



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

CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

LORI GRIFA  
*Commissioner*

**FINAL DECISION**

**July 26, 2011 Government Records Council Meeting**

Janet Pizar  
Complainant

Complaint No. 2010-176

v.

New Jersey Department of Environmental Protection  
Custodian of Record

At the July 26, 2011 public meeting, the Government Records Council (“Council”) considered the July 19, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Complainant’s request for the complete 2009 through 2010 annual report that was due to the legislature on June 30, 2010 pursuant to N.J.S.A. 23:2-2 required the Custodian to conduct research to identify the requested record, such request is invalid under MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007) and Bart v. County of Passaic Public Housing Authority, GRC Complaint No. 2008-89 (September 2009).
2. Because the Custodian certified in his Statement of Information that the fiscal year 2010 Annual Report was in draft form at the time of the Complainant’s OPRA request and that the requested record was in the process of being completed for the State Legislature, the record responsive to the Complainant’s OPRA request herein is deliberative in nature and thus exempt from disclosure under OPRA as advisory, consultative and deliberative (“ACD”) material pursuant to N.J.S.A. 47:1A-1.1; In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000).

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 26<sup>th</sup> Day of July, 2011

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: July 28, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Janet Pizar<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2010-176**

v.

**New Jersey Department of Environmental Protection<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** Copy of the complete 2009 through 2010 annual report that was due to the legislature on June 30, 2010 pursuant to N.J.S.A. 23:2-2.

**Request Made:** July 20, 2010

**Response Made:** July 23, 2010

**Custodian:** Matthew Coefer

**GRC Complaint Filed:** July 28, 2010<sup>3</sup>

**Background**

**July 20, 2010**

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.

**July 23, 2010**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the third (3<sup>rd</sup>) business day following receipt of such request. The Custodian states that access to the requested record is denied because the requested record is deliberative material pursuant to N.J.S.A. 47:1A-1.1.

**July 28, 2010**

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:<sup>4</sup>

- Complainant's OPRA request dated July 20, 2010
- Letter from the Custodian to the Complainant dated July 23, 2010

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

<sup>2</sup> Represented by DAG Christine Piatek, on behalf of the NJ Attorney General.

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

<sup>4</sup> The Complainant signs the mediation agreement, but also indicates that she does not want to participate in mediation.

The Complainant states that the requested record is a mandatory annual summary report pursuant to N.J.S.A. 23:2-2. The Complainant argues that the requested record is not deliberative material as the Custodian states.

**August 3, 2010**

E-mail from the GRC to the Complainant. The GRC states that upon review of the Complainant's Denial of Access Complaint, the Complainant indicated that she did not want to participate in mediation but signed the mediation agreement form. The GRC states that it needs to know if the Complainant wishes to participate in mediation before the GRC proceeds with the Complainant's complaint. The GRC requests the Complainant respond within five (5) business days.

**August 3, 2010**

E-mail from the Complainant to the GRC. The Complainant states that she wants more information regarding the mediation process.

**August 3, 2010**

Telephone call from the GRC to the Complainant. The GRC informs the Complainant about the mediation process. The Complainant states that she wants to participate in mediation.

**August 3, 2010**

E-mail from the GRC to the Complainant. The GRC confirms with the Complainant that she wants to mediate her Denial of Access Complaint.

**August 3, 2010**

Offer of Mediation sent to the Custodian.

**August 9, 2010**

The Custodian agrees to mediate this complaint.

**March 22, 2011**

The complaint is referred back to the GRC for adjudication.

**March 22, 2011**

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

**March 22, 2011**

E-mail from the Custodian to the Complainant. The Custodian attaches a copy of the requested record. The Custodian states that the report attached is for fiscal year 2010. The Custodian also states that the Division of Fish and Wildlife ("DFW") did not prepare a report for 2009. The Custodian further states that the requested record was finalized and submitted to the Legislature on March 21, 2011.

**March 22, 2011**

Telephone call from the GRC to the Complainant. The GRC states that the Custodian provided the Complainant with the requested record and inquires if she still wants to proceed with her complaint. The Complainant states she will discuss the matter

with her attorney and will inform the GRC later in the week as to the disposition of this matter.<sup>5</sup>

**March 28, 2011**

E-mail from the Custodian to the GRC. The Custodian inquires if the GRC heard from the Complainant about proceeding with her complaint. The Custodian states that he will start his SOI.

**March 28, 2011**

Telephone call from the GRC to the Custodian. The GRC states that it contacted the Complainant about proceeding with her complaint. The GRC also grants a five (5) business day extension to complete the SOI.

**March 28, 2011**

E-mail from the GRC to the Custodian. The GRC confirms an earlier telephone conversation granting the Custodian a five (5) business day extension to complete the SOI. The GRC informs the Custodian that the new due date for the SOI is April 4, 2010.

**March 29, 2011**

E-mail from the Complainant to the GRC. The Complainant states that she tried contacting her attorney and is waiting for her attorney's approval to withdraw her complaint.

**March 29, 2011**

E-mail from the Complainant to the GRC. The Complainant states that she spoke with her attorney. The Complainant also states that Counsel informed her that pursuant to a court order, the DFW was required to present the report to Counsel on March 2, 2011. The Complainant further states that Counsel requests that she not withdraw the complaint with the GRC.

**April 1, 2011**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated July 20, 2010
- Letter from the Custodian to the Complainant dated July 23, 2010
- E-mail from the Custodian to the Complainant dated March 22, 2011 with attachments.<sup>6</sup>
- DFW's Fiscal Year 2010 Annual Report from July 1, 2009 through June 30, 2010.<sup>7</sup>

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<sup>5</sup> The attorney the Complainant mentioned is not representing the Complainant in her Denial of Access Complaint.

<sup>6</sup> The Custodian attaches a copy of an e-mail from Donna Mahon stating that the report was delivered to the Legislature on March 21, 2011.

<sup>7</sup> DFW's Fiscal Year 2010 Annual Report from July 1, 2009 through June 30, 2010 is the record responsive in this Denial of Access Complaint.

The Custodian certifies that his search for the requested records included reviewing the OPRA request and assigning it to the Division of Natural and Historic Resources Program (“NHRP”). The Custodian also certifies that the Custodian for NHRP, Shelley Coltrain (“Ms. Coltrain”), assigned the Complainant’s request to DFW File Officer, Debra Zook, to search for any records responsive. The Custodian further certifies that Ms. Zook informed Ms. Coltrain that the record responsive was in draft form and not finalized. The Custodian also certifies that Ms. Coltrain informed the Office of Records Access that the record responsive to the Complainant’s OPRA request was in draft form and not finalized.

The Custodian certifies that the record responsive must be permanently kept by NJDEP in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”).

The Custodian certifies that the Custodian for the Office of Records Access, Sandra Remboske (“Ms. Remboske”), denied the Complainant’s OPRA request on July 23, 2010 because the record responsive is deliberative material pursuant to N.J.S.A. 47:1A-1.1. The Custodian also certifies that the Complainant filed a Denial of Access Complaint and request for mediation on August 3, 2010. The Custodian further certifies that the Office of Record Access received notice from NHRP that the record responsive was finalized on March 21, 2011. In addition, the Custodian certifies that the Office of Record Access electronically sent a copy of the record responsive to the Complainant on March 22, 2011. The Custodian certifies that the Complainant requested a “2009 through 2010 Annual Report”, however, the actual report was entitled “FY 2010 Annual Report.” Lastly, the Custodian certifies that the NJ Department of Environmental Protection (“NJDEP”) did not prepare a report for 2009 through 2010.

The Custodian argues that the record responsive to the instant OPRA request was clearly exempt from access under OPRA pursuant to N.J.S.A. 47:1A-1.1 because the definition of a government record does not include inter-agency, intra-agency advisory, consultative or deliberative material. The Custodian certifies that the NJDEP responded accurately and within the seven (7) business day response period. The Custodian also certifies that the record responsive was actively being worked on and was in draft form at the time of the Complainant’s OPRA request. The Custodian certifies that the record responsive was not finalized and as such was incomplete and in a state of being created at the time of the Complainant’s OPRA request.

The Custodian certifies that the NJDEP provided the record responsive to the Complainant on March 22, 2011, the next business day after the record responsive was finalized. The Custodian also certifies that the NJDEP has attached an e-mail exchanged from the NJDEP’s Deputy Chief of Staff, David Glass (“Mr. Glass”) to the Director of Legislative Affairs, John Hazen (“Mr. Hazen”), who provided the report to the Legislature on March 21, 2011.

The Custodian asserts that based on his arguments, the GRC should find that NJDEP sufficiently and completely responded appropriately to the Complainant’s request

and did not wrongfully deny access to any record responsive. The Custodian requests that the Complainant's Denial of Access Compliant be dismissed.

### Analysis

#### **Whether the Custodian unlawfully denied access to the requested record?**

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

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

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

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

The Complainant requested a "[c]opy of the complete 2009 through 2010 annual report that was due to the legislature on June 30, 2010 pursuant to N.J.S.A. 23:2-2." The Complainant argued that the requested record should be released because it is a mandatory annual summary report pursuant to N.J.S.A. 23:2-2. The Complainant also disputed the Custodian's assertion that the requested record constitutes deliberative material. Conversely, the Custodian certified in his SOI that the record responsive was in draft form and not finalized and as such was incomplete and in a state of being created at the time of the Complainant's OPRA request. The Custodian also certified that the NJDEP provided the record responsive to the Complainant on March 22, 2011, the next business day after the record responsive was finalized.

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or examination.'* N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt. Wholesale requests for general information to be analyzed, collated and compiled by the responding government entity are not encompassed therein. In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

In determining that MAG Entertainment's request for "all documents or records" from the Division of Alcoholic Beverage Control pertaining to selective enforcement was invalid under OPRA, the Appellate Division noted that:

"[m]ost significantly, the request failed to identify with any specificity or particularity the governmental records sought. MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past. Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted." *Id.*

The Appellate Division later noted that "[r]esearch is not among the custodian's responsibilities" under OPRA. New Jersey Builders' Ass'n v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 177 (App. Div. 2007).

Moreover, in Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), the Council held that pursuant to MAG, a custodian is obligated to search his or her files to find identifiable government records listed in a requestor's OPRA request. The Complainant in Donato requested all motor vehicle accident reports from September 5, 2005 to September 15, 2005. The Custodian sought clarification of said request on the basis that it was not specific enough. The Council stated that:

"[p]ursuant to [MAG], the Custodian is obligated to *search* her files to *find* the identifiable government records listed in the Complainant's OPRA request (all motor vehicle accident reports for the period of September 5, 2005 through September 15, 2005). However, the Custodian is not required to *research* her files to figure out which records, if any, might be responsive to a broad or unclear OPRA request. The word *search* is defined as 'to go or look through carefully in order to find something



missing or lost.’<sup>8</sup> The word *research*, on the other hand, means ‘a close and careful study to find new facts or information.’<sup>9</sup>”.

Additionally, in Bart v. County of Passaic Public Housing Authority, GRC Complaint No. 2008-89 (September 2009), one of the Complainant’s request items sought “[r]ecords and data from February 2002 to present that document the basis on which utility allowance and surcharge schedules and revisions thereof were established...” to include records and data required pursuant to several federal regulations. The GRC contemplated past case law regarding an OPRA request in which the requestor sought records required to be made pursuant to other statutes:

“... in Taylor v. Elizabeth Board of Education (Union), GRC Complaint No. 2007-214 (April 2008), the Complainant submitted numerous requests for records which may have been required to be created under federal rules. The Council held that:

“[b]ecause the Complainant’s OPRA requests are not requests for identifiable government records and because the Custodian is not required to conduct research in response to an OPRA request, the Complainant’s requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (March 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (October 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007)...”

The Council reasoned that:

“[w]hile some of the requests may provide a certain level of specific information as to the record sought (such as identifying a federal regulation under which a record should be created), there is still not enough information for the Custodian to identify with reasonable clarity the records sought. In fact, item # 2 of the Complainant’s requests cites to a definitional regulation rather than a regulation that requires the creation of a record. In actuality, many of the regulations cited by the Complainant do not specifically require that a record be created and thus such records may not even exist. More importantly, *the fact that the Custodian would have to research the federal regulations cited by the Complainant to determine whether said regulations require that a record be created places an undue burden on the Custodian.*” (Emphasis added).

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<sup>8</sup> “Search.” Dictionary.com Unabridged (v 1.1) Based on the Random House Unabridged Dictionary. Random House, Inc. 2006.

<sup>9</sup> “Research.” Kerneman English Multilingual Dictionary (Beta Version), 2000-2006 K Dictionaries Ltd. Janet Pizar v. NJ Department of Environmental Protection, 2010-176 – Findings and Recommendations of the Executive Director

Additionally, in Bart v. Passaic County Public Housing Agency, GRC Complaint No. 2007-215 (May 2008), the Complainant sought access to the Passaic County Housing Agency signs posted in conformance with N.J.S.A. 47:1A-5.j., an OPRA provision which mandates that a custodian post a specific sign in his/her office. The Council stated that:

“[c]ustodians are required to be familiar with all provisions of OPRA as custodians must grant or deny access in accordance with the law.... However, the court cases listed above specifically state that a custodian is not required to conduct research in response to an OPRA request. The court in MAG, *supra*, does not qualify the extent of research [a] custodian may or may not do in response to requests. The court simply states that custodians are not required to conduct research and that only identifiable government records shall be accessible. MAG, *supra*, at 546, 549. The Complainant here fails to explain in his request what N.J.S.A. 47:1A-5.j. provides and thus leaves it to the Custodian to conduct research in order to determine what said provision of OPRA mandates. Thus, the Complainant’s request as currently written does not seek an identifiable government record without requiring the Custodian to research a New Jersey State statute. Although the Public Information Officer ultimately provided the Complainant with the requested records, neither she nor the Custodian were required to conduct research in order to fulfill the Complainant’s requests.”

The Complainant appealed the Council’s decision that his OPRA request was invalid because it failed to identify with reasonable clarity the records sought. In Bart v. Passaic County Public Housing Agency, 406 N.J.Super. 445 (App. Div. 2009), the Appellate Division stated that:

“Bart’s request for documents required the Agency’s custodian of records to undertake some legal research and analysis in order to identify the signs to which Bart was referring in his request. [OPRA] does not, however, require that custodians of government records engage in legal research or consult an attorney in order to identify the records being requested. Bart was required to identify the records he requested with specificity. In our judgment, the GRC correctly found that he failed to do so.”

Based on the foregoing, the GRC held that:

“... because [Item No. 4] of the Complainant’s OPRA request fail to identify with reasonable clarity the records sought, and because the Complainant’s request requires an open-ended search of the PHA’s files, as well as because the Custodian is not required to conduct research in response to an OPRA request, said items are invalid. As such, the Custodian has not unlawfully denied access to the requested records

pursuant to MAG, *supra*, Bent, *supra*, NJ Builders, *supra*, Schuler, *supra*, Taylor, *supra*, and Bart, *supra*.”

In the instant complaint, the Complainant requested a mandatory 2009 through 2010 Annual Report due to the State Legislature by June 30, 2010 pursuant to N.J.S.A. 23:2-2. The Custodian denied access to such report because it was advisory, consultative and deliberative. Similar to Bart, *supra*, although the Custodian should be aware of what annual reports are mandated by the State Legislature, the Custodian is not required to research the statute cited in the request to determine which division within NJDEP is mandated to submit an annual report to the State Legislature by June 30, 2010.

Therefore, because the Complainant’s request for a “[c]opy of the complete 2009 through 2010 annual report that was due to the legislature on June 30, 2010 pursuant to N.J.S.A. 23:2-2. required the Custodian to conduct research to identify the requested record, such request is invalid under MAG, *supra*, NJ Builders, *supra*, Donato, *supra* and Bart, *supra*.

However, the evidence of record indicates that the Custodian provided the Complainant with the “FY 2010 Annual Report, July 1, 2009 through June 30, 2010” along with the Statement of Information. However, the Custodian certified in his SOI that such report was actively being worked on for the State Legislature at the time of the Complainant’s OPRA request on July 20, 2010.

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

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

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). Specifically, the New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Education Law Center v. NJ Department of Education, 198 N.J. 274, 966 A.2d 1054,

1069 (2009). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

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

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

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

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

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

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

In the instant complaint, the Complainant asserted that the requested record is a mandatory report to be delivered to the Legislature. However, the Custodian certified in his SOI that the Complainant requested a 20009 through 2010 Annual Report, but the actual report was entitled “FY 2010 Annual Report July 1, 2009 through June 30, 2010.”

The Custodian certified that the requested record was actively being worked on for the State Legislature at the time of the Complainant's OPRA request on July 20, 2010. The Custodian also certified that as soon as the report was completed for the State Legislature, it was provided to the Complainant. Lastly, the Custodian certified that because this requested record was actively being completed for the State Legislature at the time of the Complainant's OPRA request, it was exempt from disclosure as deliberative material.

Because the Custodian certified in his SOI that the FY 2010 Annual Report was in draft form at the time of the Complainant's OPRA request and that the requested record was in the process of being completed for the State Legislature, the record responsive to the Complainant's OPRA request herein is deliberative in nature and thus exempt from disclosure under OPRA as ACD material pursuant to N.J.S.A. 47:1A-1.1; In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000).

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant's request for the complete 2009 through 2010 annual report that was due to the legislature on June 30, 2010 pursuant to N.J.S.A. 23:2-2 required the Custodian to conduct research to identify the requested record, such request is invalid under MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007) and Bart v. County of Passaic Public Housing Authority, GRC Complaint No. 2008-89 (September 2009).
2. Because the Custodian certified in his Statement of Information that the fiscal year 2010 Annual Report was in draft form at the time of the Complainant's OPRA request and that the requested record was in the process of being completed for the State Legislature, the record responsive to the Complainant's OPRA request herein is deliberative in nature and thus exempt from disclosure under OPRA as advisory, consultative and deliberative ("ACD") material pursuant to N.J.S.A. 47:1A-1.1; In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000).

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Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

July 19, 2011