



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

February 28, 2012 Government Records Council Meeting

Lisa Miceli Waters
(on behalf of Giordani, Halleran & Ciesla)
Complainant

Complaint No. 2009-257

v.

New Jersey Office of the Inspector General
Custodian of Record

At the February 28, 2012 public meeting, the Government Records Council (“Council”) considered the February 21, 2012 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 the responsive records are exempt from disclosure pursuant to N.J.S.A. 47:1A-3.a. because the evidence of record is clear that the records are part of an ongoing investigation being conducted by the United States Attorney’s Office for the District of New Jersey, the disclosure of which would be inimical to the public interest. Thus, the Custodian lawfully denied access to the responsive records. N.J.S.A. 47:1A-6.

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 28th Day of February, 2012

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Denise Parkinson Vetti, Esq., Secretary
Government Records Council

Decision Distribution Date: March 5, 2012



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

Lisa Miceli Waters
(On Behalf of Giordani, Halleran & Ciesla)¹
Complainant

GRC Complaint No. 2009-257

v.

New Jersey Office of the Inspector General²³
Custodian of Records

Records Relevant to Complaint: Copies of transcripts of all interviews conducted by the New Jersey Office of the Inspector General (“OIG”) in connection with the investigation referenced in the “Meadowlands Remediation and Redevelopment Project” report dated February 28, 2008.

Request Made: June 1, 2009

Response Made: June 9, 2009

Custodian: Vincent Funelas⁴

GRC Complaint Filed: September 15, 2009⁵

Background

June 1, 2009

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form electronically via OPRA Central.

June 9, 2009

Custodian’s response to the OPRA request. The Custodian responds in writing via letter to the Complainant’s OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that access to the requested records is denied because the records pertain to an investigation in progress. N.J.S.A. 47:1A-3.a.

¹ The Complainant, an attorney at Giordano, Halleran & Ciesla, (Red Bank, NJ), represents Redevelopment Materials, Inc.

² Represented by DAG Frantz Masse, on behalf of the NJ Attorney General. Previous Counsel was DAG Gregory A. Spellmeyer.

³ The Office of Inspector General became the Division of Investigations in the Office of the State Comptroller on July 1, 2010.

⁴ Mr. Funelas was the Custodian of Record at the time of this complaint and prior to the OIG becoming the Division of Investigations within the Office of the State Comptroller.

⁵ The GRC received the Denial of Access Complaint on said date.

September 15, 2009

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

- “Meadowlands Remediation and Redevelopment Project” report (“Report”) dated February 28, 2008.
- Chart of interview statements included in the report (undated).
- Complainant’s OPRA request dated June 1, 2009.
- Letter from the Custodian to the Complainant dated June 9, 2009.
- Certification of Kurt E. Anderson, Esq., dated September 14, 2009.
- Subpoena to Testify Before Grand Jury/Redevelopment Materials, Inc. dated February 5, 2009.
- Subpoena to Testify Before Grand Jury/ Encap Golf Holdings, LLC (“Encap”) dated March 20, 2009.

The Complainant states that on February 28, 2008, the OIG made public its Report disclosing its findings of an investigation of the Meadowlands Remediation and Redevelopment Project (“Project”). The Complainant states that according to the Report, the OIG interviewed 75 people to include employees, consultants, vendors, local government officials, and so on with some being interviewed multiple times. The Complainant states that most of the interviews were recorded. The Complainant states that the Report, which is available to the public on the OIG’s website, makes approximately 461 references to interviews and quotes approximately 40 interviewees.⁶

The Complainant states that sometime prior to June 1, 2009, the OIG disclosed copies of audio recordings of six (6) interviews to another law firm, Friedman, Kaplan, Seiler & Adelman, LLP (“Friedman”). *See* Certification of Kurt E. Anderson, Esq., dated September 14, 2009. The Complainant states that on June 1, 2009, she submitted an OPRA request on behalf of a client for all interview transcripts. The Complainant states that the Custodian responded in writing on June 9, 2009 denying access to the requested records pursuant to N.J.S.A. 47:1A-3.a. because the requested transcripts pertain to an investigation in progress. The Complainant states that the Custodian’s denial letter does not specify which agency is conducting the investigation. The Complainant notes that she is aware that the United States Attorney’s Office for the District of New Jersey (“USAO”) is conducting an investigation based on a subpoena from the USAO which was served on the Complainant’s client.

The Complainant argues that the Custodian has unlawfully denied access to the responsive transcripts⁷ because disclosure of same is not inimical to the public interest. The Complainant states that under OPRA, access to records cannot be denied simply because they pertain to a pending investigation: disclosure must be deemed to be “inimical to the public interest.” N.J.S.A. 47:1A-3.a. The Complainant states that in Asbury Park Press v. Lakewood Township Police, 354 N.J. Super. 146, 158 (Law Div. 2002), the Court held that “[i]t should be emphasized that the statutory requirements of

⁶ The Complainant included a 13-page chart of interview statements.

⁷ The Complainant notes that although her request specifically sought transcripts, she would accept copies of the audio recordings if transcripts were not available.

N.J.S.A. 47:1A-3.a. are conjunctive. In order to find a basis to deny access, [the records in questions must be found to] pertain to an investigation in progress *and* that their release would be inimical to the public interest.” *Id.*

The Complainant argues that the OIG’s response to the OPRA request is insufficient because the OIG did not also assert that disclosure of the transcripts would be inimical to the public interest nor articulate how disclosure would affect the public interest. The Complainant argues that disclosure of the responsive transcripts is not inimical to the public interest. The Complainant states that because the Report was posted to the OIG’s website on February 28, 2008, any member of the public can review same. The Complainant reiterates that the Report also makes approximately 461 references to interviews and quotes approximately 40 interviewees. The Complainant asserts that as such, the Report is essentially a summary of the transcripts. The Complainant argues that the sheer number of these references in the Report negates the claim that disclosure of the transcripts would be inimical to the public interest. The Complainant argues that it is inconceivable that any portion of the transcripts which are not summarized in the Report contain information that is inimical to the public interest.

The Complainant notes that the Report alleges that Encap took advantage of state financial incentive programs and public low interest loan programs to enter into financial arrangements with New Jersey municipalities. The Complainant argues that the public’s interest in disclosure is high because the taxpayers have a right to know how the State and local municipalities are using public funds. *See Serrano v. South Brunswick Township*, 358 N.J. Super. 352, 367 (App. Div. 2003). The Complainant notes that although the OIG may be uneasy about disclosing the transcripts, mere unease concerning the disclosure of records should not undermine the public’s right of access. *Id.* at 365. The Complainant asserts that even if the OIG views disclosure of the transcripts as an “inconvenience,” this does not make the transcripts “inimical to the public interest.” *Id.* at 367.

The Complainant further argues that the OIG waived its right to deny access to the responsive transcripts by voluntarily providing copies of audio recordings to Friedman. The Complainant notes that Friedman is a member of the general public and did not represent any of the interviewees. The Complainant states that in Gannett New Jersey Partners, L.P. v. County of Middlesex, 379 N.J. Super. 205, 213 (App. Div. 2005), the County was precluded from withholding records based on confidentiality claims because it previously released records pursuant to a prior request. The Complainant states that the Court held that “... a voluntary disclosure of most of the documents sought by Gannett and refusal to release the remaining documents solely on confidentiality grounds constituted a waiver of whatever right the County may have had to deny ...” the request. *Id.* at 213.

The Complainant states that OPRA provides that access to government records cannot be prohibited when “... a record of that agency ... was open for public inspection, examination, or copying before the investigation commenced.” N.J.S.A. 47:1A-3.a. The Complainant reiterates that she is aware that the USAO is conducting an investigation that may be connected with an investigation being conducted by the State Office of the Attorney General. The Complainant asserts that the records were subject to access at some point either prior to or during the investigation because the OIG provided some of

the interview recordings to Friedman. The Complainant argues that access to the transcripts cannot be denied under N.J.S.A. 47:1A-3.a.

The Complainant contends that even if the GRC determines that the Custodian's denial of access was lawful, the OIG cannot withhold access to all transcripts. The Complainant states that Friedman was provided six (6) interviewee recordings. The Complainant argues that she is entitled to have access to the corresponding transcripts. The Complainant asserts that with respect to the remaining 70 or so transcripts, although an outright denial is overly protective, the Complainant would agree to an *in camera* review in order to determine the validity of the OIG's claimed exemption. Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005). The Complainant asserts that should the GRC conclude that disclosure of the transcripts is inimical to the public interest, the transcripts should be disclosed with redactions.⁸

The Complainant agrees to mediate this complaint.

September 15, 2009

Offer of Mediation sent to both parties.

September 21, 2009

The Custodian declines mediation.

September 22, 2009

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

September 29, 2009

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension of five (5) business days to submit the requested SOI. Counsel states that as noted by the Complainant, the transcripts relate to an investigation currently being conducted by the USAO. Counsel states that he attempted to contact the USAO to notify them of this complaint; however, the assigned attorney was out of the office until September 28, 2009. Counsel states that the USAO provided statements that the OIG intends to include in the SOI.

September 29, 2009

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension of time until October 6, 2009 to submit the requested SOI.

October 6, 2009

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel a second extension of time until October 14, 2009 to submit the requested SOI.⁹

October 14, 2009

Custodian's SOI with the following attachments:

⁸ The Complainant argued that access under common law should be granted; however, the GRC does not have the authority to address common law complaints.

⁹ Counsel sought a second extension of time verbally.

- Complainant's OPRA request dated June 1, 2009.
- Letter from the Custodian to the Complainant dated June 9, 2009.

The Custodian certifies that he conducted a thorough search of the OIG's hard copy and electronic investigatory file as well as consulted with persons inside the OIG who have personal knowledge of the file. The Custodian certifies that the responsive recordings and transcripts were readily identified and located.

The Custodian also certifies that no records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that he received the Complainant's OPRA request on June 1, 2009. The Custodian certifies that he responded in writing on June 9, 2009 denying access to the responsive transcripts pursuant to N.J.S.A. 47:1A-3.a.

The Custodian certifies that 62 audio recorded interview sessions exist. The Custodian certifies that every recording has been maintained. The Custodian certifies that certain interviews were also transcribed by a court reporting service as they were conducted and recorded.¹⁰

Previous Custodian's Counsel submits a letter brief on behalf of the OIG's position.¹¹ Counsel recapitulates the facts of the instant complaint. Counsel argues that the requested interview records are not subject to access under OPRA. Counsel states that OPRA provides that access to records pertaining to an investigation "may be denied if the inspection, copying or examination of such record or records shall be inimical to the public interest..." N.J.S.A. 47:1A-3.a.

Counsel certifies that because the records pertain to an investigation being conducted by the USAO, Counsel advised the USAO of this complaint. Counsel certifies that the USAO, through Assistant United States Attorney Bradley Harsch ("Mr. Harsch"), confirmed to Counsel that its investigation could be acknowledged to the GRC in support of the OIG's response and that same remains in progress. Counsel certifies that Mr. Harsch advised that the requested records play an important part in its investigation because the records provide a basis on which the USAO may seek additional interviews and records. Counsel certifies that Mr. Harsch further advised that disclosure of the records would be detrimental to its investigation. Counsel thus argues that because the records pertain to an investigation in progress and that access would be inimical to the public interest, the Custodian lawfully denied access to the responsive records and this complaint should be dismissed.

Counsel disputes the Complainant's argument that the records should be disclosed because they were accessible prior to the commencement of an investigation. N.J.S.A.

¹⁰ The Custodian does not indicate how many transcripts exist.

¹¹ Previous Counsel also submitted a legal certification as part of his letter brief.

47:1A-3.a. Counsel states that all audio recordings at issue were made during the investigation conducted by the OIG. Counsel states that the recordings did not exist before its investigation commenced and could not have previously been subject to access.

Counsel asserts that the responsive records are also exempt from disclosure pursuant to N.J.S.A. 52:15B-13. *See* N.J.S.A. 47:1A-9.a. (providing that OPRA “shall not “abrogate any exemption of a public record ... pursuant to any other statute ... regulation ... Executive Order ... Rules of Court ...”).

Counsel states that N.J.S.A. 52:15B-13 protects the work product of the OIG from public disclosure. Counsel states that the OIG was created to help ensure that government officials are publically accountable for their expenditure of taxpayer funds. N.J.S.A. 52:15B-1. Counsel states that the OIG was established within the Executive Branch and the Inspector General reports directly to the Governor. N.J.S.A. 52:15B-2. Counsel states that the OIG is authorized to investigate alleged waste, fraud, abuse or mismanagement of State funds. N.J.S.A. 52:15B-7. Counsel states that all State agencies are required to cooperate with the OIG’s investigations. N.J.S.A. 52:15B-6. Counsel states that the OIG is empowered with the ability to refer investigations “for further civil, criminal and administrative action to the appropriate authorities.” N.J.S.A. 52:15B-11. Counsel states that the enabling statute also recognizes a need for discretion in order to preserve the confidentiality of investigations. N.J.S.A. 52:15B-12.

Counsel asserts that the sensitive nature of the OIG’s work is specifically demonstrated by the statutory protection that the Legislature provided to its work product:

“Whenever a person requests access to a government record that the Inspector General, during the course of an investigation, obtained from another public agency, which record was open for public inspection, examination or copying before the investigation commenced, the public agency from which the Inspector General obtained the record shall comply with the request if made pursuant to [OPRA], provided that the request does not in any way identify the record sought by means of a reference to the Inspector General's investigation or to an investigation by any other public agency, including, but not limited to, a reference to a subpoena issued pursuant to such investigation.” N.J.S.A. 52:15B-13.

Counsel asserts that because N.J.S.A. 52:15B-13 protects records referred to the OIG by other agencies, the protection logically extends to the OIG’s own investigation records and work product. Counsel further asserts that there is no indication that the protection expires upon the conclusion of the investigation regardless of what information is released to the public thereafter. Counsel asserts that the determination as to the release of records obtained during an investigation is left to the discretion of the OIG.

Counsel argues that the records are also exempt from disclosure because they contain official information the disclosure of which will harm the public interest. *See*

N.J.S.A. 2A:84A-27; N.J.R.E. 515.¹² Counsel argues that the requested records have not been officially disclosed to the public, which places them under the definition suggested by the Supreme Court in In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 93 (2000)(holding that “... the term ‘official information’ is not defined. However, a prior version of N.J.R.E. 515 defined the term to include ‘information not open or theretofore officially disclosed to the public relating to internal affairs of the State ...’” *Citing N.J.R.E. 515. Id.* at 93.) Counsel further argues that the protection afforded by N.J.S.A. 52:15B-13 reinforces the position that the records are entitled to the protection afforded by N.J.S.A. 2A:84A-27 and N.J.R.E. 515.

Counsel further argues that the requested records are exempt from disclosure because they constitute investigative and advisory, consultative or deliberative (“ACD”) material not subject to access pursuant to N.J.S.A. 47:1A-1.1.

Counsel states that applicable case law holds that the public and an investigating agency have an interest in the confidentiality of an investigation and in the materials considered important to the investigation process. McClain v. College Hosp. & New Jersey College of Medicine and Dentistry, 99 N.J. 346, 362-63 (1985). *See also River Edge Sav. & Loan Ass’n v. Hyland*, 165 N.J. Super. 540, 543-45 (App. Div.) *cert. denied*, 81 N.J. 58 (1979)(holding that investigative files are privileged even if no charges are brought.) Counsel states that sources of information and investigative techniques for an investigation fall within the ACD exemption, which seeks to protect, in part, an agency’s work product. McClain at 359. Counsel further states that records revealing an investigating agency’s thought processes also fall under the ACD exemption. *Id.* at 360. Counsel states that factual components can also be considered ACD material:

“The mere use of the word ‘process’ in the name of the privilege suggests that the material can include factual components and still be protected from disclosure if it was used in the agency’s efforts to reason through to an ultimate decision, including a decision to reject all options and not to act. So long as disclosure of such material would reveal the nature of the deliberations that occurred during the agency’s processes, the material is entitled to the protection of the deliberative process privilege.” Education Law Center v. New Jersey Dept. of Educ., 198 N.J. 274, 296 (2009).

Counsel states that any assessment of the ACD exemption must be made against the backdrop of the agency’s deliberative effort:

“a record, which contains or involves factual components, is subject to the deliberative process privilege when it was used in the decision-making process and its disclosure would reveal the nature of the deliberations that occurred during that process. By that standard, individual documents may not be capable of being determined to be, necessarily, deliberative

¹² N.J.S.A. 2A:84A-27 and N.J.R.E. 515 provide that “[n]o person shall disclose official information of this State or of the United States (a) if disclosure is forbidden by or pursuant to any Act of Congress or of this State, or (b) if the judge finds that disclosure of the information in the action will be harmful to the interests of the public.”

material, or not, standing alone. A court must assess such fact-based documents against the backdrop of an agency's deliberative efforts in order to determine a document's nexus to that process, and its capacity to expose the agency's deliberative thought-processes.” *Id.* at 299-300.

Counsel argues that the records at issue herein are ACD material because they are critical to the OIG’s investigation and its deliberative process in reaching a reasonable conclusion. Counsel further asserts that verbatim witness statements are not necessarily factual; rather, the OIG considers how to evaluate all statements based on a number of factors including witness credibility, collaborative evidence and source of information. Counsel asserts that these evaluation processes apply to all evidence, whether testimonial or documentary, gathered during an investigation. Counsel contends that the ultimate outcome of evaluating the evidence is to determine a substantially supported conclusion, and that all of the evidence inherently reflects the evaluation process. Counsel asserts that dialogue, exchanges between interviewer and interviewee and questions asked reveal the OIGs thought process in investigating the Project and should not be disclosed to the Complainant.

Moreover, Counsel disputes that the OIG waived the confidentiality of certain records by posting the report for public review and providing certain interview recordings to Friedman.

Counsel argues that the release of certain information reflects the OIG’s discretion to balance its duty and ability to investigate matters against its responsibility to inform the Governor, the Legislature and the public of its findings. Counsel asserts that the GRC should recognize the OIG’s discretion to maintain this balance. Counsel reiterates that the OIG was established to conduct investigations and adds that the OIG must foster an environment in which people will be willing to provide relevant information. Counsel asserts that confidentiality of investigations has been recognized as a primary method for ensuring an agency’s ability to effectively conduct investigations. *See River Edge* at 543-45.

Counsel asserts that the OIG must balance confidentiality against its responsibility to report its findings to both the Governor, public and the entity at issue. *See N.J.S.A. 52:15B-15* and *16*. Counsel argues that the OIG’s responsibility to report its findings and protection of work product afforded in *N.J.S.A. 52:15B-12* and *N.J.S.A. 52:15B-13* provides the OIG with discretion to pick and choose which information and records to release and to whom. Counsel argues that the release of the report did not constitute a waiver of any right of confidentiality.

Counsel further asserts that providing a recording of a witness interview to that individual witness does not constitute a waiver of confidentiality. Counsel states that the OIG is empowered to compel, by subpoena, sworn testimony from witnesses. *N.J.S.A. 52:15B-8.c*. Counsel states that a compelled witness is afforded the right to be accompanied by counsel. *N.J.S.A. 52:15B-8.d*. Counsel states that in this instance, Friedman represented individual shareholders, officers and counsel for Encap and those attorneys from Friedman were present during interviews to protect the interests of Encap and those representatives. Counsel further states that Friedman received certain

recordings based on their relationship to Encap and its representatives. Counsel contends that this does not constitute a waiver of any confidentiality.

Counsel notes that the OIG also provided recorded interviews to three (3) witnesses from the New Jersey Meadowlands Commission (“NJMC”), another agency within the Executive Branch of the State. Counsel states that the OIG and NJMC share a common interest and purpose in determining whether fraud, waste, abuse or mismanagement of taxpayer funds exists within the Project. *See LaPorta v. Gloucester County Bd. Of Chosen Freeholders*, 340 N.J. Super. 254, 261-63 (App. Div. 2001)(holding that common interest privilege applies to parties with common purpose.) Counsel reiterates that the OIG was exercising its responsibility to provide information to the NJMC without waiving any confidentiality.¹³

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA provides that:

“... where it shall appear that the record or records which are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency, the right of access provided for in [OPRA] *may be denied if the inspection, copying or examination of such record or records shall be inimical to the public interest*; provided, however, that this provision shall not be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced.” (Emphasis added.) N.J.S.A. 47:1A-3.a.

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

¹³ The Custodian addresses the Complainant’s common law argument, for which the GRC has no authority to adjudicate.

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

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

The Complainant filed this Complaint seeking disclosure of transcripts of all interviews conducted in reference to an investigation of the Project. The Complainant argued that the Custodian, in his response, denied access to the responsive records as part of an investigation in progress pursuant to N.J.S.A. 47:1A-3.a. but failed to indicate the public agency currently conducting an investigation. The Complainant noted that she knew that the USAO was conducting said investigation because the USAO served a subpoena on the Complainant’s client. The Complainant included as part of the Denial of Access Complaint two (2) subpoenas to establish her knowledge of such facts.

The Complainant further disputed the Custodian’s denial of access and asserted that disclosure of the records would not be inimical to the public interest because 461 references to interviews and quotes of approximately 40 interviewees appeared in the Report, which is available for public viewing on the OIG’s website. The Complainant argued that the Custodian failed to assert that disclosure would be inimical to the public interest and failed to articulate how disclosure would be affect the public interest.

In the SOI, the Custodian certified 62 total recordings exist but that only certain interviews were transcribed. Previous Counsel also submitted a legal certification as part of the SOI. Counsel certified that the USAO, through Mr. Harsch, confirmed with Counsel that the USAO is conducting an investigation and that the requested records play an important role in said investigation. Counsel further certified that Mr. Harsch advised that disclosure of the records at that time would be detrimental to the USAO’s investigation. Counsel thus asserted that the Custodian properly denied access to the responsive records pursuant to N.J.S.A. 47:1A-3.a.

Counsel’s legal certification, however, contains hearsay. Specifically, a review of such certification reveals that Counsel was advised by another party that the USAO is conducting an investigation and that disclosure of the responsive records would be inimical to the public interest.

In determining whether to accept Counsel’s legal certification as evidence and evaluating the weight to give such evidence, the Council turns to the Administrative Procedures Act (“APA”) and the Office of Administrative Law’s (“OAL”) rules and regulations. The APA states in pertinent part that “[i]n contested cases ... [t]he parties shall not be bound by rules of evidence ... all relevant evidence is admissible ...” N.J.S.A. 52:14B-10. OAL’s regulations, however, place some restrictions upon the Council’s ability to accept hearsay evidence: “Notwithstanding the admissibility of

hearsay evidence, *some legally competent evidence* must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.” (Emphasis added). *N.J.A.C.* 1:1-15.5.

In the matter before the Council, the assertions contained in Counsel’s legal certification that the transcripts at issue herein are part of an ongoing investigation of the USAO is supported by the two (2) subpoenas issued by the USAO which the Complainant provided as part of the Denial of Access Complaint. Moreover, the Complainant specifically noted in the Denial of Access Complaint that she is aware that the USAO is conducting an investigation in which the requested transcripts are material based upon such subpoenas. Thus, the evidence of record is clear that the requested transcripts of all interviews conducted by the OIG in connection with the investigation referenced in the Report are material to an ongoing investigation being conducted by the USAO, the disclosure of which would be inimical to the public interest.

Therefore, the responsive records are exempt from disclosure pursuant to N.J.S.A. 47:1A-3.a. because the evidence of record is clear that the records are part of an ongoing investigation being conducted by the USAO, the disclosure of which would be inimical to the public interest. Thus, the Custodian lawfully denied access to the responsive records. N.J.S.A. 47:1A-6.

The Council declines to address whether the records are exempt from disclosure as ACD material or pursuant to the OIGs regulations because it has been determined that same are exempt from access under OPRA. N.J.S.A. 47:1A-3.a. The Council further declines to address whether the OIG has waived any privilege by providing six (6) recordings to Friedman.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the responsive records are exempt from disclosure pursuant to N.J.S.A. 47:1A-3.a. because the evidence of record is clear that the records are part of an ongoing investigation being conducted by the United States Attorney’s Office for the District of New Jersey, the disclosure of which would be inimical to the public interest. Thus, the Custodian lawfully denied access to the responsive records. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

February 21, 2012