



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

November 30, 2010 Government Records Council Meeting

Tonia Hobbs
Complainant

Complaint No. 2009-286

v.

Township of Hillside (Union)
Custodian of Record

At the November 30, 2010 public meeting, the Government Records Council (“Council”) considered the November 23, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. The Custodian’s response to the Complainant’s request on October 15, 2010 informing the Complainant that her request for each department’s proposed 2010 budgets had been forwarded to Mayor Menza for completion after the statutorily mandated response time results in an insufficient response pursuant to N.J.S.A. 47:1A-5.i. because said response failed to provide the Complainant with a specific date upon which records would be provided.
3. Because the Custodian herein certified that no records responsive to the Complainant’s request Items No. 1 and No. 3 exist, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny access to the Complainant’s OPRA request Items No. 1 and No. 3 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Although the names of the Urban Enterprise Zone Coordinator, Director of Economic Development, Auditor and Chief Financial Officer are disclosable pursuant to N.J.S.A. 47:1A-10, the Complainant did not request the names of these individuals in her original OPRA request. Therefore, pursuant to the Council’s decision in Danis v. Garfield Board



of Education, GRC Complaint Nos. 2009-156, 2009-157 & 2009-158 (June 2010), the Custodian should have provided a record or records made, maintained, kept on file or received in the course of the Township's business which contained the requested information; such record(s) would likely also contain the names of the individuals filling these positions. All other non-responsive information contained on such record(s) should have been redacted. See Danis, *supra*.

5. The names of the Auditors requested by the Complainant are not easily identifiable. Unlike the specific individuals who fill the positions of Urban Enterprise Zone Coordinator, Director of Economic Development and Chief Financial Officer, the evidence of record indicates that there are multiple Auditors employed by the Township. The Complainant's request was unclear as to which Auditor was the subject of the records request or even whether all of the Auditors were the subject of the request. Thus, the Custodian did not violate OPRA by not providing a record containing the names of the Auditors. N.J.S.A. 47:1A-6.
6. Each department's proposed 2010 budgets sought by the Complainant at request Item No. 4 contains advisory, consultative or deliberative material because each department's 2010 proposed budgets are used to assist the Mayor in preparing the 2010 final Township budget. Therefore, each department's proposed 2010 budgets are deliberative in nature and thus exempt from disclosure under OPRA as advisory, consultative or deliberative material. N.J.S.A. 47:1A-1.1; In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000).
7. Although the Custodian failed to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days which resulted in a "deemed" denial and a violation of N.J.S.A. 47:1A-5.g., and provided an insufficient response to the Complainant's request for each department's proposed 2010 budgets because such response did not provide a date certain on which records would be provided, no records responsive exist to the request for job descriptions for the requested job titles and procedures for advertising on Local Channel 35, the Custodian did provide the Complainant with the hire dates for the requested job titles, each department's proposed 2010 budgets are exempt from disclosure as advisory, consultative or deliberative material, and the Mayor provided the Complainant with copies of the 2009-2010 Township budget, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

Final Decision Rendered by the
Government Records Council
On The 30th Day of November, 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: December 3, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 30, 2010 Council Meeting**

**Tonia Hobbs¹
Complainant**

GRC Complaint No. 2009-286

v.

**Township of Hillside (Union)²
Custodian of Records**

Records Relevant to Complaint:³

1. Job descriptions for the UEZ Coordinator, Director of Economic Development, Auditor, and Chief Financial Officer (CFO).
2. Hire date and job titles for the CFO, UEZ Coordinator, and Auditor.
3. Guidelines and procedures for advertisement on Local Channel 35.
4. Each department's proposed 2010 budget.

Request Made: October 5, 2009

Response Made: October 15, 2009 and October 16, 2009⁴

Custodian: Janet Vlasisavljevic

GRC Complaint Filed: October 21, 2009⁵

Background

October 5, 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.

October 8, 2009

Memorandum from the Custodian to Mayor Menza. The Custodian states that she is in receipt of the Complainant's OPRA request and is forwarding the Complainant's request for each department's proposed 2010 budget to the Mayor's office. The Custodian also asks the Mayor to contact her or the Complainant when the request is complete.

¹ No legal representation listed on record.

² Represented by Christine Burgess, Esq. (Montclair, NJ).

³ The Complainant also requested additional records which are not relevant to the adjudication of this complaint.

⁴ The Custodian responded to Item No. 4 of the Complainant's OPRA request on October 15, 2009 and Item Nos. 1, 2 and 3 on October 16, 2009.

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

October 15, 2009

Custodian's response to the OPRA request. The Custodian responds in writing⁶ to Item No. 4 of the Complainant's OPRA request on the eighth (8th) business day following receipt of such request. The Custodian states that she is responding to the Complainant's request for each department's proposed 2010 budgets. The Custodian informs the Complainant that the Custodian forwarded this part of the Complainant's OPRA request to Mayor Joe Menza for response.

October 16, 2009

Custodian's 2nd response to the OPRA request. The Custodian responds in writing to request Items No. 1, 2 and 3 of the Complainant's OPRA request on the ninth (9th) business day following receipt of such request. The Custodian states that the Township does not maintain job descriptions for the UEZ Coordinator, Director of Economic Development, Auditor and CFO, and there are no procedures for advertising on Local Channel 35. The Custodian, however, states that Marie Pardo, the CFO, was hired February 3, 2000; Yves Auborg, the UEZ Coordinator/Director of Economic Development was hired July 18, 2005 and the Auditors were appointed July 1, 2009.

October 21, 2009

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:⁷

- Complainant's OPRA request dated October 5, 2009
- Memorandum from the Custodian to the Complainant dated October 15, 2009
- Memorandum from the Custodian to the Complainant dated October 16, 2009

The Complainant states that with respect to Item No. 1 of the OPRA request, which sought job descriptions, the Custodian informed her that the Township does not maintain these descriptions. In regards to Item No. 2, the Complainant contends that when the Custodian provided her with information regarding the hiring dates, only the UEZ Coordinator and CFO were identified by name, not the Auditors. With respect to Item No. 3 of the OPRA request, the Complainant states that she was advised by the Custodian that there were no advertisement procedures for Local Channel 35. Finally, with respect to Item No. 4 of the OPRA request for the each department's proposed 2010 budgets, the Complainant acknowledges that she received correspondence stating that the request was forwarded to Mayor Menza. The Complainant asserts that Mayor Menza informed her that he would provide her with a copy of the each department's proposed 2010 budgets, but the Complainant further asserts that the Clerk already had the documents in her office to fulfill the Complainant's request.

The Complainant does not agree to mediate this complaint.

November 16, 2009

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

⁶ The Custodian's response took the form of a memorandum.

⁷ The Complainant attached additional records to this Denial of Access Complaint which are not relevant to the adjudication of this complaint.

December 1, 2009

Custodian's SOI with the following attachments:⁸

- Complainant's OPRA request dated October 5, 2009
- Memorandum from the Custodian to Mayor Joseph Menza dated October 8, 2009
- Memorandum from the Custodian to the Complainant dated October 15, 2009
- Memorandum from the Custodian to the Complainant dated October 16, 2009

The Custodian certifies that she received the Complainant's OPRA request on October 5, 2009. The Custodian further certifies that she sent correspondence to Mayor Menza on October 8, 2009 requesting that each department's proposed 2010 budgets be given to the Complainant or to the Custodian so she could provide the documents to the Complainant. The Custodian certifies that Mayor Menza did not supply the Custodian's Office with the responsive records.

The Custodian further certifies that on October 16, 2009 she responded to Items No. 1, 2 and 3 of Complainant's OPRA request. The Custodian certifies that Item No. 2 of the Complainant's request did not seek the names of the people or the company holding the job titles requested. In addition, the Custodian certifies that the Clerk's Office does not maintain job descriptions responsive to request Items No. 1 and 3, but instead the job descriptions are maintained by the New Jersey Department of Civil Service, and further certifies that there are no guidelines or procedures in ordinance or resolution form to advertise on Channel 35.

The Custodian asserts that request Item No. 4, each department's proposed 2010 budgets, are government records because they are made, maintained or kept by the Township's department directors. The Custodian further asserts that each department's proposed 2010 budgets might contain specific personnel or pension records and thus these documents are exempt from disclosure pursuant to Executive Orders. The Custodian argues that each department's proposed 2010 budgets are deliberative because these documents assist the Mayor in preparing the final 2010 Township budget; therefore these documents are exempt from disclosure because they are advisory, consultative and deliberative. However, the Custodian also states that the Town Council waived the deliberative exemption last year and held public hearings with the department heads. The Custodian states that the decision to hold public hearings is executive in nature and that the current Mayor has not announced that he will hold public hearings.

May 28, 2010

E-mail from the GRC to the Complainant. The GRC asks the Complainant whether the Mayor provided the Complainant with each department's proposed 2010 budgets.

June 4, 2010

E-mail from the Complainant to the GRC. The Complainant states that the Mayor did provide her with each departments' proposed 2010 budgets.

⁸ The Custodian attached additional materials to the SOI which are not relevant to this adjudication of this complaint.

June 4, 2010

E-mail from the GRC to the Complainant. The GRC inquires as to when the Complainant received each department's proposed 2010 budgets.

June 7, 2010

E-mail from the Complainant to the GRC. The Complainant states that the Mayor gave her each department's proposed 2010 budgets that same week.⁹ The Complainant also states that the Custodian had access to each department's proposed 2010 budgets and the Custodian should have provided the Complainant with the records.

July 28, 2010

E-mail from the GRC to the Custodian. The GRC requests a legal certification from the Custodian certifying when the Township's 2010 budget was introduced to the Township Council.

July 30, 2010

Letter from the Custodian to the GRC. The Custodian legally certifies that the Mayor introduced the 2009-2010 Township budget to the Township Council on September 22, 2009 and that the budget was advertised for public hearing on December 15, 2009.

September 13, 2010

E-mail from the Complainant to the GRC. The Complainant states that she received a copy of the 2009-2010 Township budget, not each department's proposed 2010 budgets sought in her OPRA request.

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 ... The terms shall not include inter-agency or intra-agency

⁹ Although it is unclear as to the exact date when each department's proposed 2010 budgets were provided to the Complainant, the evidence of record indicates that the Complainant received the documents the same week as the Custodian responded to the OPRA request.

advisory, consultative, or deliberative material” (Emphasis added.)
N.J.S.A. 47:1A-1.1.

OPRA also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor ... If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA], the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.” N.J.S.A. 47:1A-5.g.

OPRA further provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived.

In the event a custodian fails to respond within seven business days after receiving a request, the failure to respond shall be deemed a denial of the request....” N.J.S.A. 47:1A-5.i.

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

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

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

In the instant complaint, the Custodian responded in writing on the eighth (8th) business day following receipt of the request to Item No. 4 of the Complainant’s OPRA request, informing the Complainant that her request for each department’s proposed 2010 budgets had been forwarded to Mayor Menza for completion. In addition, the Custodian responded in writing to OPRA request Items No. 1, 2 and 3 on the ninth (9th) business day following receipt thereof. The Custodian stated that the Township does not maintain job descriptions for the UEZ Coordinator, Director of Economic Development, Auditor and CFO, and there are no procedures for advertising on Local Channel 35. The

Custodian, however, stated that Marie Pardo, the CFO, was hired February 3, 2000; Yves Auborg, the UEZ Coordinator/Director of Economic Development was hired July 18, 2005 and the Auditors were appointed July 1, 2009.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.¹⁰ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Moreover, the Custodian's response to the Complainant's request on October 15, 2010 informing the Complainant that her request for each department's proposed 2010 budgets had been forwarded to Mayor Menza for completion after the statutorily mandated response time results in an insufficient response pursuant to N.J.S.A. 47:1A-5.i. because said response failed to provide the Complainant with a specific date upon which records would be provided.

The Complainant's OPRA request sought four (4) types of records: 1) job descriptions for the UEZ Coordinator, Director of Economic Development, Auditor, and CFO; 2) hire date and job titles for CFO, UEZ Coordinator, and Auditor; 3) guidelines and procedures for advertisements on Local Channel 35; and 4) each department's proposed 2010 budgets.

The Custodian's response to request Item No. 1 stated that the Township does not maintain the requested job descriptions and the Custodian later certified in the SOI that such descriptions are maintained by the New Jersey Department of Civil Service. The Custodian provided the Complainant with the hire dates for the above-mentioned titles in response to request Item No. 2. The Custodian stated that there were no procedures for advertising on Local Channel 35 in response to request Item No. 3 and later certified to this in the SOI. Finally, in response to request Item No. 4, the Custodian informed the

¹⁰ It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

Complainant that this portion of the OPRA request was forwarded to the Mayor to supply the Complainant with each department's proposed 2010 budgets.

Request Items No. 1 and No. 3: Job Descriptions for the UEZ Coordinator, Director of Economic Development, Auditor, and CFO and Guidelines and Procedures for Advertisement on Local Channel 35

The Custodian's response to the Complainant's OPRA request Item No. 1 stated that the job descriptions for the UEZ Coordinator, Director of Economic Development, Auditor and CFO are not maintained within the Township of Hillside and later certified in the SOI that the Township does not maintain such records. The Custodian also responded to request Item No. 3 stating that there are no procedures for advertisement on Local Channel 35, and later certified to such in her SOI. The Complainant has failed to provide any evidence to refute the Custodian's certification.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) the Complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The Custodian responded, stating that there was no record of any telephone calls made to the Complainant. The Custodian subsequently certified that no records responsive to the Complainant's request existed. The Complainant submitted no evidence to refute the Custodian's certification. The GRC determined that, because the Custodian certified that no records responsive to the request existed, there was no unlawful denial of access to the requested records.

Therefore, because the Custodian herein certified that no records responsive to the Complainant's request Items No. 1 and No. 3 exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to the Complainant's OPRA request Items No. 1 and No. 3 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Request Item No. 2: Hire Dates and Job Titles for the UEZ Coordinator, CFO, and Auditor:

OPRA provides that:

“Notwithstanding the provisions of [OPRA] or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that:

- an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be a government record...” N.J.S.A. 47:1A-10.

Moreover, OPRA further provides that:

“A custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record” N.J.S.A. 47:1A-5.

In the instant complaint, the Complainant requested the hire dates and job titles for the CFO, UEZ Coordinator, and Auditor. The Custodian responded to the Complainant providing the hire dates for all three (3) positions. The evidence of record is clear that the Complainant’s OPRA request did not specifically seek the names of the individuals filling these positions; however, the Custodian provided the Complainant with the individual names for the CFO and UEZ Coordinator but did not provide the names of the Auditors. The Custodian did not provide a responsive record with the requested information; instead the Custodian wrote the information in a letter to the Complainant. The Complainant now argues that the Custodian should have provided her with the names of the Auditors.

In Danis v. Garfield Board of Education, GRC Complaint Nos. 2009-156, 2009-157 & 2009-158 (June 2010), the Council determined that because “name, title, position, salary, payroll record and length of service” is information which is specifically considered to be a government record under N.J.S.A. 47:1A-10, and because “payroll records” must be disclosed pursuant to Jackson v. Kean University, GRC Complaint No. 2002-98 (February 2004), the Complainant’s March 25, 2009 request for “[t]he name, position, salary, payroll record and length of service for every Board/District employee who was employed in whole or part from January 1, 2008 to March 24, 2009” was a valid request pursuant to OPRA.

In the present complaint, the Complainant requested hire dates and job titles for the UEZ Coordinator, Director of Economic Development, Auditor, and Chief Financial Officer (CFO); the Complainant did not request the names of the individuals who filled the positions of UEZ Coordinator, Director of Economic Development, and Chief Financial Officer. Notwithstanding the fact that the Complainant’s OPRA request did not specifically seek the names of the individuals filling these positions, such information is easily identifiable from the parameters given in the Complainant’s OPRA request and is disclosable under OPRA pursuant to N.J.S.A. 47:1A-10.

Therefore, pursuant to the Council’s decision in Danis, *supra*, the Custodian should have provided a record or records made, maintained, kept on file or received in the course of the Township’s business which contained the requested information; such record(s) would likely also contain the names of the individuals filling these positions. All other non-responsive information contained on such record(s) should have been redacted. *See Danis*, *supra*.

However, the names of the Auditors are not easily identifiable. Unlike the specific individuals who fill the positions of UEZ Coordinator, Director of Economic Development and Chief Financial Officer, the evidence of record indicates that there are multiple Auditors employed by the Township. The Complainant’s request was unclear as to which Auditor was the subject of the records request or even whether all of the

Auditors were the subject of the request. Thus, the Custodian did not violate OPRA by not providing a record containing the names of the Auditors. N.J.S.A. 47:1A-6.

Request Item No. 4: Each department's proposed 2010 budgets:

With respect to Item No. 4 of the OPRA request dated October 5, 2009 seeking each department's proposed 2010 budgets, the Complainant asserts that in response to her OPRA request she received correspondence from the Custodian stating that the request was forwarded to Mayor Menza for his response. The Complainant also asserts that Mayor Menza stated that he would provide her with a copy of each department's proposed 2010 budgets. However, the Complainant contends that at the time of the OPRA request, the Clerk had in her office copies of each department's proposed 2010 budgets. Nevertheless, the Complainant states that Mayor Menza did provide her with the 2009-2010 Township budget and not each department's proposed 2010 budgets.¹¹

The Custodian certifies that each department's proposed 2010 budgets are government records because they are made, maintained or kept by the Township's department directors, but also certifies that these records might contain specific personnel or pension records and thus these records are exempt from disclosure pursuant to Executive Orders. The Custodian also certifies that each department's proposed 2010 budgets are exempt from disclosure as advisory, consultative or deliberative material (ACD) because these records assist the Mayor in preparing the final Township 2010 budget. Finally, the Custodian has certified that the Mayor introduced the 2009-2010 Township budget to the Township Council on September 22, 2009 and that the budget was advertised for public hearing on December 15, 2009.

OPRA excludes from the definition of a government record "inter-agency or intra-agency advisory, consultative or deliberative material." N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the "deliberative process privilege."

In O'Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006), the Council stated that "neither the statute nor the courts have defined the terms... 'advisory, consultative, or deliberative' in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA's ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J.149 (App. Div. 2004).

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). Specifically, the New Jersey Supreme Court has ruled that a

¹¹ The record is unclear as to when the records were provided.

record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Education Law Center v. NJ Department of Education, 198 N.J. 274, 966 A.2d 1054, 1069 (2009). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

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

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

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

“[t]he initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.” In Re Liquidation of Integrity, *supra*, 165 N.J. at 88, *citing* McClain, *supra*, 99 N.J. at 361-62.

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

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

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

1. That burden can be met by a showing of:
 - i. the importance of the information to the requesting party,
 - ii. its availability from other sources **and**
 - iii. the effect of disclosure on frank and independent discussion of contemplated government policies.

In the instant complaint, the Custodian asserts that each department's proposed 2010 budgets are exempt from disclosure under OPRA as advisory, consultative and deliberative material (ACD) because these records provide the Mayor with information necessary to assist him in preparing a final budget. The Custodian stated in her response to the OPRA request that the request would be forwarded to the Mayor so that the Mayor may provide the Complainant with copies of each department's proposed 2010 budgets. The Complainant stated in an e-mail to the GRC dated September 13, 2010 that the Mayor provided her with a copy of the 2009-2010 budget and not each department's proposed 2010 budgets.

Each department's proposed 2010 budgets sought by the Complainant at request Item No. 4 contain ACD material because each department's 2010 proposed budgets are used to assist the Mayor in preparing the 2010 final Township budget. Therefore, each department's proposed 2010 budgets are deliberative in nature and thus exempt from disclosure under OPRA as ACD material. N.J.S.A. 47:1A-1.1; In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000).

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

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

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

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

The Custodian responded in writing to Item No. 4 of the Complainant's OPRA request on the eighth (8th) business day following receipt of such request stating that this request was forwarded to the Mayor for completion. The Custodian responded to request Items No. 1, 2 and 3 on the ninth (9th) business day following receipt of the Complainant's OPRA request. The Custodian stated that the Township does not maintain the job descriptions for the requested job titles, nor did any procedures for advertising on Local Channel 35 exist. Finally, the Custodian did provide the Complainant with the hire dates for the requested job titles. Although it is the Custodian's duty under OPRA to grant or deny access to government records, the evidence of record indicates that the Mayor provided the Complainant with copies of the 2009-2010 Township budget and not each department's proposed 2010 budgets.

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

Although the Custodian failed to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days which resulted in a "deemed" denial and a violation of N.J.S.A. 47:1A-5.g., and provided an insufficient response to the Complainant's request for each department's proposed 2010 budgets because such response did not provide a date certain upon which records would be provided, no records responsive exist to the request for job descriptions for the requested job titles and procedures for advertising on Local Channel 35, the Custodian did provide the Complainant with the hire dates for the requested job titles, each department's proposed 2010 budgets are exempt from disclosure as ACD material, and the Mayor provided the Complainant with copies of the 2009-2010 Township budget, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. The Custodian's response to the Complainant's request on October 15, 2010 informing the Complainant that her request for each department's proposed 2010 budgets had been forwarded to Mayor Menza for completion after the statutorily mandated response time results in an insufficient response pursuant to N.J.S.A. 47:1A-5.i. because said response failed to provide the Complainant with a specific date upon which records would be provided.
3. Because the Custodian herein certified that no records responsive to the Complainant's request Items No. 1 and No. 3 exist, and because there is no credible evidence in the record to refute the Custodian's certification, the

Custodian did not unlawfully deny access to the Complainant's OPRA request Items No. 1 and No. 3 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

4. Although the names of the Urban Enterprise Zone Coordinator, Director of Economic Development, Auditor and Chief Financial Officer are disclosable pursuant to N.J.S.A. 47:1A-10, the Complainant did not request the names of these individuals in her original OPRA request. Therefore, pursuant to the Council's decision in Danis v. Garfield Board of Education, GRC Complaint Nos. 2009-156, 2009-157 & 2009-158 (June 2010), the Custodian should have provided a record or records made, maintained, kept on file or received in the course of the Township's business which contained the requested information; such record(s) would likely also contain the names of the individuals filling these positions. All other non-responsive information contained on such record(s) should have been redacted. *See Danis, supra*.
5. The names of the Auditors requested by the Complainant are not easily identifiable. Unlike the specific individuals who fill the positions of Urban Enterprise Zone Coordinator, Director of Economic Development and Chief Financial Officer, the evidence of record indicates that there are multiple Auditors employed by the Township. The Complainant's request was unclear as to which Auditor was the subject of the records request or even whether all of the Auditors were the subject of the request. Thus, the Custodian did not violate OPRA by not providing a record containing the names of the Auditors. N.J.S.A. 47:1A-6.
6. Each department's proposed 2010 budgets sought by the Complainant at request Item No. 4 contains advisory, consultative or deliberative material because each department's 2010 proposed budgets are used to assist the Mayor in preparing the 2010 final Township budget. Therefore, each department's proposed 2010 budgets are deliberative in nature and thus exempt from disclosure under OPRA as advisory, consultative or deliberative material. N.J.S.A. 47:1A-1.1; In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000).
7. Although the Custodian failed to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days which resulted in a "deemed" denial and a violation of N.J.S.A. 47:1A-5.g., and provided an insufficient response to the Complainant's request for each department's proposed 2010 budgets because such response did not provide a date certain on which records would be provided, no records responsive exist to the request for job descriptions for the requested job titles and procedures for advertising on Local Channel 35, the Custodian did provide the Complainant with the hire dates for the requested job titles, each department's proposed 2010 budgets are exempt from disclosure as advisory, consultative or deliberative material, and the Mayor provided the Complainant with copies of the 2009-2010 Township budget, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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Executive Director

November 23, 2010