances compel the GRC to reconsider its determination that the Custodian's response was legally insufficient because she failed to provide a date certain upon which she would respond to the Complainant's OPRA request; Counsel argues that the Custodian advised the Complainant in her May 6, 2009 written response that she would not be in the office for a few days based on a surgical procedure, which inferred that she could not give a definitive response date. Counsel requests that the Custodian be given an opportunity to explain the reason for her inability to give a date certain based on a surgical procedure. Further, Counsel requests that the GRC reconsider its decision regarding the Custodian's response and determine that her response was legally sufficient because she ultimately provided a specific lawful basis for denying access to the requested records based upon N.J.S.A. 10:4-12.

Moreover, Counsel disputes the GRC's determination that the Custodian failed to respond to each request item individually and argues that a fair reading of the response would indicate that the Custodian had grouped the request items together as a whole. Counsel requests that, based on the foregoing, the GRC should reconsider its finding regarding the Custodian's response.

Conversely, the Complainant requests that the Township comply with the Council's order and produce the records for an *in camera* review by August 13, 2010. The Complainant argues that Counsel's contentions are inapposite to the provisions of OPRA.

While it is correct that the Council issued its decision in Wolosky v. Vernon Township Board of Education, GRC Complaint No. 2009-57 (December 2009) while this

matter was pending review, Counsel has ignored the case law underlying the Council's decision in Wolosky, which was also discussed in the Council's findings and recommendations herein; such case law includes the Council's decision in Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), wherein the Council held that "...the Custodian has not unlawfully denied access to the requested meeting minutes as the Custodian certifies that at the time of the request said minutes *had not been approved by the governing body* and as such, they constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1." (Emphasis added). Moreover, Counsel's argument displays a basic misunderstanding of the Open Public Meetings Act generally and N.J.S.A. 10:4-12 specifically.

Far from requiring a two-tier approval process such as the one utilized by the Township herein, N.J.S.A. 10:4-12(b) merely states that a public body may exclude the public *only* from that portion of a meeting at which any of the enumerated subjects set forth therein are discussed: thus the need for executive session. However, as a practical matter, once the governing body has approved the minutes of such executive session, those minutes are no longer considered advisory, consultative and deliberative ("ACD") material for the purposes of OPRA; such minutes may be released upon request *with redactions* if any of the matters which precipitated the executive session have not yet been resolved. A custodian need only consult with their governing body and/or municipal counsel to determine if such is the case.

Counsel has therefore failed to establish that the GRC's reliance upon its decision in Wolosky and its reference to the exemption to disclosure for ACD material with regard to the requested records was based upon a "palpably incorrect or irrational basis;" or that "it is obvious that the [Council] did not consider, or failed to appreciate, the significance of probative, competent evidence." *E.g., Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996), or that the Council acted in an arbitrary, capricious or unreasonable manner. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990).

With regard to Counsel's assertion that extraordinary circumstances compel the GRC to reconsider its determination that the Custodian's response was legally insufficient because she failed to provide a date certain upon which she would respond to the Complainant's OPRA request, the Council notes that OPRA clearly states that "any limitations on the right of access accorded by [OPRA]...shall be construed in favor of the public's right of access." N.J.S.A. 47:1A-1. Moreover, OPRA provides that the "requestor shall be advised ... when the record can be made available. If the record is not made available by that time, access shall be deemed denied." N.J.S.A. 47:1A-5.i.

The evidence of record is clear that the Custodian herein failed to provide a date certain upon which the Complainant could expect to receive the requested records; moreover, the evidence of record is clear that the Custodian's absence from work was anticipated and not unexpected. Therefore, the Custodian should have been able to accurately project a date certain upon which she would respond to the Complainant. Moreover, Counsel has failed to cite a single legal authority for his assertion that would overrule N.J.S.A. 47:1A-5.i. Additionally, Counsel's contention that a fair reading of the Custodian's response indicates that she grouped the Complainant's request items together

when responding to same does not support reconsideration of the Council's decision that the Custodian's response was insufficient; Counsel has failed to cite a single legal authority for this contention. Moreover, the Council's decision is consistent with many previous decisions involving these issues. *See Paff v. Willingboro Board of Education (Burlington)*, GRC Complaint No. 2007-272 (May 2008); *Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-166 (April 2009); *Verry v. Borough of South Bound Brook (Somerset)*, GRC Complaint No. 2008-48 (Interim Order March 2009); *Hardwick v. New Jersey Department of Transportation*, GRC Complaint No. 2007-164 (February 2008); *Feasel v. City of Trenton (Mercer)*, GRC Complaint No. 2008-103 (Interim Order April 2009); *Pusterhofer v. Shrewsbury Borough School District (Monmouth)*, GRC Complaint No. 2007-270 (April 2009).

Therefore, the Custodian has failed to establish that the Council's decision that the Custodian's response was legally insufficient because she failed to provide a date certain upon which she would respond to the Complainant's OPRA request and because she failed to respond to each of the Complainant's request items individually was based upon a "palpably incorrect or irrational basis;" or that "it is obvious that the [Council] did not consider, or failed to appreciate, the significance of probative, competent evidence." *E.g., Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996), or that the Council acted in an arbitrary, capricious or unreasonable manner. *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990).

The Council notes that Custodian's argument that the issues of whether the Custodian failed to provide a date certain upon which she would respond to the Complainant's OPRA request and whether she failed to respond to each of the Complainant's request items individually should have been decided at the conclusion of the *in camera* review is unsupported in the law. Moreover, as noted by the Council in the July 27, 2010 Interim Order, the purpose of the *in camera* review is 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-9.a and N.J.S.A. 10:4-12(b). Thus, the consideration of the sufficiency of the Custodian's response to the OPRA request is not dependent on the outcome of the *in camera* review and the insufficient nature of the Custodian's response to the OPRA request would not factor into the determination of whether the asserted exemption applies to the requested records. The Custodian has, therefore, failed to establish that the Council's determination of these issues in the Interim Order dated July 27, 2010 was based upon a "palpably incorrect or irrational basis;" or that "it is obvious that the [Council] did not consider, or failed to appreciate, the significance of probative, competent evidence." *E.g., Cummings, supra*, 295 N.J. Super. 374, 384 (App. Div. 1996), or that the Council acted in an arbitrary, capricious or unreasonable manner. *D'Atria, supra*, 242 N.J. Super. 392, 401 (Ch. Div. 1990).

Therefore, because the Custodian has failed to establish in her motion for reconsideration of the Council's July 27, 2010 Interim Order that the Council's decision was 1) based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, said motion for reconsideration is denied. *Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996); *D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990); *In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval*

To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian has failed to establish in her motion for reconsideration of the Council's July 27, 2010 Interim Order that the Council's decision was 1) based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).
2. **Pursuant to the Council's July 27, 2010 Interim Order, the Custodian must deliver⁹ to the Council in a sealed envelope nine (9) copies of the requested unredacted CD electronic recordings and executive session meeting minutes dated January 5, 2009 and January 14, 2009, a document or redaction index¹⁰, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4¹¹, that the records provided are 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. Pursuant to the Council's July 27, 2010 Interim Order, 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
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

October 19, 2010

⁹ 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.

¹⁰ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹¹ "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."



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

INTERIM ORDER

July 27, 2010 Government Records Council Meeting

Stultz Taylor
Complainant

Complaint No. 2009-174

v.

Township of Downe (Cumberland)
Custodian of Record

At the July 27, 2010 public meeting, the Government Records Council ("Council") considered the July 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. Although the Custodian responded in writing to the Complainant's May 6, 2009 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response was legally insufficient because she failed to provide a date certain on which she would either grant or deny access to the requested records and failed to respond to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g., Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. Because the Township Committee approved the January 5, 2009 and January 14, 2009 executive session minutes on May 4, 2009 and March 18, 2009 respectively, said minutes no longer constituted advisory, consultative or deliberative (ACD) material at the time of the Complainant's request and were therefore disclosable with appropriate redactions for discussions exempt from disclosure under the Open Public Meetings Act pursuant to N.J.S.A. 47:1A-9.a. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the requested CD electronic recordings and executive session meeting minutes pursuant to N.J.S.A. 47:1A-6.
3. 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 CD



electronic recordings and executive session meeting minutes dated January 5, 2009 and January 14, 2009 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-9.a and N.J.S.A. 10:4-12(b).

4. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 3 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4³, that the records provided are the records 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.**
5. 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 27th Day of July, 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: July 28, 2010

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."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Stultz Taylor¹
Complainant**

GRC Complaint No. 2009-174

v.

**Township of Downe (Cumberland)²
Custodian of Records**

Records Relevant to Complaint:

1. Electronic recording of the executive session meeting dated January 5, 2009 either on tape or compact disc (“CD”).
2. Electronic recording of the executive session meeting dated January 14, 2009 either on tape or CD.
3. Copy of executive session meeting minutes dated January 5, 2009.
4. Copy of executive session meeting minutes dated January 14, 2009.

Request Made: May 6, 2009

Response Made: May 6, 2009

Custodian: Diane Patterson

GRC Complaint Filed: May 27, 2009³

Background

May 6, 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.

May 6, 2009

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the same business day as receipt of such request. The Custodian acknowledges receipt of the Complainant’s request and states that she will be out of the office until May 12, 2009. The Custodian states that she will not be able to provide access to the requested records within the statutorily mandated seven (7) business days because the Custodian’s Counsel has advised that the Township Committee must approve a resolution on what records to disclose. The Custodian states that she will pursue the matter but that it will take some time.

¹ No legal representation listed on record.

² Represented by Thomas P. Farnoly, Esq., of the Law Office of Thomas P. Farnoly, P.A. (Vineland, NJ).

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

May 27, 2009

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

- Complainant’s OPRA request dated May 6, 2009
- E-mail from the Custodian to the Complainant dated May 6, 2009⁴

The Complainant states that he submitted an OPRA request to the Township of Dover on May 6, 2009. The Complainant states that the Custodian responded in writing via e-mail on the same day verifying receipt of the Complainant’s OPRA request. The Complainant states that he received no further correspondence from the Custodian.

The Complainant asserts that the requested records should be subject to disclosure once said minutes are approved by a governing body. The Complainant asserts that the meeting minutes of January 5, 2009 were formally approved on May 4, 2009 and that the meeting minutes of January 14, 2009 were formally approved on March 2, 2009. The Complainant asserts that the Complainant was only informed by the Custodian that the Township Committee would have to approve a resolution on what to disclose pursuant to request Item No. 3 and request Item No. 4.⁵

The Complainant argues that OPRA contains no provision that states that a governing body must approve by resolution those records to be disclosed. The Complainant further argues that the Custodian’s Counsel should have reviewed the minutes prior to approval by the Township’s Committee.

Additionally, the Complainant questions whether a tape recording made of a meeting, either public or executive session, is a public record under OPRA.

The Complainant does not agree to mediate this complaint.

July 2, 2009

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

July 9, 2009

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated May 6, 2009
- E-mail from the Custodian to the Complainant dated May 6, 2009⁶

The Custodian certifies that she received the Complainant’s OPRA request on May 6, 2009. The Custodian certifies that she responded in writing to the Complainant

⁴ The Complainant submitted additional documentation that is irrelevant to the instant complaint.

⁵ The Complainant notes that in response to a previous OPRA request for the records responsive to request Item No. 1 and Item No. 2, the Township denied access stating that there was a law that prohibits the disclosure of the audio recordings.

⁶ The Custodian submitted additional documentation that was irrelevant to the instant complaint.

via e-mail on May 6, 2009 acknowledging receipt of the Complainant's request.⁷ The Custodian certifies that she informed the Complainant that she would not be able to provide access to the requested records within the statutorily mandated seven (7) business days because the Custodian's Counsel had advised that the Township Committee must approve by resolution those records to be disclosed. Further, the Custodian certifies that she advised the Complainant that she will pursue the matter, but that it will take some time.

The Custodian contends that access to the requested records was based upon the Open Public Meetings Act ("OPMA"), which provides that:

"[a] public body may exclude the public only from that portion of a meeting at which the public body discusses...

(4) Any collective bargaining agreement, or the terms and conditions which are proposed for inclusion in any collective bargaining agreement, including the negotiation of the terms and conditions thereof with employees or representatives of employees of the public body....

(7) Any pending or anticipated litigation or contract negotiation other than in subsection b. (4) herein in which the public body is, or may become a party. Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.

(8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting." N.J.S.A.10:4-12(b).

The Custodian asserts that both the January 5, 2009 and January 14, 2009 executive session meetings included discussions related to personnel and attorney-client privileged matters.

Additionally, the Custodian asserts that access to the January 14, 2009 executive session meeting records was denied because those records are exempt from disclosure because they contain discussions of pending or anticipated litigation. The Custodian states that litigation has been brought against the Township (Campbell v. Downe Township, et al., Docket No. CUM-L-000508-09) as a result of the Mayor and Township Committee's decision not to reappoint an employee of the Township.

⁷ The Custodian certified that the search undertaken and whether any records which may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM") is not applicable in this complaint.

The Custodian further contends that executive session meeting minutes are reviewed by the Township and approved for content, but are not released to the public until the issues contained therein which are exempt from disclosure have been resolved. The Custodian asserts that whether the release of any executive session meeting minutes is approved is based upon review of such minutes by the Custodian's Counsel, who makes a recommendation regarding the release of such minutes to the Township Committee. The Custodian asserts that based on the foregoing, the Township Committee must approve a resolution to release any executive session meeting minutes.⁸

Finally, the Custodian notes that it is important to point out that the Township Committee took no formal action with respect to any of the issues discussed in either the January 5, 2009 or January 14, 2009 executive session meetings. The Custodian contends that access to the requested records was lawfully denied pursuant to N.J.S.A.10:4-12(b).

July 28, 2009

The Complainant's response to the Custodian's SOI. The Complainant states that the Custodian argues in the SOI that one reason for denying access to the requested records was pending or anticipated litigation. The Complainant notes that the complaint in the Campbell matter was filed in June 2009, or more than a month following the submission of the Complainant's OPRA request.

The Complainant disputes the Custodian's assertion that no formal action was taken with respect to issues discussed in the executive session meetings held on January 5, 2009 and January 14, 2009. The Complainant states that these meetings were in part for reorganization purposes; however, there is no evidence of formal action within the public session meeting minutes from those two (2) meetings in regards to the non-reappointment of an employee of the Township. The Complainant requests that the GRC conduct an *in camera* review of the requested records.

July 29, 2009

Letter from the Custodian's Counsel to the GRC. Counsel states that he objects to the Complainant's July 28, 2009 submission. Counsel states that *N.J.A.C. 5:105 et seq.*, provides no basis for a complaining party to submit additional arguments beyond those contained in the Denial of Access Complaint. Counsel requests that the Township be given the opportunity to respond to the Complainant's allegations, should the GRC consider the Complainant's July 28, 2009 submission.

May 4, 2010

E-mail from the GRC to the Custodian. The GRC states that it has reviewed the Custodian's SOI and is in need of additional information. The GRC requests that the Custodian provide a legal certification responding to the following:

⁸ The Custodian attached two (2) documents regarding the Custodian Counsel's review process that she asserts were only provided to the GRC because the records are considered to be exempt from disclosure as attorney-client privileged material.

1. Whether the requested executive session meeting minutes dated January 5, 2009 and January 14, 2009 were approved by the Township Committee prior to the Complainant's May 6, 2009 OPRA request?
2. Whether any audio recordings or digital recordings of the January 5, 2009 and/or January 14, 2009 executive session meetings exist?

The GRC requests that the Custodian provide the requested legal certification as soon as possible but no later than May 6, 2010.

Additionally, the GRC acknowledges receipt of Counsel's letter dated July 29, 2009 requesting an opportunity to respond to the Complainant's July 28, 2009 submissions. The GRC states that *N.J.A.C. 5:105-2* does not expressly afford additional responses following the SOI. The GRC advises that, as a matter of practice, any additional submissions which provide new information or evidence relevant to the instant complaint will be considered.

May 6, 2010

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension of time until May 10, 2010 to submit the requested legal certification.

May 6, 2010

E-mail from the GRC to the Custodian's Counsel. The GRC grants an extension of time until May 10, 2010 to submit the requested legal certification.

May 10, 2010

Custodian's legal certification. The Custodian certifies that the executive session meeting minutes dated January 5, 2009 were approved by the Township Committee on May 4, 2009. The Custodian certifies that the executive session meeting minutes dated January 14, 2009 were approved by the Township Committee on March 18, 2009. The Custodian certifies that neither meeting minutes have been approved for release to the public.

The Custodian further certifies that the Township maintains CDs of audio recordings of both executive session meetings; however, these CDs are not available to the public because the meeting minutes have not been approved for release.

Additionally, Counsel submits a response to the Complainant's e-mail dated July 28, 2009. Counsel states that the Custodian relies on her position that the requested records are exempt from disclosure because they contain discussion of pending or anticipated litigation. Counsel states that N.J.S.A. 10:4-12(b) addresses discussion issues from which a public body may exclude members of the public. Counsel states that those issues include pending and anticipated litigation, and that there is litigation ongoing at this time. Counsel states that based on the foregoing, the requested executive session meeting minutes must still be withheld from disclosure.

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 also provides that:

“*[t]he provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [OPRA]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.*” (Emphasis added.) N.J.S.A. 47:1A-9.a.

The provisions of OPMA provide that:

“[a] public body may exclude the public only from that portion of a meeting at which the public body discusses...”

(4) Any collective bargaining agreement, or the terms and conditions which are proposed for inclusion in any collective bargaining agreement, including the negotiation of the terms and conditions thereof with employees or representatives of employees of the public body....

(7) Any pending or anticipated litigation or contract negotiation other than in subsection b. (4) herein in which the public body is, or may become a party. Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.

(8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.” N.J.S.A.10:4-12(b).

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 GRC first turns to the issue of whether the Custodian’s initial response was sufficient under OPRA.

OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6. OPRA specifically states that a custodian “shall promptly comply with *a request... [for] a government record.*” (Emphasis added.) N.J.S.A. 47:1A-5.g.

Further, in Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the Custodian provided the Complainant with a written response to his request on the seventh (7th) business day following receipt of such request in which the Custodian requested an extension of time to fulfill said request but failed to notify the Complainant of when the requested records would be provided. The Council held that:

“...because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5.i, the Custodian’s written response to the Complainant dated June 20, 2007 and the request for an extension of time dated June 29, 2007 are inadequate under OPRA and the Complainant’s request is “deemed” denied pursuant to N.J.S.A. 47:1A-5.g, N.J.S.A. 47:1A-5.i and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007)].”

Moreover, in Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008), the GRC held that:

“[a]lthough the Custodian responded in writing to the Complainant’s August 28, 2007 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because he failed to respond to each request item individually. Therefore, the Custodian has violated N.J.S.A. 47:1A-5.g.”

In the instant complaint, the Custodian responded in writing to the Complainant’s OPRA request on the same business day as receipt of such request, stating that she would not be able to provide access to the requested records within the statutorily mandated seven (7) business days because the Custodian’s Counsel has advised that the Township Committee must approve what records will be disclosed by resolution. The Custodian further stated that she would pursue the matter but that it would take some time. The Custodian gave no indication as to which request items she was responding nor did the Custodian provide a date certain upon which she would respond either granting or denying access to the requested records.

Therefore, based on the evidence of record, although the Custodian responded in writing to the Complainant’s May 6, 2009 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s response was legally insufficient because she failed to provide a date certain upon which she would either grant or deny access to the requested records and failed to respond to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g., Hardwick, *supra*, and Paff, *supra*.

The GRC next turns to the issue of whether the Custodian lawfully denied access to the requested records.

The Complainant argued in the Denial of Access Complaint that the requested executive session meeting minutes should have been provided because the Township Committee approved said minutes at the time of the request. The Complainant further argued that OPRA does not allow a governing body to withhold executive session meeting minutes until the governing body approves by resolution which records may be disclosed.

The Custodian argued in the SOI that the Township approved the requested meeting minutes in terms of accuracy and content but has not approved the release of the minutes to the public because the minutes must be reviewed by Counsel and approved for release by resolution of the Township Committee. The Custodian later certified that the executive session meeting minutes responsive to request Items No. 3 and No. 4 were approved by the Township Committee on May 4, 2009 and March 18, 2009 respectively.

The first issue which the Council must resolve is whether a public agency can withhold meeting minutes from disclosure after approval by said agency.

As a general matter, draft documents are advisory, consultative and deliberative communications. Although OPRA broadly defines a “government record” as records either “made, maintained or kept on file in the course of [an agency’s] official business,”

or “received” by an agency in the course of its official business, N.J.S.A. 47:1A-1.1, the statute also excludes from this definition a variety of documents and information. Ibid. See Bergen County Improvement Auth. v. North Jersey Media, 370 N.J. Super. 504, 516 (App. Div. 2004). The statute expressly provides that “inter-agency or intra-agency advisory, consultative, or deliberative material” is not included within the definition of a government record. N.J.S.A. 47: 1A-1 .1.

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

The New Jersey Appellate Division also has reached this conclusion with regard to draft documents. In the unreported section of In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004), the court reviewed an OPRA request to the Department of Corrections (“DOC”) for draft regulations and draft statutory revisions. The court stated that these drafts were “all clearly pre-decisional and reflective of the deliberative process.” Id. at 18. It further held:

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

Additionally, the GRC has previously ruled on the issue of whether draft meeting minutes are exempt from disclosure pursuant to OPRA. In Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), the Council held that “...the Custodian has not unlawfully denied access to the requested meeting minutes as the Custodian certifies that at the time of the request said minutes had not been approved by the governing body and as such, they constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.”

Thus, in accordance with the foregoing case law and the prior GRC decision in Parave-Fogg, *supra*, all draft minutes of a meeting held by a public body, are entitled to the protection of the deliberative process privilege. Draft minutes are pre-decisional. In addition, they reflect the deliberative process in that they are prepared as part of the

public body's decision making concerning the specific language and information that should be contained in the minutes to be adopted by that public body, pursuant to its obligation, under the Open Public Meetings Act, to "keep reasonably comprehensible minutes." N.J.S.A. 10:4-14.

In the instant complaint, the Custodian argued in the SOI that the requested executive session meeting minutes had not been approved by the Township Committee for disclosure to the public. Additionally, the Custodian argued that the Township Committee must approve by resolution those records to be disclosed. However, the Custodian later certified that the requested minutes were approved prior to the Complainant's submission of his OPRA request; therefore, the executive session meeting minutes requested no longer constitute draft documents.

Moreover, the Custodian subsequently certified on May 10, 2010 that the Township maintains CDs of executive session meetings responsive to request Items No. 1 and No. 2; however, said CDs are not available to the public because the minutes of such meetings have not been approved for release.

In Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009), the custodian denied the complainant access to executive session minutes on the basis that the requested minutes were not approved for release to the public. The custodian argued that the sole issue was the complainant's misconception that the BOE's approval as to accuracy and content signified that the minutes were for release to the general public. The Council ultimately found that because the BOE had already approved the requested executive session minutes as to accuracy and content, said minutes no longer constituted ACD material pursuant to N.J.S.A. 47:1A-1.1., and were therefore disclosable pursuant to the provisions of OPRA.

Like the custodian in Wolosky, the Custodian in the instant complaint argued that although the requested executive session meeting minutes were approved for content by the Township Committee, the Township Committee must also approve by resolution those records to be disclosed.

However, the Council has previously found that once the governing body of an agency has approved meeting minutes as to accuracy and content (per the requirement of OPMA), said minutes are subject to disclosure under OPRA. Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Although properly approved executive session minutes are disclosable, custodians may redact from the minutes those discussions that require confidentiality because the matters discussed therein are unresolved or still pending pursuant to N.J.S.A. 47:1A-5.g.

Therefore, because the Township Committee approved the January 5, 2009 and January 14, 2009 executive session minutes on May 4, 2009 and March 18, 2009 respectively, said minutes no longer constituted advisory, consultative or deliberative (ACD) material at the time of the Complainant's request and were therefore disclosable with appropriate redactions for discussions exempt from disclosure under the Open Public Meetings Act pursuant to N.J.S.A. 47:1A-9.a. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the

requested CD electronic recordings and executive session meeting minutes pursuant to N.J.S.A. 47:1A-6.

The second issue which the Council must resolve is whether the exemptions to disclosure cited by the Custodian apply to the requested records. Specifically, the Custodian asserted that exemptions to the disclosure of government records contained in N.J.S.A. 10:4-12(b) apply to the requested executive session meeting minutes.

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 GRC⁹ 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 requested CD electronic recordings and executive session meeting minutes dated January 5, 2009 and January 14, 2009 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-9.a and N.J.S.A. 10:4-12(b).

⁹ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
Stultz Taylor v. Township of Downe (Cumberland), 2009-174 – Findings and Recommendations of the Executive Director

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

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. Although the Custodian responded in writing to the Complainant's May 6, 2009 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response was legally insufficient because she failed to provide a date certain on which she would either grant or deny access to the requested records and failed to respond to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g., Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. Because the Township Committee approved the January 5, 2009 and January 14, 2009 executive session minutes on May 4, 2009 and March 18, 2009 respectively, said minutes no longer constituted advisory, consultative or deliberative (ACD) material at the time of the Complainant's request and were therefore disclosable with appropriate redactions for discussions exempt from disclosure under the Open Public Meetings Act pursuant to N.J.S.A. 47:1A-9.a. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the requested CD electronic recordings and executive session meeting minutes pursuant to N.J.S.A. 47:1A-6.
3. 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 CD electronic recordings and executive session meeting minutes dated January 5, 2009 and January 14, 2009 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-9.a and N.J.S.A. 10:4-12(b).
4. **The Custodian must deliver¹⁰ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 3 above), a document**

¹⁰ 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.

or redaction index¹¹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4¹², that the records provided are the records 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.

5. 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
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

July 20, 2010

¹¹ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹² "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."