



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**

**May 24, 2011 Government Records Council Meeting**

Robert F. Edwards

Complainant

v.

Plainfield Housing Authority (Union)

Custodian of Record

Complaint No. 2009-318

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the April 20, 2011 *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 because the Complainant has failed to establish in his motion for reconsideration of the Council’s November 30, 2010 Final Decision that 1) the GRC's decision is 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, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing of the complaint, and failed to submit any evidence to support reconsideration of this matter, 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). The Council’s November 30, 2010 Final Decision therefore stands.

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 24<sup>th</sup> 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: June 3, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

*Reconsideration*

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

**Robert F. Edwards<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2009-318**

v.

**Plainfield Housing Authority (Union)<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** Copies of the following documents:

1. Hope VI Application
2. Five year plan from 2005-2009
3. 2008 Annual plan

**Request Made:** October 22, 2009, October 26, 2009, October 30, 2009 and November 16, 2009

**Response Made:** November 3, 2009 and November 23, 2009

**Custodian:** Randall Wood

**GRC Complaint Filed:** December 2, 2009

**Background**

**November 30, 2010**

Government Records Council's ("Council") Final Decision. At its November 30, 2010 public meeting, the 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, found that:

1. The Custodian's failure to respond in writing to the Complainant's October 22, 2009 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. Because the Complainant has failed to provide competent, credible evidence sufficient to refute the Custodian's certification that the legal certifications were attached to the requested Five Year Plan and 2008 Annual Plan at the time of the Complainant's review of these records, the Custodian has not unlawfully denied

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

<sup>2</sup> Represented by Dan Smith, Esq. (Orange, NJ)

access to the requested Five Year Plan and the 2008 Annual Plan. N.J.S.A. 47:1A-6.

3. Because the Hope VI Application was not complete at the time of each of the Complainant's OPRA requests on October 22, 2009, October 26, 2009 and November 16, 2009, the record responsive is exempt from disclosure under OPRA as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and O'Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006).
4. Because the Custodian failed to charge the Complainant the lawful copying fee in effect at the time of the Complainant's OPRA requests, i.e., \$.75 per page for the first page to the tenth page, pursuant to N.J.S.A. 47:1A-5.b., the Custodian must refund \$2.00 to the Complainant, representing the amount by which the Complainant was overcharged.
5. Although the Custodian's untimely response to the Complainant's October 22, 2009 OPRA request resulted in a deemed denial and a violation of N.J.S.A. 47:1A-5.g., the Custodian made available the requested Five Year Plan and 2008 Annual Plan for review, and the Complainant has submitted no competent, credible evidence to refute the Custodian's certification that all legal certifications were not attached to said Plans at the time of the Complainant's review. Moreover, the Custodian did not unlawfully deny access to the requested Hope VI application because said record was exempt from disclosure under OPRA as advisory, consultative or deliberative material at the time of the Complainant's October 22, 2009, October 26, 2009 and November 16, 2009 OPRA requests for said record as the requested record was incomplete at those times. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA under the totality of the circumstances.

### **December 3, 2010**

Council's Final Decision distributed to the parties.

### **December 28, 2010**

Letter from the Complainant to the GRC. The Complainant states that he was unable to submit his request for reconsideration within the ten (10) business days as prescribed by *N.J.A.C. 5:105-2.10* due to health concerns from December 4, 2010 to December 17, 2010. The Complainant requests a thirty (30) day extension to file a motion for reconsideration.

### **January 10, 2011**

E-mail from the GRC's Executive Director to the Complainant. The Director states that she received the Complainant's request for an extension of time to request reconsideration of the Council's final decision. The Director also states that the Council's regulations require requests for reconsideration of Council decisions be filed within ten (10) business days following receipt of a Council decision pursuant to *N.J.A.C. 5:105-2.10*. Additionally, the Director states that the Council's November 30, 2010 final decision in this matter was distributed to the parties on December 3, 2010. The Director

also states that all requests for reconsideration were due to the Council by December 17, 2010.

Furthermore, the Director states that in her discretion as Executive Director, she will grant an extension of thirty (30) days for the Complainant to submit the request for reconsideration. Lastly, the Director states that the Complainant must submit his request for reconsideration to the Council by the end of business on February 9, 2011.

### **February 9, 2011**

Complainant's request for reconsideration of the Council's final decision.<sup>3</sup> The Complainant states that he agrees with the Council's findings stating that the Custodian's failure to respond in writing to the Complainant's October 22, 2009 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. The Complainant states that he disagrees with the Council's findings on six (6) counts:

1. The Complainant states that the Council failed to recognize that when the Custodian failed to promptly respond to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i., that the Custodian knowingly, willfully and unreasonably denied access to a public record pursuant to N.J.S.A. 47:1A-11. The Complainant also states that the Custodian violated N.J.S.A. 47:1A-6 by failing to state the legal explanation and statutory citation for such denial.
2. The Complainant further states that the Council failed to follow the rules as stated in *N.J.A.C. 5:105-2.4(7)* which state that the Custodian's failure to submit a completed and signed Statement of Information (SOI) within the five (5) business days may result in the GRC's issuing a decision in favor of the Complainant. The Complainant asserts that the Custodian failed to respond to the GRC's request for a completed and signed SOI on December 8, 2009.<sup>4</sup> The Complainant also asserts that despite the Custodian's failure to respond to the request for the SOI in a timely manner, the GRC refused to issue a decision in favor of the Complainant. Furthermore, the Complainant contends that the Custodian's conduct illustrates how Custodians could easily circumvent OPRA by ignoring requests for SOIs.
3. The Complainant states that the Custodian should disclose the records responsive to Item No. 1, Hope VI application. The Complainant asserts that the Plainfield Housing Authority (PHA) was statutorily required to have public meetings

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<sup>3</sup> The Complainant failed to complete the request for reconsideration form. Additionally, the Complainant fails to assert that the Council's decision is based upon a "palpably incorrect or irrational basis" or the Council did not consider the significance of probative, competent evidence, or that the Council acted arbitrarily, capriciously or unreasonably in disposing of the complaint.

<sup>4</sup> The Complainant mistakenly states the GRC requested an SOI from the Custodian on August 5, 2010 and August 20, 2010. The evidence of record is clear, however, that on August 5, 2010 the GRC requested a legal certification from the Custodian as to when he received the Complainant's four (4) OPRA requests. The Custodian responded to the August 5, 2010 request for a legal certification on August 20, 2010. However, the Custodian failed to state the dates when he received the Complainant's four (4) OPRA requests.

regarding the Hope VI Application. The Complainant states that these public meetings occurred on October 21, 2009 and October 28, 2009. The Complainant further states that at these meetings the Hope VI plan was presented to the residents and community. Thus, the Complainant asserts that because the PHA made these records public, the records should be disclosed.

4. The Complainant states that the Custodian made fraudulent representations in his letter dated December 18, 2009 wherein the Custodian stated that there is no requirement that records responsive to Item No. 1 must be displayed and reviewed by residents.<sup>5</sup> The Complainant asserts that the Custodian's statement contradicts the statutory requirement of the Hope VI application process. The Complainant states that the PHA is statutorily required to involve the affected public housing residents in the planning process, proposed implementation and management of the Hope VI plan. The Complainant encloses a public meeting notice from the PHA which states that the PHA will review the Hope VI plan and application with residents and answer any questions the residents might have.
5. The Complainant states that the PHA made the records responsive to Item No. 1, the Hope VI application and plan available to the public on October 21, 2009 and October 28, 2009. However, the Complainant states that his request for these records was denied on November 3, 2009 and November 23, 2009. The Complainant also states that the Custodian failed to state a legal explanation and statutory citation for such denials pursuant to N.J.S.A. 47:1A-6. Therefore, the Complainant states that the Custodian knowingly and willfully violated OPRA.
6. The Complainant also states that the PHA was statutorily required to make the records responsive to Items No. 2, Five-year plan from 2005-2009 and No. 3, 2008 Annual Plan, available to the public pursuant to the Department of Housing and Urban Development Code of Federal Regulation, 24 CFR Ch. IX §903.3, 903.4, and 903.17.<sup>6</sup> The Complainant states that when he examined the records

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<sup>5</sup> This letter was enclosed as part of the Custodian's SOI. The Complainant mistakenly states that the Custodian made these legal certifications. In fact, this legal certification was made by Mr. Wan Chang, Modernization Coordinator, not the Custodian.

<sup>6</sup> These codes provide:

“Subpart B – PHA plans, §903.3 What is the purpose of this subpart?”

(a) This subpart specifies the requirements for the PHA plans, required by section 5A of the United States Housing Act of 1937.

(b) The purpose of the plans is to provide a framework for:

(1) local accountability; and

(2) An easily identifiable source by which public housing residents, participants in the tenant-based assistance program, and other members of the public may locate basic PHA policies, rules and requirements concerning the PHA's operations, programs and services.

§903.4 What are the public housing agency plans?

(a) *Types of plans.* There are two public housing agency plans. They are:

(1) 5-Year Plan (the 5-Year Plan) that a public housing agency (PHA) must submit to HUD once every five PHA fiscal years. The 5-Year Plan covers the five PHA fiscal years immediately following the date on which the 5-Year Plan is due to HUD; and

(2) The Annual Plan (Annual Plan) that the PHA must submit to HUD for each fiscal year immediately following the date on which the Annual Plan is due to HUD...

903.17 What is the process for obtaining public comment on the plans?

responsive to Items No. 2 and No. 3, the records did not contain certifications. Thus, the Complainant states that pursuant to N.J.S.A. 47:1A-11 he is entitled to a judgment against the Custodian for knowingly and willfully violating OPRA and an unreasonable denial of access to a public record in the amount of \$5,000. The Complainant also states that he should also be entitled to a civil penalty of \$3,000 for the Custodian's violation of the Frivolous Lawsuit Statute pursuant to N.J.S.A. 2A:15-59.1(B)(1).

### Analysis

#### **Whether the Complainant has met the required standard for reconsideration of the Council's Final Decision dated November 30, 2010?**

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, the Complainant submitted a letter to the GRC dated December 28, 2010 in which he stated that he was unable to submit a request for reconsideration within ten (10) business days of his receipt of the Council's Final Decision as prescribed by *N.J.A.C.* 5:105-2.10 due to health concerns from December 4, 2010 to December 17, 2010; the Complainant requested a thirty (30) day time extension to file a motion for reconsideration. On January 10, 2011, the Executive Director of the GRC granted the Complainant's request for an extension of time to request reconsideration of the Council's Final Decision and stated that the GRC will grant an extension of thirty (30) days for the Complainant to submit the request for reconsideration; the Complainant must submit his request for reconsideration to the Council by the end of business on February 9, 2011. The Complainant submitted his request for reconsideration of the Council's November 30, 2010 Final Decision on February 9, 2011. Thus, pursuant to *N.J.A.C.* 5:105-2.10, the GRC will consider the Complainant's motion for reconsideration as timely filed.

Applicable case law holds that:

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- (a) The PHA's board of directors or similar governing body must conduct a public hearing to discuss the PHA plan (either the 5-Year Plan and/or Annual Plan, as applicable) and invite public comment on the plan(s). The hearing must be conducted at a location that is convenient to the residents served by the PHA.
- (b) Not later than 45 days before the public hearing is to take place, the PHA must:
- (1) Make the proposed PHA plan(s), the required attachments related to the plans, and all information relevant to the public hearing to be conducted, available for inspection by the public at the principal office of the PHA during normal business hours; and
  - (2) Publish a notice informing the public that the information is available for review and inspection, and that a public hearing will take place on the plan, and the date, time and location of the hearing."

“[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, the Complainant submitted a legal argument in which the Complainant stated that:

1. The Council failed to recognize that the Custodian knowingly, willfully and unreasonably denied access to a public record pursuant to N.J.S.A. 47:1A-11 when the Custodian failed to promptly respond to the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i. The Complainant also stated that the Custodian violated N.J.S.A. 47:1A-6 by failing to state the legal explanation and statutory citation for such denial;
2. The Council failed to follow its regulations at N.J.A.C. 5:105-2.4(7), which state that the Custodian’s failure to submit a completed and signed Statement of Information (SOI) within the five (5) business days may result in the GRC’s issuing a decision in favor of the Complainant; in spite of the Custodian’s failure to respond to the request for the SOI in a timely manner, the GRC refused to issue a decision in favor of the Complainant. Furthermore, the Complainant contended that the Custodian’s conduct illustrates how Custodians could easily circumvent OPRA by ignoring requests for SOIs.
3. Because the Plainfield Housing Authority (PHA) was statutorily required to have public meetings regarding the Hope VI Application, which meeting occurred on October 21, 2009 and October 28, 2009, and because the Hope VI plan was presented to the residents and community at such meetings, the PHA made these records public, and the requested records should therefore be disclosed;
4. The Custodian made fraudulent representations in his letter dated December 18, 2009 when the Custodian stated that there is no requirement that records responsive to Item No. 1 must be displayed and reviewed by residents; this statement contradicts the statutory requirement of the Hope VI application process;



5. Although the PHA made the records responsive to Item No. 1, the Hope VI application and plan, available to the public on October 21, 2009 and October 28, 2009, the Complainant's OPRA request for these records was denied on November 3, 2009 and November 23, 2009; the Custodian failed to state a legal explanation and statutory citation for such denials pursuant to N.J.S.A. 47:1A-6, which failure constitutes a knowing and willful violation of OPRA;
6. The PHA was statutorily required to make the records responsive to Items No. 2, Five-year plan from 2005-2009 and No. 3, 2008 Annual Plan, available to the public pursuant to the Department of Housing and Urban Development Code of Federal Regulation, 24 CFR Ch. IX §903.3, 903.4, and 903.17, which statutes require the plans to contain certifications; when the Complainant examined the records responsive to Items No. 2 and No. 3, the records did not contain certifications.

Thus, the Complainant states that pursuant to N.J.S.A. 47:1A-11 he is entitled to a judgment against the Custodian for knowingly and willfully violating OPRA and an unreasonable denial of access to a public record in the amount of \$5,000. The Complainant also states that he should also be entitled to a civil penalty of \$3,000 for the Custodian's violation of the Frivolous Lawsuit Statute pursuant to N.J.S.A. 2A:15-59.1(B)(1).

Although the Complainant argued in his motion for reconsideration that the Council's decision that the Custodian did not knowingly and willfully violate OPRA was based upon a "palpably incorrect or irrational basis," the Complainant submitted no evidence in support of this contention and instead recapitulated arguments already made before the Council. A review of the Council's November 30, 2010 Final Decision reveals that the Council in its analysis considered the Custodian's untimely response to the Complainant's OPRA request, the issue of the certifications attached to the requested Plans, and the exemption from disclosure of the requested HOPE VI application and concluded that such actions did not rise to the level of a knowing and willful violation of OPRA under the totality of the circumstances and concluded as follows:

"Although the Custodian's untimely response to the Complainant's October 22, 2009 OPRA request resulted in a deemed denial and a violation of N.J.S.A. 47:1A-5.g., the Custodian made available the requested Five Year Plan and 2008 Annual Plan for review, and the Complainant has submitted no competent, credible evidence to refute the Custodian's certification that all legal certifications were not attached to said Plans at the time of the Complainant's review. Moreover, the Custodian did not unlawfully deny access to the requested Hope VI application because said record was exempt from disclosure under OPRA as ACD material at the time of the Complainant's October 22, 2009, October 26, 2009 and November 16, 2009 OPRA requests for said record as the requested record was incomplete at those times. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA under the totality of the circumstances." Government

Records Council, November 30, 2010 Findings and Recommendations, p. 14-15.

Regarding the Complainant's contention that the Council's November 30, 2010 Final Decision should be reversed because the Council failed to follow its regulations at *N.J.A.C. 5:105-2.4(7)*, which state that the Custodian's failure to submit a completed and signed Statement of Information (SOI) within the five (5) business days may result in the GRC's issuing a decision in favor of the Complainant, the evidence of record indicates that the Custodian submitted an SOI to the GRC on December 22, 2009. Moreover, the issue of the weight to be given a Custodian's failure to comply with the GRC's request for an SOI is within the sole discretion of the Council.

Regarding the Complainant's argument that the Council failed to consider that the Custodian did not provide specific basis for a denial, the evidence of record shows that the Complainant requested the Hope VI application in his OPRA requests of October 22, 2009, October 26, 2009, and November 16, 2009. The evidence of record further demonstrates that the Custodian denied access to the requested record in his responses to such OPRA requests dated November 3, 2009<sup>7</sup> on the grounds that the Hope VI application was not complete. In his November 23, 2009 response to the Complainant's November 16, 2009 OPRA request for the Hope VI application, the Custodian denied access stating that the requested record was not available for review. Government Records Council, November 30, 2010 Findings and Recommendations, p. 9.

Regarding the Complainant's assertions regarding the statutory requirements of the Hope VI application process, including the Plans developed for this process (including the Five Year Plan and 2008 Annual Plan) or the public hearing attendant upon such process, the Council has no authority to determine whether the Custodian complied with such statutes. *N.J.S.A. 47:1A-7*. The Council notes that the Complainant's request for reconsideration on this point repeats the assertions made during the investigation of this matter; the GRC considered such assertions as part of the Council's November 30, 2010 Findings and Recommendations, p. 9 – 12.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is 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. *See Cummings, supra*.

The Complainant failed to do so. The Complainant has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing of the complaint. *See D'Atria, supra*. Further, the Complainant failed to present any evidence which was not available at the time of the Council's adjudication which would change the substance of the Council's decision.

Therefore, because the Complainant has failed to establish in his motion for reconsideration of the Council's November 30, 2010 Final Decision that 1) the GRC's

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<sup>7</sup> The Custodian responded to the Complainant's October 22, 2009 and October 26, 2009 OPRA requests on November 3, 2009.

decision is 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, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing of the complaint, and failed to submit any evidence to support reconsideration of this matter, 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). The Council’s November 30, 2010 Final Decision therefore stands.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that because the Complainant has failed to establish in his motion for reconsideration of the Council’s November 30, 2010 Final Decision that 1) the GRC's decision is 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, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing of the complaint, and failed to submit any evidence to support reconsideration of this matter, 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). The Council’s November 30, 2010 Final Decision therefore stands.

Prepared By: Karyn Gordon, Esq.  
In House Counsel

Approved By: Catherine Starghill, Esq.  
Executive Director

April 20, 2011



**State of New Jersey**  
GOVERNMENT RECORDS COUNCIL  
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**CHRIS CHRISTIE**  
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**FINAL DECISION**

**November 30, 2010 Government Records Council Meeting**

Robert F. Edwards  
Complainant

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v.

Plainfield Housing Authority (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 October 22, 2009 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. Because the Complainant has failed to provide competent, credible evidence sufficient to refute the Custodian’s certification that the legal certifications were attached to the requested Five Year Plan and 2008 Annual Plan at the time of the Complainant’s review of these records, the Custodian has not unlawfully denied access to the requested Five Year Plan and the 2008 Annual Plan. N.J.S.A. 47:1A-6.
3. Because the Hope VI Application was not complete at the time of each of the Complainant’s OPRA requests on October 22, 2009, October 26, 2009 and November 16, 2009, the record responsive is exempt from disclosure under OPRA as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and O’Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006).
4. Because the Custodian failed to charge the Complainant the lawful copying fee in effect at the time of the Complainant’s OPRA requests, i.e., \$.75 per page for the first page to the tenth page, pursuant to N.J.S.A. 47:1A-5.b., the Custodian must refund



\$2.00 to the Complainant, representing the amount by which the Complainant was overcharged.

5. Although the Custodian's untimely response to the Complainant's October 22, 2009 OPRA request resulted in a deemed denial and a violation of N.J.S.A. 47:1A-5.g., the Custodian made available the requested Five Year Plan and 2008 Annual Plan for review, and the Complainant has submitted no competent, credible evidence to refute the Custodian's certification that all legal certifications were not attached to said Plans at the time of the Complainant's review. Moreover, the Custodian did not unlawfully deny access to the requested Hope VI application because said record was exempt from disclosure under OPRA as advisory, consultative or deliberative material at the time of the Complainant's October 22, 2009, October 26, 2009 and November 16, 2009 OPRA requests for said record as the requested record was incomplete at those times. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA 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 30<sup>th</sup> 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**

**Robert F. Edwards<sup>1</sup>  
Complainant**

**GRC Complaint No. 2009-318**

v.

**Plainfield Housing Authority (Union)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of the following documents:

1. Hope VI Application due November 17, 2009
2. Five year plan from 2005-2009
3. 2008 Annual plan

**Requests Made:** October 22, 2009, October 26, 2009, October 30, 2009 and November 16, 2009.

**Responses Made:** November 3, 2009 and November 23, 2009

**Custodian:** Randall Wood

**GRC Complaint Filed:** December 2, 2009<sup>3</sup>

**Background**

**October 22, 2009**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to Item No. 1, Hope VI Application due November 17, 2009, listed above in a letter referencing OPRA.

**October 26, 2009**

Complainant's second (2<sup>nd</sup>) OPRA request. This request duplicates the October 22, 2009 request.

**October 30, 2009**

Complainant's third (3<sup>rd</sup>) OPRA request. The Complainant requests to review record Items No. 2, Five year plan from 2005-2009 and No. 3, 2008 Annual Plan, listed in this complaint in a letter referencing OPRA.

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

<sup>2</sup> Represented by Dan Smith, Esq. (Orange, NJ).

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

**November 3, 2009**

Custodian's response to the first (1<sup>st</sup>) and second (2<sup>nd</sup>) OPRA requests.<sup>4</sup> The Custodian responds in writing to the Complainant's OPRA requests on the eighth (8<sup>th</sup>) business day following receipt of the first (1<sup>st</sup>) OPRA request and on the sixth (6<sup>th</sup>) business day following receipt of the second (2<sup>nd</sup>) OPRA request. The Custodian states that access to the requested record for Item No. 1 is denied because the requested Hope VI application is not complete. The Custodian states that once said application is complete, the Plainfield Housing Authority ("PHA") will grant access to the requested record subject to any applicable copying costs.

**November 3, 2009**

Custodian's response to the Complainant's third (3<sup>rd</sup>) OPRA request.<sup>5</sup> The Custodian responds on the second (2<sup>nd</sup>) business day following receipt of such OPRA request. The Custodian states that the Complainant may review the 2008 Annual Plan and the 2005-2009 Five Year Plan on Tuesday November 10, 2009 at 11:00 a.m. at Richmond Towers.

**November 16, 2009**

Complainant's fourth (4<sup>th</sup>) OPRA request. The Complainant requests review of the records responsive to Items No. 1, Hope VI Application, No. 2, Five Year Plan from 2005-2009 and No. 3, 2008 Annual Plan, in a letter referencing OPRA.

**November 23, 2009**

Custodian's response to the Complainant's fourth (4<sup>th</sup>) OPRA request. The Custodian responds in writing on the fifth (5<sup>th</sup>) business day following receipt of such request. The Custodian states that the Complainant may review the requested records responsive to Items No. 2, Five Year Plan from 2005-2009 and No. 3, 2008 Annual Plan on Wednesday November 25<sup>th</sup> at 9:30 a.m. The Custodian states that Item No. 1, Hope VI Application due November 17, 2009, is not available for review.

**November 30, 2009**

Letter from the Complainant to the Custodian.<sup>6</sup> The Complainant states that he requested review of the records relevant to this complaint listed above. The Complainant further states that he requested review of a copy of the record responsive to request Item No. 2, the Five Year Plan from 2005-2009, but upon review he discovered the instrument lacked a certification.<sup>7</sup> In addition, the Complainant states that he was denied access without any explanation to the record responsive to request Item No. 1, the Hope VI Application due November 17, 2009. Furthermore, the Complainant states that he believes that the record responsive to request Item No. 1, the Hope VI application, was received by the grantor by the November 17, 2009 deadline.<sup>8</sup> The Complainant asks if

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<sup>4</sup> The Custodian's response did not address the request for Items No. 2, Five year plan from 2005-2009 and No. 3, the 2008 Annual Plan.

<sup>5</sup> The Custodian's response did not address request for Item No. 1, the Hope VI Application.

<sup>6</sup> The Complainant did not address the Custodian's lack of response for Item No. 3, 2008 Annual Plan.

<sup>7</sup> The evidence of record indicates that legal certifications are supposed to be included with the Five Year Plan from 2005-2009.

<sup>8</sup> The evidence of record indicates that the PHA was to file the Hope VI application with the U.S. Department of Housing and Urban Development by November 17, 2009.

the Custodian and the PHA submitted Item No. 1, the Hope VI Application, to the grantor by November 17, 2009.

The Complainant also notes that the Custodian telephoned and attempted to discourage the Complainant from pursuing his rights regarding the review of requested records and the Custodian's continual denial of the Complainant's OPRA requests. Further, the Complainant states that he told the Custodian that he does not trust anyone from the PHA.

**December 2, 2009**

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

- Complainant's OPRA request dated October 22, 2009<sup>9</sup>
- Complainant's OPRA request dated October 26, 2009<sup>10</sup>
- Letter from the Custodian to the Complainant dated November 3, 2009
- Letter from the Custodian to the Complainant dated November 3, 2009
- Letter from the Complainant to the Custodian dated November 16, 2009
- Letter from the Custodian to the Complainant dated November 23, 2009
- Letter from the Complainant to the Custodian dated November 30, 2009

The Complainant argues that he made four (4) OPRA requests for the records responsive to these requests listed above. The Complainant argues that PHA's omissions and responses are fraudulent denials of access to government records under OPRA.

The Complainant does not agree to mediate this complaint.

**December 8, 2009**

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

**December 10, 2009**

Letter from the Custodian to the GRC. The Custodian requests a seven (7) business day extension to complete the SOI.

**December 17, 2009<sup>11</sup>**

Letter from the Complainant to the GRC. The Complainant amends his Denial of Access complaint attaching:

- Screenshot of HUD's website<sup>12</sup>
- Copies of 24 CFR Ch. IX §903.3, 903.4, and 903.17.
- Screenshot of HUD's website Frequently Asked Questions for FY2009 Hope VI Revitalization.

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<sup>9</sup> The October 26, 2009 request is a duplicate to the October 22, 2009 OPRA request.

<sup>10</sup> The October 30, 2009 request was not included with the original Denial of Access Complaint. The Complainant submitted this request to the GRC on September 8, 2010

<sup>11</sup> The Complainant attaches a screenshot of the HUD website.

<sup>12</sup> The screenshot notes that the PHA submitted the Hope VI application by November 17, 2009.



- Letter from Mr. Edward DePaula, Director of Office of Public Housing, HUD, to the Custodian dated February 28, 2008

The Complainant asserts that a review of the website of the U.S. Department of Housing and Urban Development (“HUD”) shows that the PHA submitted the requested HOPE VI application before the deadline of November 17, 2009. The Complainant asserts that the Custodian’s denial of access is unlawful because according to HUD’s website the PHA submitted the HOPE VI application before the deadline of November 17, 2009. The Complainant asserts that the Custodian denied him access to see this application before it was submitted to HUD. Furthermore, the Complainant argues that the proposed HOPE VI application must be made available to the public before and after completion pursuant to 24 CFR Ch. IX §903.3, 903.4, and 903.17.<sup>13</sup> Additionally, the Complainant argues that §903.17 provides that “not later than 45 days before the public hearing is to take place, the Public Housing Agency must: 1) Make the proposed Public Housing Agency plan(s), the required attachments and documents related to the plans, and all information relevant to the public hearing to be conducted, available for inspection by the public at the principal office of the Plainfield Housing Authority during normal business hours.” Lastly, the Complainant argues that the Custodian did not prove that the denial of access was lawful.

### **December 22, 2009**

Custodian’s SOI with the following attachments:

- Letter from the Custodian to the Complainant dated November 3, 2009

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<sup>13</sup> These codes provide:

“Subpart B – PHA plans, §903.3 What is the purpose of this subpart?

(a) This subpart specifies the requirements for the PHA plans, required by section 5A of the United States Housing Act of 1937.

(b) The purpose of the plans is to provide a framework for:

(1) local accountability; and

(2) An easily identifiable source by which public housing residents, participants in the tenant-based assistance program, and other members of the public may locate basic PHA policies, rules and requirements concerning the PHA’s operations, programs and services.

§903.4 What are the public housing agency plans?

(a) *Types of plans.* There are two public housing agency plans. They are:

(1) 5-Year Plan (the 5-Year Plan) that a public housing agency (PHA) must submit to HUD once every five PHA fiscal years. The 5-Year Plan covers the five PHA fiscal years immediately following the date on which the 5-Year Plan is due to HUD; and

(2) The Annual Plan (Annual Plan) that the PHA must submit to HUD for each fiscal year immediately following the date on which the Annual Plan is due to HUD...

903.17 What is the process for obtaining public comment on the plans?

(a) The PHA’s board of directors or similar governing body must conduct a public hearing to discuss the PHA plan (either the 5-Year Plan and/or Annual Plan, as applicable) and invite public comment on the plan(s). The hearing must be conducted at a location that is convenient to the residents served by the PHA.

(b) Not later than 45 days before the public hearing is to take place, the PHA must:

(1) Make the proposed PHA plan(s), the required attachments related to the plans, and all information relevant to the public hearing to be conducted, available for inspection by the public at the principal office of the PHA during normal business hours; and

(2) Publish a notice informing the public that the information is available for review and inspection, and that a public hearing will take place on the plan, and the date, time and location of the hearing.”

- Letter from the Custodian to the Complainant dated November 3, 2009
- Letter from the Custodian to the Complainant dated November 23, 2009
- Legal certification from Mr. Wan Chang, Modernization Coordinator, dated December 18, 2009
- Legal certification from Ms. Janet Niemeyer, Secretary, dated December 18, 2009

The Custodian argues that the Complainant was not denied access to the requested records. The Custodian also argues that his secretary, Ms. Niemeyer, certified that the Complainant made an appointment to come in on December 10, 2009 and paid \$8.00 (\$1.00 per page) to copy the entire PHA file. The Custodian certifies that the record responsive to request Item No. 1, the HOPE VI application, was not complete at the time of the Complainant's requests. The Custodian further argues that the HUD made it clear that only the plan and not the application must be made available to the public for review and inspection.

The Custodian also certifies that on November 10, 2009 the Complainant came to the PHA to review records responsive to request Items No. 2, Five Year Plan from 2005-2009 and No. 3, 2008 Annual Plan. Additionally, the Custodian certifies that Secretary Beverly Allen and Mr. Chang produced these records for the Complainant. The Custodian further certifies that the Complainant asked for copies of eight (8) pages from the file and these were provided to him. The Custodian also certifies that after he received a copy of the Denial of Access Complaint on November 18, 2009<sup>14</sup> he called the Complainant to clarify what records were not provided and advised the Complainant to make another appointment to review the records. The Custodian also certifies that the Complainant came to the PHA offices again on November 25, 2009 to review records responsive to request Items No. 2, Five Year Plan from 2005-2009 and No. 3, 2008 Annual Plan and requested to see the records responsive to request Item No. 1, Hope VI Application; however, the Complainant could not review the records because Mr. Chang was not in the office.

In addition, the Custodian certifies that the Complainant informed Ms. Niemeyer that he wanted to make an appointment to come back but never did so. The Custodian certifies that on November 30, 2009 he contacted the Complainant and informed him that the Complainant could review the requested records at the next meeting; the Custodian certifies that the Complainant stated that he would contact Ms. Niemeyer the following week but never did so. Lastly, the Custodian certifies that he received another Denial of Access Complaint on December 16, 2009.

Additionally, the Custodian argues that the standard for a knowing and willful violation of OPRA requires that the Custodian's actions must be more than mere negligence. Furthermore, the Custodian asserts that the Custodian must have some knowledge that his actions were wrongful, Fielder v. Stonack, 141 N.J. 101, 124 (1995) and that his actions were intentional or deliberate with knowledge of their wrongfulness, ESES v. Salmon, 295 N.J. Super. 86 (App. Div. 1996). Lastly, the Custodian argues that

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<sup>14</sup> The complaint the Custodian received on November 18, 2009 is not the same complaint which is the subject of this adjudication.

the complaint should be dismissed since the Custodian's conduct is not willful or intentional.

Ms. Janet Niemeyer certifies that on November 10, 2009 the Complainant had an appointment to review records responsive to request Items No. 2, Five Year Plan from 2005-2009 and No. 3, 2008 Annual Plan of the OPRA requests. Ms. Niemeyer also certifies that she was not in the office that day so she left the records responsive to these Items with Ms. Beverly Allen. Furthermore, Ms. Niemeyer certifies that upon information and belief Ms. Allen gave the plans to Mrs. Chang who in turn gave these records to the Complainant to review. Additionally, Ms. Niemeyer certifies that it is her understanding that the Complainant was not satisfied with the records responsive to Item No. 2, Five Year Plan from 2005-2009, because there were no certifications attached. Ms. Niemeyer certifies that she was unaware if the Complainant asked to see the attached legal certifications for Item No. 2, Five Year Plan from 2005-2009. Ms. Niemeyer also certifies that the Complainant made another appointment to review the entire file for records responsive to request Items No. 2, Five Year Plan from 2005-209 and No. 3, 2008 Annual Plan on November 25, 2009.

Mr. Wan Chang, Modernization Coordinator, certifies that the Complainant came to the PHA offices on November 10, 2009. Mr. Chang also certifies that he gave the Complainant records responsive to request Items No. 2, Five Year Plan from 2005-2009 and No. 3, 2008 Annual Plan to review. Additionally, Mr. Chang certifies that during the preparation of the Hope VI application, the PHA called two (2) meetings on October 21, 2009 and October 28, 2009 to present the plans to the residents. Mr. Chang certifies that the Complainant was not present at these meetings. Lastly, Mr. Chang certifies that there is no requirement that the Hope VI application must be disclosed, reviewed, or approved by residents; however, Mr. Chang certifies that upon request of residents and at the convenience of PHA, the application can be reviewed by residents.

#### **August 5, 2010**

E-mail from the GRC to the Custodian. The GRC requests that the Custodian provide a legal certification as to when he received the Complainant's four (4) OPRA requests.

#### **August 20, 2010<sup>15</sup>**

Legal certification from the Custodian to the GRC. The Custodian certifies that the Complainant came to the PHA on November 10, 2009 to review the requested documents. Additionally, the Custodian certifies that upon information and belief from Mr. Chang and Ms. Beverly Allen, the Complainant was placed in a conference room where he reviewed records responsive to request Items No. 2, Five Year Plan from 2005-2009 and No. 3, 2008 Annual Plan. Further, the Custodian certifies that records responsive to request Item No. 1 were not complete, but the Complainant was verbally briefed on the Hope VI application process.

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<sup>15</sup> The Custodian failed to respond to the GRC's request for a legal certification.

**September 7, 2010**

E-mail from the GRC to the Complainant. The GRC requests the Complainant to provide a copy of the OPRA request relevant to request Items No. 2, Five Year Plan from 2005-2009 and No. 3, 2008 Annual Plan listed above.

**September 8, 2010**

Letter from the Complainant to the GRC. The Complainant encloses a copy of the OPRA requests relevant to request Items No. 2, Five Year Plan from 2005-2009 and 3.

**October 20, 2010**

E-mail from the GRC to the Custodian. The GRC asks the Custodian if the legal certifications are part of records responsive to Item No. 2, Five Year 2005-2009 Plan.

**October 21, 2010**

E-mail from the Custodian to the GRC. The Custodian states that the certifications were part of the Five Year Plan. In addition, the Custodian states that these certifications must be approved yearly by HUD and the PHA has always been in compliance. Lastly, the Custodian states that the Complainant must have missed seeing the certifications attached to the Five Year Plan due to an oversight.

**October 21, 2010**

E-mail from the GRC to the Custodian. The GRC requests that the Custodian provide his response dated October 21, 2010 in a legal certification format within five (5) business days.

**October 25, 2010**

E-mail from the Custodian to the GRC. The Custodian includes a legal certification. The Custodian certifies that the legal certifications in response to Item No. 2, Five Year Plan from 2005-2009 of the Complainant's OPRA request are part of the Five Year Plan file. Furthermore, the Custodian certifies that these certifications were always kept on file by the PHA.

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

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

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

The Council will first address whether the Custodian’s response to the Complainant’s October 22, 2009 OPRA request constitutes a deemed denial.

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.<sup>16</sup> 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).

The Custodian responded to the Complainant’s October 22, 2009 OPRA request on November 3, 2009, eight (8) business days following receipt thereof, and denied access to the requested record because such record was not complete at the time of the request.

Therefore, the Custodian’s failure to respond in writing to the Complainant’s October 22, 2009 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).

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<sup>16</sup> 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.

With regard to the Complainant's request for the PHA's Five Year Plan and the 2008 Annual Plan, Items No. 2, Five Year Plan from 2005-2009 and No. 3, 2008 Annual Plan of the Complainant's October 30, 2009 OPRA request, the Custodian has certified that the Complainant reviewed and made copies of the records responsive to these request Items on November 10, 2009, approximately seven (7) business days after receipt of the Complainant's October 30, 2009 OPRA request. However, the Complainant claims that when he reviewed the records responsive to Items No. 2, Five Year Plan from 2005-2009 and No. 3, 2008 Annual Plan in response to his October 30, 2009 OPRA request, there was no legal certification attached to either plan.

The Custodian certified to the GRC that the legal certifications are in fact part of the Five Year Plan and the Annual Plan. Furthermore, the Custodian certifies that these legal certifications must be approved yearly by HUD and the PHA has always kept these records on file. The Custodian has asserted that the Complainant merely overlooked the presence of the legal certifications at the time of the Complainant's review of the requested Five Year Plan and the Annual Plan.

The Complainant has provided no evidence to refute the Custodian's legal certification that these records were not part of the Five Year Plan when the Complainant reviewed the file at the PHA. Thus, the Complainant has failed to provide competent, credible evidence to refute the Custodian's certification that the legal certifications were part of the requested PHA Five Year Plan and the 2008 Annual Plan at the time of the Complainant's review.

Because the Complainant has failed to provide competent, credible evidence sufficient to refute the Custodian's certification that the legal certifications were attached to the requested Five Year Plan and 2008 Annual Plan at the time of the Complainant's review of these records, the Custodian has not unlawfully denied access to the requested Five Year Plan and the 2008 Annual Plan. N.J.S.A. 47:1A-6.

**Whether the requested Hope VI Application is exempt from disclosure under OPRA as advisory, consultative and deliberative material?**

The evidence of record demonstrates that the Complainant requested the Hope VI application in his OPRA requests of October 22, 2009, October 26, 2009, and November 16, 2009. The evidence of record further demonstrates that the Custodian denied access to the requested record in his responses to such OPRA requests dated November 3, 2009<sup>17</sup> on the grounds that the Hope VI application was not complete. In his November 23, 2009 response to the Complainant's November 16, 2009 OPRA request for the Hope VI application, the Custodian denied access, stating that the requested record was not available for review.

The Complainant has proffered evidence that the Hope VI application was submitted to the granting authority, HUD, on November 17, 2009 and has argued that the

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<sup>17</sup> The Custodian responded to the Complainant's October 22, 2009 and October 26, 2009 OPRA requests on November 3, 2009.

Hope VI application must therefore have been complete at the time of his OPRA request on November 16, 2009. Moreover, the Complainant has argued that the proposed Hope VI application must be made available to the public before and after completion pursuant to 24 CFR Ch. IX §903.3, 903.4, and 903.17. 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’ [“ACD”] in the context of the public records law. The Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA’s ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies. In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J.149 (App. Div. 2004).

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). Specifically, the New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Education Law Center v. NJ Department of Education, 198 N.J. 274, 966 A.2d 1054, 1069 (2009). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

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

“[a] document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-

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

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

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

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

- (1) The initial burden falls on the government agency to establish that matters are both *pre-decisional* and *deliberative*.
  - a. Pre-decisional means that the records were generated before an agency adopted or reached its decision or policy.
  - b. Deliberative means that the record contains opinions, recommendations, or advice about agency policies or decisions.
    - i. Deliberative materials do not include purely factual materials.
    - ii. Where factual information is contained in a record that is deliberative, such information must be produced so long as the factual material can be separated from its deliberative context.
  - c. The exemption covers recommendations, draft documents, proposals, suggestions, and other subjective documents *which reflect the personal opinions of the writer rather than the policy of the agency*.



- d. Documents which are protected by the privilege are those which *would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is only a personal position.*
  - e. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves *whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency.*
- (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.

- a. 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.

The evidence of record shows that the Custodian denied the Complainant's OPRA request because the Hope VI application was not complete at the time of the Complainant's October 22, 2009, October 26, 2009 and November 16, 2009 OPRA requests. The evidence of record further shows that the Hope VI application was submitted to HUD on November 17, 2009. The requested Hope VI application was therefore not complete at the time of the Complainant's OPRA requests and is therefore exempt from disclosure as ACD material.

Therefore, because the Hope VI Application was not complete at the time of each of the Complainant's OPRA requests on October 22, 2009, October 26, 2009 and November 16, 2009, the record responsive is exempt from disclosure under OPRA as ACD material pursuant to N.J.S.A. 47:1A-1.1 and O'Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006).

The Complainant argues that the Custodian's denial of access was unlawful because the proposed Hope VI application must be made available to the public before and after completion pursuant to 24 CFR Ch. IX §§903.3, 903.4, and 903.17. Additionally, the Complainant argues that §903.17 provides that "not later than 45 days before the public hearing is to take place, the Public Housing Agency must: 1) Make the proposed Public Housing Agency plan(s), the required attachments and documents related to the plans, and all information relevant to the public hearing to be conducted, available for inspection by the public at the principal office of the [Plainfield Housing Authority] during normal business hours."

24 CFR Ch. IX §903.17 states:

“the Public Housing Authority must conduct a public hearing to discuss (*either the Five year Plan and/or the Annual Plan, as applicable*) and invite the public to comment on the plan(s)...not later than forty-five (45) days before the public hearing make the proposed plans, the required attachments...and all information relevant to the public hearing...available for inspection by the public at the principal office of the Public Housing Authority during normal business hours.”

Although the Complainant cites to 24 CFR Ch. IX §903.17 in support of his contention that the Hope VI Application must be made available to the public before and after completion, by its terms this section is only applicable to the Five Year Plan and the Annual Plan. Therefore, the Custodian has not unlawfully denied access to the requested Hope VI application. N.J.S.A. 47:1A-6.

**Did the Custodian properly charge the appropriate copying fees for records responsive to Items No. 2, Five Year Plan from 2005-2009 and No. 3, 2008 Annual Plan?**

OPRA provides that:

“[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation...”  
(Emphasis added.) N.J.S.A. 47:1A5.b.

Additionally, OPRA provides for the recognition of fees imposed by law or regulation:

“Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following:

- first page to tenth page, \$0.75 per page;
- eleventh page to twentieth page, \$0.50 per page;
- all pages over twenty, \$0.25 per page.”

(Emphasis added.) N.J.S.A. 47:1A-5.b.

The evidence of record demonstrates that the Custodian charged the Complainant \$1.00 per page for eight (8) pages of records responsive to request Items No. 2, Five Year Plan from 2005-2009 and No. 3, 2008 Annual Plan, for a total of \$8.00 for records responsive to Items No. 2 and No. 3 of his OPRA request. At the time the Complainant made his OPRA request, the Custodian should have charged him in accordance with the OPRA fee schedule or \$0.75 per page for a total cost of \$6.00. The Custodian therefore failed to charge the Complainant the lawful copying fee in effect at the time of the Complainant’s OPRA requests.

Because the Custodian failed to charge the Complainant the lawful copying fee in effect at the time of the Complainant's OPRA requests, *i.e.*, \$0.75 per page for the first page to the tenth page, pursuant to N.J.S.A. 47:1A-5.b., the Custodian must refund \$2.00 to the Complainant, representing the amount by which the Complainant was overcharged.

**Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and an 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 to the Complainant's first (1<sup>st</sup>) OPRA request on the eighth (8<sup>th</sup>) business day following receipt of such request. The Custodian responded to the Complainant's first (1<sup>st</sup>) OPRA request stating that the records responsive to Item No. 1, Hope VI Application due November 17, 2009, were not completed. The Complainant states that the legal certifications that were supposed to be responsive to records for Item No. 2, Five Year Plan from 2005-2009 were not in the file when he reviewed these records. However, the Custodian provided a legal certification that these certifications are always kept on file with the Five Year Plan.

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's untimely response to the Complainant's October 22, 2009 OPRA request resulted in a deemed denial and a violation of N.J.S.A. 47:1A-5.g.,

the Custodian made available the requested Five Year Plan and 2008 Annual Plan for review, and the Complainant has submitted no competent, credible evidence to refute the Custodian's certification that all legal certifications were not attached to said Plans at the time of the Complainant's review. Moreover, the Custodian did not unlawfully deny access to the requested Hope VI application because said record was exempt from disclosure under OPRA as ACD material at the time of the Complainant's October 22, 2009, October 26, 2009 and November 16, 2009 OPRA requests for said record as the requested record was incomplete at those times. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA 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 October 22, 2009 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. Because the Complainant has failed to provide competent, credible evidence sufficient to refute the Custodian's certification that the legal certifications were attached to the requested Five Year Plan and 2008 Annual Plan at the time of the Complainant's review of these records, the Custodian has not unlawfully denied access to the requested Five Year Plan and the 2008 Annual Plan. N.J.S.A. 47:1A-6.
3. Because the Hope VI Application was not complete at the time of each of the Complainant's OPRA requests on October 22, 2009, October 26, 2009 and November 16, 2009, the record responsive is exempt from disclosure under OPRA as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and O'Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006).
4. Because the Custodian failed to charge the Complainant the lawful copying fee in effect at the time of the Complainant's OPRA requests, i.e., \$.75 per page for the first page to the tenth page, pursuant to N.J.S.A. 47:1A-5.b., the Custodian must refund \$2.00 to the Complainant, representing the amount by which the Complainant was overcharged.
5. Although the Custodian's untimely response to the Complainant's October 22, 2009 OPRA request resulted in a deemed denial and a violation of N.J.S.A. 47:1A-5.g., the Custodian made available the requested Five Year Plan and 2008 Annual Plan for review, and the Complainant has submitted no competent, credible evidence to refute the Custodian's certification that all

legal certifications were not attached to said Plans at the time of the Complainant's review. Moreover, the Custodian did not unlawfully deny access to the requested Hope VI application because said record was exempt from disclosure under OPRA as advisory, consultative or deliberative material at the time of the Complainant's October 22, 2009, October 26, 2009 and November 16, 2009 OPRA requests for said record as the requested record was incomplete at those times. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA under the totality of the circumstances.

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Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

November 23, 2010