



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

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 31, 2012 Government Records Council Meeting

Mary Steinhauer-Kula
Complainant

Complaint No. 2010-200

v.

Township of Downe (Cumberland)
Custodian of Record

At the July 31, 2012 public meeting, the Government Records Council (“Council”) considered the July 24, 2012 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the amended findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian did not contact the GRC seeking an extension of the prescribed time frame to comply with the Council’s March 27, 2012 Interim Order until after the GRC telephoned the Township on May 10, 2012, the Custodian did not timely comply with the Council’s March 27, 2012 Interim Order.
2. The Council’s *in camera* examination reveals that the records at issue herein were used in the decision making process to evaluate and determine the property tax for the properties listed because disclosure of the records at issue herein would reveal deliberations that occurred during the decision making process, because the requested records contain handwritten notes, calculations, and other impressions affecting the tax valuation of the subject properties. Thus, the requested “Downe Township Value Determination” and “Field Data Sheets” from the property tax record cards are exempt from disclosure under OPRA as inter-agency or intra-agency advisory, consultative or deliberative material. N.J.S.A. 47:1A-1.1; see Education Law Ctr. v. N.J. Dept. of Educ., 198 N.J. 274 (2009). The Custodian has therefore borne his burden of proof that denial of access to the requested records was lawful. N.J.S.A. 47:1A-6.
3. Although the Custodian failed to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, resulting 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 failed to timely comply with the Council’s March 27, 2012 Interim Order by providing the records necessary for the Council’s *in camera* review within five (5) business days of receipt of the Council’s Interim Order, the Custodian bore his burden of proving that access to the requested records was lawfully denied under N.J.S.A. 47:1A-1.1. Therefore, it is concluded that the



Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

Final Decision Rendered by the
Government Records Council
On The 31st Day of July, 2012

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: August 6, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
July 31, 2012 Council Meeting**

**Mary Steinhauer-Kula¹
Complainant**

GRC Complaint No. 2010-200

v.

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

Records Relevant to Complaint: Copy of “Downe Township Value Determination” and “Field Data Sheet” from the property tax record cards for properties.³

Request Made: July 16, 2010

Response Made: July 20, 2010

Custodian: Richard DeVillasanta

GRC Complaint Filed: August 3, 2010⁴

Records Submitted for *In Camera* Examination: Downe Township Value Determination and Field Data Sheets from the property tax cards for:

1. B1, 84 Lot 1
2. B1, 23 Lot 138
3. B1, 41 Lot 17
4. B1, 82 Lot 10
5. B1, 93 Lot 10
6. B1, 69 Lot 6
7. B1, 69 Lot 5
8. B1, 3 Lot 9
9. B1, 23 Lot 143
10. B1, 12 Lot 7
11. B1, 17 Lot 14
12. B1, 18 Lot 39
13. B1, 70 Lot 8
14. B1, 23 Lot 234.01

¹ No legal representation listed on record.

² Represented by John Carr, Esq. of Cresse & Carr (Woodbury, NJ).

³ The Complainant lists fourteen (14) properties by Lot and Block number to identify which records she is seeking.

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

Background

March 27, 2012

Government Records Council's Interim Order. At the March 27, 2012 public meeting, the Government Records Council ("Council") considered the March 20, 2012 Executive Director's Findings and Recommendations and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council therefore found that:

1. Although the Custodian responded to the Complainant's OPRA request within the statutorily mandated seven (7) business days, said response was not in writing. Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., Kelley v. Township of Rockaway (Morris), GRC Complaint No. 2007-11 (Interim Order October 31, 2007) and DeLuca v. Town of Guttenberg (Hudson), GRC Complaint No. 2006-126 (February 2007). Moreover, because the Custodian failed to provide an anticipated date upon which the records responsive would be provided, the Custodian violated OPRA pursuant to Hobbs v. Township of Hillside (Union), GRC Complaint No. 2009-286 (November 2010).

2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an in-camera review of the "Downe Township Value Determination" and "Field Data Sheet" from the property tax record cards set forth below to determine the validity of the Custodian's assertion that these records contain advisory, consultative and deliberative information which is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1.
 1. B1, 84 Lot 1
 2. B1, 23 Lot 138
 3. B1, 41 Lot 17
 4. B1, 82 Lot 10
 5. B1, 93 Lot 10
 6. B1, 69 Lot 6
 7. B1, 69 Lot 5
 8. B1, 3 Lot 9
 9. B1, 23 Lot 143
 10. B1, 12 Lot 7
 11. B1, 17 Lot 14
 12. B1, 18 Lot 39
 13. B1, 70 Lot 8
 14. B1, 23 Lot 234.01

3. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see #2 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁷ that the records provided are the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

March 29, 2012

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

May 10, 2012

Telephone call from the GRC to Ms. Nadine Lockley ("Ms. Lockley), Deputy Clerk. The GRC states that it has not received a response to the Council's Interim Order. Ms. Lockley states that the Custodian is out on extended sick leave and has not been in the office. Ms. Lockley also states that she is acting as Custodian for the Township. The GRC informs Ms. Lockley that that it will re-send the Council's March 27, 2012 Interim Order to Ms. Lockley for her completion. Ms. Lockley states that she is willing to help the GRC in fulfilling the Council's Interim Order.

May 11, 2012

E-mail from the GRC to Ms. Lockley attaching the Council's March 27, 2012 Interim Order and Findings and Recommendations. The GRC states that Ms. Lockley must respond to the Council's Interim Order within five (5) business days.

May 18, 2012

E-mail from Custodian's Counsel to the GRC. Counsel states that he is in receipt of the GRC's e-mail dated May 11, 2012. Counsel states that the Township only has one Municipal Clerk who has been out on sick leave since April 5, 2012. Counsel also states that the Custodian has been in the office only once since April 5, 2012 for approximately one (1) hour. Counsel further states that the Custodian began collecting the records responsive to comply with Council's Interim Order, however, to date he has not been able to complete his research nor the required legal certification pursuant to N.J. Court Rule 1:4-4. Counsel additionally states that given the circumstances in a Township with two (2) full time employees, he hopes the GRC can work with the Township as to a timeframe within which to respond. Lastly, Counsel states that the Custodian's anticipated date of return to work is June 1, 2012.

⁵ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

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

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

May 24, 2012

E-mail from the Custodian to the GRC attaching a legal certification in response to the Council's Interim Order. The Custodian certifies that he is providing the Downe Township Value Determination and Field Data Sheets from the property tax record cards for the properties listed in the Complainant's OPRA request.⁸

June 5, 2012

E-mail from the GRC to Custodian's Counsel. The GRC states that on March 27, 2012 the Council issued an Order requiring the Custodian to provide certain records to the GRC for an *in camera* review. The GRC also states that although the Custodian provided the GRC with a certification on May 24, 2012 stating that the records in question were attached for Council's review, no such records were attached to the certification. The GRC states that if the GRC does not receive the records enumerated in the March 27, 2012 Interim Order by close of business on June 8, 2012, this matter will be transferred to the Office of Administrative Law for a hearing to resolve the facts and determine if the Custodian has knowingly and willfully violated OPRA.

June 5, 2012

E-mail from Custodian's Counsel to the GRC. Counsel states that he relayed the GRC's e-mail dated June 5, 2012 to the Custodian and the Custodian advised Counsel he will handle this issue.

June 6, 2012

E-mail from the Custodian to the GRC attaching the records responsive for the *in camera* review. The Custodian states he will be mailing nine (9) copies of these records responsive to the GRC.

June 8, 2012

Letter from Custodian's Counsel to the GRC. Counsel attaches a copy of the legal certification from the Custodian, certifying that he provided the records responsive to the Complainant's OPRA request for an *in camera* review. Counsel also includes nine (9) copies of these records responsive.

Analysis**Whether the Custodian complied with the Council's March 27, 2012 Interim Order?**

At its March 27, 2012 public meeting, the Council determined that because the Custodian has asserted that the requested records were lawfully denied because they contain advisory, consultative or deliberative ("ACD") material, the Council must determine whether the legal conclusion asserted by the Custodian is properly applied to the records at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the GRC must conduct an *in camera* review of the requested records to determine the validity of the Custodian's assertion that the requested record was properly denied.

⁸ The Custodian failed to provide the GRC with the required document index. The Custodian also failed to provide nine (9) copies of the records responsive to the request.
Mary Steinhauer-Kula v. Township of Downe (Cumberland), 2010-200 – *In Camera* Findings and Recommendations of the Executive Director 4

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order or on April 5, 2012.

The Custodian provided the GRC with a legal certification, the unredacted records requested for the *in camera* inspection and a redaction index on June 8, 2012. Although the Deputy Clerk informed the GRC that the Custodian was out of the office on sick leave, it appears that he did not leave until April 5, 2012, the date upon which compliance with the Council's Interim Order was due. Moreover, no representative of Downe Township contacted the GRC regarding compliance with the Council's Interim Order until the GRC's telephone call to the Deputy Clerk on May 10, 2012.

Therefore, because the Custodian did not contact the GRC seeking an extension of the prescribed time frame to comply with the Council's March 27, 2012 Interim Order until after the GRC telephoned the Township on May 10, 2012, the Custodian did not timely comply with the Council's March 27, 2012 Interim Order.

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

The evidence of record indicates that the Custodian denied access to the requested "Downe Township Value Determination" and "Field Data Sheets" for the subject properties in their entirety. The Custodian asserted that he lawfully denied the Complainant access to the requested records because, as the Custodian certified in the Statement of Information filed with the GRC on August 27, 2010, the requested records contain subjective and deliberative opinions regarding the determination of a property's value. The Custodian certified that the property record folder also contains the effective age and net condition of a property, which factors are subjective and deliberate and are used as a partial measure of determining the property's value. The Custodian certified that comparable sales were also used to determine value. The Custodian also certified that the value of a property is based on the expert opinion of certified and licensed professionals and all properties within the municipality were given the same treatment. Lastly, the Custodian certified that judgments of value were made by the certified re-evaluation firm with limited involvement of the Municipal Tax Board. In a further certification to the GRC made on September 3, 2010, the Custodian certified that the Complainant requested the property tax record cards on July 16, 2010, and also certified that Ms. Sanza denied access to these cards because these records are ACD material

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.

OPRA further provides that:

““Government record" or "record" means 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 in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. *The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.*” N.J.S.A. 47:1A-1.1 (Emphasis added).

The records at issue comprise worksheets showing acreage, type of property, tax rate per acre and total land valuation, or building class, living area, net condition, depreciated value, adjustments, total structure value, land value, total value and notes (“Downe Township Land Value Determinations”); and worksheets showing building class, utilities, style of building, number of rooms, amenities, net condition of the property, a section for comments and an inspection record (“Field Data Sheet”). Both types of worksheets contain numerous handwritten notes.

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 Education Law Ctr. v. N.J. Dept. of Educ., 198 N.J. 274 (2009), the Education Law Center (“ELC”), as representative of pupils in the State's poorest school districts, challenged in litigation with the Department of Education (“DOE”) its revised state funding formula for public education. *Id.* at 279. In that connection, ELC filed a document request, pursuant to OPRA seeking records "related to the ... estimate, review and/or analyses of the cost of providing a thorough and efficient education undertaken by the Office of School Funding." *Id.* at 281. Although many documents were produced in response to the request, the DOE sought to withhold, on the basis of OPRA's deliberative process exemption and under a balancing of interests based on common law right of access principles, a single memorandum prepared by it that outlined state aid simulation results for three school funding formula structures. *Id.* at 279-80. Its refusal to produce the document raised the issue, novel in New Jersey, of "how to determine precisely when material is 'deliberative,' in those instances involving statistical and like data that have factual components, but may project opinions or expose an agency's deliberations or reasoning process." *Id.* at 288.

In determining whether the document at issue was "deliberative," the Court declined to adopt a "fact" versus "opinion" dichotomy, stating that "a court must recognize the difference between factual material that is part of the formulation, or exercise, of policy-oriented judgment from factual material that is not." *Id.* at 294-95. Adopting the rationale of the D.C. Circuit in Mapother v. Dep't of Justice, 3 F.3d 1533, 1539, 303 U.S. App. D.C. 249 (D.C. Cir. 1993), the Court held: "Because of 'the need for deliberation to inform discretion and for confidentiality to protect deliberation,' ... we are convinced that the key to identifying deliberative material must be how closely the material (including the selection of 'factual' or 'informational' material) relates to the 'formulation or exercise of . . . policy-oriented judgment or [to] the process by which policy is formulated.'" Education Law Center, *supra*, 198 N.J. 274. The Court stated: "[T]he question of what is protected under the deliberative process privilege, incorporated into OPRA as an exemption from the definition of a 'government document,' must depend, first, on whether the information sought is a part of the process leading to formulation of an agency's decision, (not on a simplistic label of "fact" or "opinion,"), and, second, on the material's ability to reflect or to expose the deliberative aspects of that process." *[Ibid.]*

In adopting that standard, the Court recognized "the importance of promoting government's full and frank discussion of ideas when developing new policies, or in examining existing policies and procedures" and it further recognized that "such activities constitute a process of policy examination and evaluation." *Ibid.*

Accordingly, the Court held that: "[a] record, which contains or involves factual components, is entitled to deliberative-process protection when it was used in the decision-making process and its disclosure would reveal deliberations that occurred during that process." *Id.* at 280. Examining the memorandum at issue, the Court observed

that data set forth in it was "manipulated to provide organized information useful to the DOE, specifically for the purpose of aiding the agency in deciding on an aspect of a new funding scheme" and it was created as part of the deliberative process and was reflective of the DOE's deliberations. *Id.* at 301. The Court thus found the memorandum to be protected. *Id.* at 301-02.

However, in Tractenberg v. Township of West Orange, 416 N.J. Super. 354 (App. Div. 2010), the plaintiff's group sought to preserve certain land as open space. The township had the land appraised as a prelude to deciding whether to purchase the property, but denied the plaintiff's OPRA request for copies of the appraisals. The issue, one of first impression, was whether property appraisals of a 120-acre property performed by a private appraiser at the behest of the Township's council, fell within the deliberative process exemption of OPRA. On appeal, the Court determined that under Education Law Center, appraisals performed at the behest of a government entity are not subject to the deliberative process exemption to disclosure under OPRA where (1) they have not been used in the decision making process, and (2) their disclosure will not reveal deliberations that occurred during the decision making process. *Id.* at 360.

In the matter before the Council, the Complainant's OPRA request sought a "[c]opy of 'Downe Township Value Determination' and 'Field Data Sheet' from the property tax record cards of the following properties" and thereafter listed 14 specific properties by lot and block number.

The Council conducted an *in camera* review of the subject records. It is clear from the Council's review that the records at issue herein were used in the decision making process to evaluate and determine the property tax for the properties listed because the records contain information and calculations pertaining to the acreage, improvements, and tax rate applicable to each property. The Complainant's request, seeking such sheets "from the property tax record cards," emphasizes that the requested Value Determination and Field Data Sheets are pre-decisional and were used to set the property tax rate charged to each property. Further, disclosure of the records at issue herein would reveal deliberations that occurred during the decision making process, because the requested records contain handwritten notes, calculations, and other impressions affecting the tax valuation of the subject properties.

Therefore, the Council's *in camera* examination reveals that the records at issue herein were used in the decision making process to evaluate and determine the property tax for the properties listed because disclosure of the records at issue herein would reveal deliberations that occurred during the decision making process because the requested records contain handwritten notes, calculations, and other impressions affecting the tax valuation of the subject properties. Thus, the requested "Downe Township Value Determination" and "Field Data Sheets" from the property tax record cards are exempt from disclosure under OPRA as ACD material. N.J.S.A. 47:1A-1.1; see Education Law Ctr. v. N.J. Dept. of Educ., 198 N.J. 274 (2009). The Custodian has therefore borne his burden of proof that denial of access to the requested records was lawful. N.J.S.A. 47:1A-6.

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

OPRA states that:

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

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

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

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

Although the Custodian failed to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, resulting 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 failed to timely comply with the Council’s March 27, 2012 Interim Order by providing the records necessary for the Council’s *in camera* review within five (5) business days of receipt of the Council’s Interim Order, the Custodian bore his burden of proving that access to the requested records was lawfully denied under N.J.S.A. 47:1A-1.1. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian did not contact the GRC seeking an extension of the prescribed time frame to comply with the Council's March 27, 2012 Interim Order until after the GRC telephoned the Township on May 10, 2012, the Custodian did not timely comply with the Council's March 27, 2012 Interim Order.
2. The Council's *in camera* examination reveals that the records at issue herein were used in the decision making process to evaluate and determine the property tax for the properties listed because disclosure of the records at issue herein would reveal deliberations that occurred during the decision making process, because the requested records contain handwritten notes, calculations, and other impressions affecting the tax valuation of the subject properties. Thus, the requested "Downe Township Value Determination" and "Field Data Sheets" from the property tax record cards are exempt from disclosure under OPRA as inter-agency or intra-agency advisory, consultative or deliberative material. N.J.S.A. 47:1A-1.1; see Education Law Ctr. v. N.J. Dept. of Educ., 198 N.J. 274 (2009). The Custodian has therefore borne his burden of proof that denial of access to the requested records was lawful. N.J.S.A. 47:1A-6.
3. Although the Custodian failed to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, resulting 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 failed to timely comply with the Council's March 27, 2012 Interim Order by providing the records necessary for the Council's *in camera* review within five (5) business days of receipt of the Council's Interim Order, the Custodian bore his burden of proving that access to the requested records was lawfully denied under N.J.S.A. 47:1A-1.1. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared and
Approved By: Karyn Gordon, Esq.
Acting Executive Director

July 24, 2012



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

RICHARD E. CONSTABLE, III
Acting Commissioner

INTERIM ORDER

March 27, 2012 Government Records Council Meeting

Mary Steinhauer-Kula
Complainant

Complaint No. 2010-200

v.

Township of Downe (Cumberland)
Custodian of Record

At the March 27, 2012 public meeting, the Government Records Council (“Council”) considered the March 20, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian responded to the Complainant’s OPRA request within the statutorily mandated seven (7) business days, said response was not in writing. Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., Kelley v. Township of Rockaway (Morris), GRC Complaint No. 2007-11 (Interim Order October 31, 2007) and DeLuca v. Town of Guttenberg (Hudson), GRC Complaint No. 2006-126 (February 2007). Moreover, because the Custodian failed to provide an anticipated date upon which the records responsive would be provided, the Custodian violated OPRA pursuant to Hobbs v. Township of Hillside (Union), GRC Complaint No. 2009-286 (November 2010).
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an in-camera review of the “Downe Township Value Determination” and “Field Data Sheet” from the property tax record cards set forth below to determine the validity of the Custodian’s assertion that these records contain advisory, consultative and deliberative information which is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1.
 1. B1, 84 Lot 1
 2. B1, 23 Lot 138
 3. B1, 41 Lot 17
 4. B1, 82 Lot 10
 5. B1, 93 Lot 10



6. B1, 69 Lot 6
 7. B1, 69 Lot 5
 8. B1, 3 Lot 9
 9. B1, 23 Lot 143
 10. B1, 12 Lot 7
 11. B1, 17 Lot 14
 12. B1, 18 Lot 39
 13. B1, 70 Lot 8
 14. B1, 23 Lot 234.01
3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see #2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the records provided are the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 27th Day of March, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Catherine Starghill, Executive Director
Government Records Council

Decision Distribution Date: March 29, 2012

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 27, 2012 Council Meeting**

**Mary Steinhauer-Kula¹
Complainant**

GRC Complaint No. 2010-200

v.

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

Records Relevant to Complaint: Copy of “Downe Township Value Determination” and “Field Data Sheet” from the property tax record cards for properties.³

Request Made: July 16, 2010

Response Made: July 20, 2010

Custodian: Richard DeVillasanta

GRC Complaint Filed: August 3, 2010⁴

Background

July 16, 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 20, 2010

Custodian’s response to the OPRA request. The Custodian verbally responds to the Complainant’s OPRA request on the second (2nd) business day following receipt of such request.⁵ The Custodian states that he will forward the request to Ms. Doris Sanza, Tax Assessor, (“Ms. Sanza”), on July 22, 2010.

July 23, 2010

Telephone call from the Complainant to the Custodian. The Complainant contacts the Custodian and states that the Custodian failed to contact her on July 22, 2010. The Custodian informs the Complainant that Ms. Sanza stated that the records responsive are not public records. The Complainant informs the Custodian that if she does not have these records by July 28, 2010, she will file a Denial of Access Complaint with the Government Records Council (“GRC”). The Custodian states that he will ask

¹ No legal representation listed on record.

² Represented by John Carr, Esq. of Cresse & Carr (Woodbury, NJ).

³ The Complainant lists fourteen (14) properties by Lot and Block number to identify which records she is seeking.

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

⁵ The Custodian does not certify as to when he received the OPRA request.

Ms. Sanza on July 29, 2010 why such records are not public records. The Complainant states that July 29, 2010 would be after the seven (7) business day deadline and the Custodian will have to obtain these records prior to July 29, 2010. Lastly, the Complainant requests a written status of her OPRA request.

July 26, 2010

E-mail from Ms. Sanza to the Custodian. Ms. Sanza states that the property tax cards responsive to the Complainant's request are exempt from disclosure under OPRA because these records are advisory, consultative or deliberative material ("ACD").⁶

July 27, 2010

Telephone call from the Custodian to the Complainant. The Custodian states that the records responsive to the Complainant's OPRA request are considered ACD material and thus are not disclosable.

August 3, 2010

Denial of Access Complaint filed with the GRC with the following attachments:

- Complainant's OPRA requests dated July 16, 2010⁷
- E-mail from Ms. Sanza to the Custodian dated July 26, 2010.

The Complainant states that she has often encouraged the Custodian to contact the GRC to determine the disclosability of records under OPRA. The Complainant states that the Custodian was working for the Township for only four (4) weeks when she filed her OPRA request. The Complainant also states that after the Custodian informed her several times that he had to check with Ms. Sanza about which records were disclosable, she asked for the status of her request in writing. The Complainant additionally states that she informed the Custodian multiple times that verbal communications are unacceptable under OPRA.⁸

The Complainant states that the Custodian verbally informed her on July 20, 2010 that he would forward her request to Ms. Sanza on July 22, 2010. The Complainant also states that she asked the Custodian to contact her when the records were ready and she would obtain them on July 22, 2010.⁹ The Complainant also states that after the Custodian failed to contact her, she telephoned the Custodian on July 23, 2010. The Complainant additionally states that the Custodian informed her that Ms. Sanza stated that the records responsive were not public records. The Complainant states that she received the same records multiple times pursuant to prior OPRA requests which are not at issue herein. The Complainant also states that she informed the Custodian that if she did not have these records by July 28, 2010 she would file a complaint with the GRC. The Complainant further states that the Custodian stated that he would ask Ms. Sanza on July 29, 2010 about why the records responsive are not public records. The Complainant

⁶ The Complainant does not state when she received a copy of Ms. Sanza's e-mail dated July 26, 2010, although a copy was included in her Denial of Access Complaint.

⁷ The Complainant also includes a copy of her OPRA request with the Custodian's notations dated July 23, 2010.

⁸ The Complainant fails to provide a date as to when these conversations occurred.

⁹ The Complainant fails to provide a date as to when this conversation occurred.

states that she informed the Custodian that July 29, 2010 would be after the seven (7) business day deadline and the Custodian would have to obtain these records before July 29, 2010. The Complainant states that she requested the Custodian to provide a written status of her request on July 23, 2010. The Complainant also states that the Custodian telephoned her on July 27, 2010 and said that Ms. Sanza stated that these records are considered ACD material and are not disclosable.

The Complainant argues that she believes the Township is not cooperating with her OPRA request because she appealed her property taxes at the county and State level. The Complainant also argues that the trial in State tax court is scheduled for September 8, 2010. The Complainant states that the Township was ordered by the courts to provide discovery on certain records and answer certain questions. The Complainant asserts that the Township did not provide certain records and did not answer some questions. The Complainant also asserts that the records requested will provide her with the information needed to support her claims and prepare her case. The Complainant further argues that the Township believes that it can withhold certain records until after trial which amounts to a knowing and willful violation of OPRA. The Complainant requests that the GRC order the Custodian to disclose the requested records. The Complainant also requests that the GRC fine the Custodian if he is found to have knowing and willfully violated OPRA. Lastly, the Complainant requests that the GRC develop and monitor a corrective action plan for the Township.

The Complainant does not agree to mediate this complaint.

August 3, 2010

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

August 9, 2010

E-mail from the GRC to the Custodian. The GRC confirms a telephone conversation requesting a five (5) business day extension to complete the SOI.

August 13, 2010

E-mail from the GRC to the Custodian. The GRC states that one (1) more extension to complete the SOI will be granted. The GRC also states that the SOI must be submitted by August 27, 2010.

August 27, 2010¹⁰

Custodian’s incomplete SOI.¹¹

The Custodian argues that he did not deny the Complainant access to any records. The Custodian certifies that at time the Complainant filed her OPRA request he was new to the Municipal Clerk’s position. The Custodian also certifies that the Township is

¹⁰ The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant’s OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

¹¹ The Custodian attaches additional material which is not relevant to the adjudication of this complaint. Mary Steinhauer-Kula v. Township of Downe (Cumberland), 2010-200 – Findings and Recommendations of the Executive Director

extremely small with a population of less than 2,000 people. The Custodian further certifies that he is the only full time employee in the office from Monday through Wednesday. The Custodian additionally certifies that Ms. Sanza is a part-time Township employee with office hours from 10:00 a.m. through 6:00 p.m. on Thursdays.

The Custodian argues that the Complainant requested several records and he cooperated with her requests. The Custodian also argues that he was unfamiliar with the immediate location of some of the records since he was relatively new to the Clerk's position. The Custodian further argues that since some of the records requested needed to be retrieved from Ms. Sanza, such records were not immediately accessible because Ms. Sanza's hours are limited. The Custodian certifies that at the time of the Complainant's requests, the Township was in the process of inventorying its records and thus some records were not readily accessible. The Custodian also certifies that he informed the Complainant of Ms. Sanza's hours and of the records inventory. The Custodian further certifies that he explained to the Complainant that no records were intentionally being withheld from her and his office was complying with her OPRA request as quickly and efficiently as possible.

The Custodian certifies that Ms. Sanza was advised by the County Tax Administrator that property records other than those for the Complainant's property are not public and are therefore exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. The Custodian also certifies that Kay & Associates were under a temporary contract with the Township and thus considered an intra-agency entity. The Custodian further certifies that the records responsive contain subjective and deliberative opinions regarding the determination of a property's value. The Custodian certifies that the property record folder also contains the effective age and net condition of a property, which factors are subjective and deliberate and are used as a partial measure of determining the property's value. The Custodian certifies that comparable sales were also used to determine value. The Custodian also certifies that the value of a property is based on the expert opinion of certified and licensed professionals and all properties within the municipality were given the same treatment. Lastly, the Custodian certifies that judgments of value were made by the certified re-evaluation firm with limited involvement of the Municipal Tax Board.

August 30, 2010

Letter from the GRC to the Custodian. The GRC states that that the Custodian's SOI is incomplete and is being returned to him for completion. The GRC also states that the Custodian must complete pages three (3) and four (4) of the SOI form and provide a copy of the Complainant's OPRA request and the Custodian's response to the OPRA request. The GRC further states that the Custodian's cover letter will be used as Item No. 12. Lastly, the GRC states that the completed SOI must be submitted by September 2, 2010.

September 3, 2010

Facsimile from the Custodian to the GRC. The Custodian provides a copy of the Complainant's OPRA request dated July 16, 2010. The Custodian certifies that the records search was difficult because he was the only person in the office and was not familiar with the file system. The Custodian also certifies that the records responsive to the Complainant's OPRA request have not been destroyed in accordance with the

Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that the Complainant requested the the property tax record cards on July 16, 2010. The Custodian also certifies that Ms. Sanza denied access to these cards because these records are ACD material.¹²

December 2, 2011

E-mail from the GRC to the Custodian. The GRC states that upon reviewing the complaint and the SOI, it is unclear when the Custodian responded to the Complainant's OPRA request. The GRC requests the Custodian to provide in a legal certification format when the Custodian responded to the Complainant's OPRA request and in the manner in which he responded. The GRC also requests that if the Custodian's response was in writing, he must provide a copy of that correspondence. The GRC further requests the Custodian to provide the legal certification within five (5) business days.

December 7, 2011

E-mail from the Custodian to the GRC. The Custodian states that he arranged a meeting with Custodian's Counsel on December 9, 2011 to respond to the requested legal certification.

December 14, 2011

E-mail from the Custodian to the GRC. The Custodian attaches a legal certification.¹³ The Custodian certifies that a copy of the records responsive to the Complainant's request were provided to the Complainant on or about July 28, 2010.¹⁴

January 9, 2012

E-mail from the GRC to Custodian's Counsel. The GRC informs Counsel that after review of the complaint and the SOI, it is unclear as to the specific date when the Custodian initially responded to each request. The GRC requests a legal certification from the Custodian as to the specific date and in what format he responded to each of the Complainant's OPRA requests. The GRC also states that it is not necessary to provide when the records were made available for inspection to the Complainant.¹⁵ The GRC requests that the legal certification be provided within three (3) business days.

January 12, 2012

E-mail from the Custodian to the GRC. The Custodian attaches the document index from the SOI with the Custodian's uncertified notations thereon. The Custodian

¹² The evidence of record indicates that the Custodian informed the Complainant on July 27, 2010 and said that Ms. Sanza stated that these records are considered advisory, consultative and deliberative material.

¹³ The Custodian does not certify as to when he responded to the Complainant's OPRA request.

¹⁴ The Custodian certified on September 3, 2010 that Ms. Sanza denied access to the requested records.

¹⁵ The GRC notes that the Complainant filed four (4) additional Denial of Access Complaints and throughout each complaint it was difficult to determine when the Custodian responded to the Complainant's OPRA requests.

states that a copy of the value determination and field data sheet responsive to the Complainant's OPRA request was provided to the Complainant on August 10, 2010.¹⁶

Analysis

Whether the Custodian properly responded to the Complainant's OPRA request?

OPRA provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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

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

OPRA mandates that a custodian must either grant or deny access to requested records in writing 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.¹⁷ 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.,

¹⁶ The Custodian certified on September 3, 2010 that Ms. Sanza denied access to the requested records. The Custodian also certified on December 14, 2011 that he provided copies of such records on July 28, 2010.

¹⁷ 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.

N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway (Morris), GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

In a matter with a similar fact pattern to the instant complaint, DeLuca v. Town of Guttenberg (Hudson), GRC Complaint No. 2006-126 (February 2007), the Custodian verbally advised the Complainant that she would not be able to provide the requested records within the seven (7) business day time frame. The Council held that:

“[w]hile the Custodian may have verbally contacted the Complainant within the statutorily mandated seven (7) business day time frame required to respond to OPRA requests, she failed to do so in writing, therefore creating a “deemed” denial of the request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and the Council’s decision in Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006).”

In Hobbs v. Township of Hillside (Union), GRC Complaint No. 2009-286 (November 2010), the custodian informed the complainant on the eighth (8th) business day following receipt of such request, that the complainant’s request was forwarded to the Mayor for completion. However, the custodian failed to provide an anticipated date certain upon the complainant could expect disclosure of the requested records. The Council held that the custodian’s response was insufficient pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because said response failed to provide the complainant with a specific date upon which records would be provided.

In the instant complaint, the Custodian verbally responded to the Complainant’s OPRA request on the second (2nd) business day following receipt of such request. The evidence of record indicates that the Custodian stated that he would forward the request to Ms. Sanza on July 22, 2010. The evidence of record also indicates that he failed to specify a date certain upon which the Complainant could expect disclosure of the requested records.

Although the Custodian responded to the Complainant’s OPRA request within the statutorily mandated seven (7) business days, said response was not in writing. Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., DeLuca, supra and Kelley, supra. Moreover, because the Custodian failed to provide an anticipated date upon which the records responsive would be provided, the Custodian violated OPRA pursuant to Hobbs, supra.

Whether the records responsive are exempt from disclosure under OPRA as advisory, consultative and deliberative material?

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.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC¹⁸ in which the GRC dismissed the complaint by accepting the Custodian’s legal conclusion for the denial of access without further review. The court stated that:

“OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.”

The Court also stated that:

“[t]he statute also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into

¹⁸ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
Mary Steinhauer-Kula v. Township of Downe (Cumberland), 2010-200 – Findings and Recommendations of the Executive Director

closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.”

Further, the Court stated that:

“[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.”

In the instant complaint, the Custodian asserted that the records responsive are exempt from disclosure under OPRA as ACD material. Therefore, pursuant to Paff, supra, the GRC must conduct an in-camera review of the “Downe Township Value Determination” and “Field Data Sheet” from the property tax record cards for properties to determine the validity of the Custodian’s assertion that these records contain ACD information which is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1.¹⁹

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

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian responded to the Complainant’s OPRA request within the statutorily mandated seven (7) business days, said response was not in writing. Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., Kelley v. Township of Rockaway (Morris), GRC Complaint No. 2007-11 (Interim

¹⁹ The Complainant requested information for the following properties: 1) B1, 84 Lot 1; 2) B1, 23 Lot 138; 3) B1, 41 Lot 17; 4) B1, 82 Lot 10; 5) B1, 93 Lot 10; 6) B1, 69 Lot 6; 7) B1, 69 Lot 5; 8) B1, 3 Lot 9; 9) B1, 23 Lot 143; 10) B1, 12 Lot 7; 11) B1, 17 Lot 14; 12) B1, 18 Lot 39; 13) B1, 70 Lot 8; 14) B1, 23 Lot 234.01

Order October 31, 2007) and DeLuca v. Town of Guttenberg (Hudson), GRC Complaint No. 2006-126 (February 2007). Moreover, because the Custodian failed to provide an anticipated date upon which the records responsive would be provided, the Custodian violated OPRA pursuant to Hobbs v. Township of Hillside (Union), GRC Complaint No. 2009-286 (November 2010).

2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an in-camera review of the “Downe Township Value Determination” and “Field Data Sheet” from the property tax record cards set forth below to determine the validity of the Custodian’s assertion that these records contain advisory, consultative and deliberative information which is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1.

1. B1, 84 Lot 1
2. B1, 23 Lot 138
3. B1, 41 Lot 17
4. B1, 82 Lot 10
5. B1, 93 Lot 10
6. B1, 69 Lot 6
7. B1, 69 Lot 5
8. B1, 3 Lot 9
9. B1, 23 Lot 143
10. B1, 12 Lot 7
11. B1, 17 Lot 14
12. B1, 18 Lot 39
13. B1, 70 Lot 8
14. B1, 23 Lot 234.01

3. **The Custodian must deliver²⁰ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see #2 above), a document or redaction index²¹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,²² that the records provided are the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

²⁰ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

²¹ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

²² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

March 20, 2012