



**State of New Jersey**  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Commissioner

**FINAL DECISION**

**December 20, 2011 Government Records Council Meeting**

Paul S. Kaplan  
Complainant

Complaint No. 2010-202

v.

Township of Winslow (Camden)  
Custodian of Record

At the December 20, 2011 public meeting, the Government Records Council (“Council”) considered the December 13, 2011 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that because the Complainant has failed to establish his burden of providing that 1) the GRC's decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in reaching its decision, the instant motion for reconsideration is denied. *See Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996); *D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 20<sup>th</sup> Day of December, 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: December 22, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***Reconsideration*  
Supplemental Findings and Recommendations of the Executive Director  
December 20, 2011 Council Meeting**

**Paul S. Kaplan<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-202**

v.

**Township of Winslow (Camden)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

June 23, 2010 OPRA request:

Copy of the e-mail sent prior to the June 15, 2010 Township meeting taking a survey of or polling the committee members concerning the request for proposal and the sale of the water system.

July 3, 2010 OPRA request:

Copies of:

1. The e-mail sent prior to the June 15, 2010 Township meeting taking a survey of or polling the committee members concerning the request for proposal and the sale of the water system.
2. Any replies (handwritten or e-mailed) in reference to Item #1 of the instant records request.

**Request Made:** June 23, 2010, July 3, 2010

**Response Made:** July 1, 2010, July 8, 2010

**Custodian:** Deborah A. Puchakjian

**GRC Complaint Filed:** August 4, 2010<sup>3</sup>

**Background**

**October 25, 2011**

Government Records Council's ("Council") Final Decision. At its October 25, 2011 public meeting, the Council considered the October 18, 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, found that the Complainant's June 23, 2010 and July 3, 2010 requests are invalid under OPRA as they fail to name specifically identifiable records, fail to name the senders and/or recipients of the e-mails sought, and

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

<sup>2</sup> Represented by Stuart A. Platt, Esq., of Marrazzo & Platt, P.C. (Stratford, NJ).

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

fail to identify a specific date range sought; these requests would require research beyond the scope of a custodian's duties pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); and Tracey-Coll v. Elmwood Park Board of Education (Bergen), GRC Complaint No. 2009-206 (June 2010). *See also* Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010).

### **October 28, 2011**

Council's Final Decision distributed to the parties.

### **November 3, 2011**

Complainant's request for reconsideration. The Complainant asserts that the Council's October 25, 2011 Final Decision is in error. The Complainant maintains that the Custodian knew exactly what document was being sought because the Custodian did not argue that the request was broad and unclear but instead argued that the requested record was exempt from disclosure pursuant to the exemption for advisory, consultative or deliberative material. The Complainant asserts that since the Custodian's argument supporting the denial of access was different from the Council's decision, the Council's decision is inherently faulty.

### **November 15, 2011**

Letter from the Custodian to the GRC. The Custodian asserts that the GRC's decision is based upon sound legal precedent. The Custodian maintains that the Complainant failed to cite any valid legal authority to support his request for reconsideration. The Custodian argues that it is well settled that "[a] party should not seek reconsideration merely based upon dissatisfaction with a decision." *See* D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). The Custodian further argues that reconsideration is reserved for those cases where the decision is based upon a "palpably incorrect or irrational basis;" or it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *See* Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The Custodian states that the Complainant has failed to submit any new evidence in support of his request for reconsideration and the motion must be denied. The Custodian states that the mere fact that the GRC's decision was based upon legal reasoning other than the arguments advanced by the Township in response to the Complainant's Denial of Access Complain is not consequential and of no legal significance.

## Analysis

### **Whether the Complainant has met the required standard for reconsideration?**

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's October 25, 2011 Final Decision on November 3, 2011, four (4) business days after the distribution of the Council's decision on October 28, 2011. Such a request for reconsideration was made within the ten (10) business days mandated by N.J.A.C. 5:105-2.10.

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. E.g., Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, supra, 242 N.J. Super. at 401. ‘Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.’ Ibid.” In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. See Cummings, supra.

The Complainant's assertion that the Council erred in its October 25, 2011 decision because the Custodian must have been able to identify the requested records since the Custodian denied the Complainant access on the basis that the sought after

records constituted advisory, consultative, and deliberative material (“ACD”) that was exempt from disclosure under OPRA, and because the Council’s findings and interpretations of the law are not the same as the Custodian’s arguments, has no basis in the law.

Well established prior case law holds that in order to be valid under OPRA, a request for records must, among other things, be reasonably comprehensible. A valid request must specify an identifiable government record. *See* MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 546 (App. Div. 2005). In addition, when a complainant’s request fails to identify specific government records, a custodian cannot be found to have unlawfully denied access to the sought after records. *See* Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

In addition, the Complainant in this instant matter sought e-mails; such request however, failed to contain the required elements for a valid OPRA requests for such records. The Council has held a valid OPRA request for an e-mail requires a requestor to specify: (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted, and (3) the sender and/or the recipient thereof. *See* Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010). The Complainant has provided no probative, competent evidence that his June 23, 2010 and July 3, 2010 requests named specifically identifiable records, named the senders and/or recipients of the e-mails sought, and identified a specific date range sought, or that these requests would not require research beyond the scope of a custodian’s duties under OPRA.

The Complainant’s arguments concerning the inconsistency between the Custodian’s basis for the denial of the Complainant’s request and the Council’s Final Decision are also without merit. The Council is permitted to raise additional defenses regarding the disclosure of records pursuant to Paff v. Township of Plainsboro, Docket No. A-2122-05T2 (App. Div. 2007), *certif. denied* by Paff v. Twp of Plainsboro, 193 N.J. 292 (2007).<sup>4</sup> In Paff, the Complainant challenged the GRC’s authority to uphold a denial of access for reasons never raised by the custodian. Specifically, the Council did not uphold the basis for the redactions cited by the custodian. The Council, on its own initiative, determined that the Open Public Meetings Act prohibited the disclosure of the redacted portions to the requested executive session minutes. The Council affirmed the custodian’s denial to portions of the executive session minutes but for reasons other than those cited by the custodian. The complainant argued that the GRC did not have the authority to do anything other than determine whether the Custodian’s cited basis for denial was lawful. The court held that:

“[t]he GRC has an independent obligation to ‘render a decision as to whether the record which is the subject of the complaint is a government record which must be made available for public access pursuant to’ OPRA...The GRC is not limited to assessing the correctness of the reasons given for the custodian’s initial determination; it is charged with determining if the initial decision was correct.”

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<sup>4</sup> On appeal from Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (March 2006).  
[unpublished]

The court further stated that:

“[a]side from the clear statutory mandate to decide if OPRA requires disclosure, the authority of a reviewing agency to affirm on reasons not advanced by the reviewed agency is well established. Cf. Bryant v. City of Atl. City, 309 N.J. Super. 596, 629-30 (App. Div. 1998) (citing Isko v. Planning Bd. Of Livingston, 51 N.J. 162, 175 (1968) (lower court decision may be affirmed for reasons other than those given below)); Dwyer v. Erie Inv. Co., 138 N.J. Super. 93, 98 (App. Div. 1975) (judgments must be affirmed even if lower court gives wrong reason), certif. denied, 70 N.J. 142 (1976); Bauer v. 141-149 Cedar Lane Holding Co., 42 N.J. Super. 110, 121 (App. Div. 1956) (question for reviewing court is propriety of action reviewed, not the reason for the action), aff’d, 24 N.J. 139 (1957).”

As in Paff v. Township of Plainsboro, Docket No. A-2122-05T2 (App. Div. 2007), in rendering its October 25, 2011 Final Decision, the Council raised defenses for the Custodian that were not previously asserted, *i.e.*, the Council determined that the Complainant’s records requests were invalid under OPRA. The Appellate Division of the Superior Court has held that such action is not only legal, but mandated and is the Council’s independent obligation to determine the proper application of OPRA. Accordingly, the Complainant’s argument that the Council’s Final Decision is erroneous because the Council issued its decision for different legal reasons than those raised by the Custodian is without legal basis.

Therefore, because the Complainant has failed to establish his burden of providing that 1) the GRC's decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in reaching its decision, the instant motion for reconsideration is denied. *See* Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that because the Complainant has failed to establish his burden of providing that 1) the GRC's decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in reaching its decision, the instant motion for reconsideration is denied. *See Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996); *D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990); *In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey*, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Darryl C. Rhone  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

December 13, 2011





## State of New Jersey

GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET

PO BOX 819

TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
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### FINAL DECISION

#### October 25, 2011 Government Records Council Meeting

Paul S. Kaplan  
Complainant

Complaint No. 2010-202

v.

Township of Winslow (Camden)  
Custodian of Record

At the October 25, 2011 public meeting, the Government Records Council (“Council”) considered the October 18, 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 the Complainant’s June 23, 2010 and July 3, 2010 requests are invalid under OPRA as they fail to name specifically identifiable records, fail to name the senders and/or recipients of the e-mails sought, and fail to identify a specific date range sought; these requests would require research beyond the scope of a custodian’s duties pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); and Tracey-Coll v. Elmwood Park Board of Education (Bergen), GRC Complaint No. 2009-206 (June 2010). See also Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010).

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 25<sup>th</sup> Day of October, 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: October 28, 2011**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
October 25, 2011 Council Meeting**

**Paul S. Kaplan<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-202**

v.

**Township of Winslow (Camden)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

June 23, 2010 OPRA request:

Copy of the e-mail sent prior to the June 15, 2010 Township meeting taking a survey of or polling the committee members concerning the request for proposal and the sale of the water system.

July 3, 2010 OPRA request:

Copies of:

1. The e-mail sent prior to the June 15, 2010 Township meeting taking a survey of or polling the committee members concerning the request for proposal and the sale of the water system.
2. Any replies (handwritten or e-mailed) in reference to Item #1 of the instant records request.

**Request Made:** June 23, 2010, July 3, 2010

**Response Made:** July 1, 2010, July 8, 2010

**Custodian:** Deborah A. Puchakjian

**GRC Complaint Filed:** August 4, 2010<sup>3</sup>

**Background**

**June 23, 2010**

Complainant's first (1<sup>st</sup>) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

**July 1, 2010**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the sixth (6<sup>th</sup>) business day following receipt of such request. The Custodian states that access to the requested record is denied because the

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

<sup>2</sup> Represented by Stuart A. Platt, Esq., of Marrazzo & Platt, P.C. (Stratford, NJ).

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

requested e-mail constitutes intra-agency advisory, consultative, and/or deliberative (“ACD”) material and is therefore not a government record as defined in OPRA.

**July 2, 2010**

E-mail from the Complainant to the Custodian. The Complainant states that the requested e-mail is not ACD material because it entails more than just advisory information. The Complainant states that the e-mail was discussed and recorded in an open public session of the governing body on June 15, 2010.<sup>4</sup> The Complainant states that this discussion renders the requested e-mail a “meeting” pursuant to the Open Public Meetings Act (“OPMA”), N.J.S.A. 10:4-6, which states that a “meeting may be in person, by telephone, conference call, or by other means of electronic communication.”

**July 3, 2010**

Complainant’s second (2<sup>nd</sup>) Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

**July 8, 2010**

Custodian’s response to the second (2<sup>nd</sup>) OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the second (2<sup>nd</sup>) business day following receipt of such request.<sup>5</sup> The Custodian states that access to the requested records is denied because the requested e-mails constitute ACD material and are therefore not government records as defined in OPRA.

**August 2, 2010**

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

- Complainant’s first (1<sup>st</sup>) OPRA request dated June 23, 2010
- Custodian’s response to the first (1<sup>st</sup>) OPRA request dated July 1, 2010
- E-mail from the Complainant to the Custodian dated July 2, 2010
- Complainant’s second (2<sup>nd</sup>) OPRA request dated July 3, 2010
- Custodian’s response to the second (2<sup>nd</sup>) OPRA request dated July 8, 2010

The Complainant asserts that the Township Mayor and Committee discussed holding meetings via e-mail on June 15, 2010. The Complainant asserts that this is a violation of OPMA and makes the requested e-mail disclosable pursuant to OPRA.

The Complainant does not agree to mediate this complaint.

**August 16, 2010**

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

**August 20, 2010**

Custodian’s SOI with the following attachments:

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<sup>4</sup> The Complainant attached a DVD recording of the June 15, 2010 Township meeting.

<sup>5</sup> In the Statement of Information submitted to the GRC, the Custodian certifies that she received the Complainant’s OPRA request dated July 6, 2010 on the same day.

- Complainant's first (1<sup>st</sup>) OPRA request dated June 23, 2010
- Custodian's response to the first (1<sup>st</sup>) OPRA request dated July 1, 2010
- E-mail from the Complainant to the Custodian dated July 2, 2010
- Complainant's second (2<sup>nd</sup>) OPRA request dated July 3, 2010
- Custodian's response to the second (2<sup>nd</sup>) OPRA request dated July 8, 2010

The Custodian certifies that none of the requested records were provided to the Complainant. The Custodian certifies that the requested records constitute pre-decisional materials that contain advice from the Township Administrator, Joseph Gallagher, to members of the governing body. The Custodian certifies that access to the requested records was denied because N.J.S.A. 47:1A-1.1 excludes inter-agency or intra-agency ACD material from the definition of a government record.<sup>6</sup>

Custodian's Counsel disputes the Complainant's argument that violations of OPMA and OPRA occurred. Counsel argues that OPRA does not authorize the GRC to adjudicate whether there has been a violation of OPMA and cites Donato v. Borough of Emeron, GRC Complaint No. 2005-125 (Interim Order February 2007) and Allegretta v. Borough of Fairview, GRC Complaint No. 2005-132 (December 2006) in support of this proposition.

Counsel argues that the GRC must first determine "whether the Complaint is within its jurisdiction or frivolous or without any reasonable factual basis." N.J.S.A. 47:1A-7.e. and N.J.A.C. 5:105-2.1.d. Counsel states that the instant matter is outside the GRC's jurisdiction to adjudicate.

Counsel argues that the issue of whether a document falls within the deliberative process privilege was recently addressed by the New Jersey Supreme Court in Education Law Center v. New Jersey Department of Education, 198 N.J. 274 (2009). Counsel maintains that the Supreme Court explained that the deliberative process privilege "permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." In Re Liquidation of Integrity Ins. Co., 165 N.J. 75, 83 (2000) (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). Counsel states that the essence of the privilege is simple with a rationale built on powerful logic and has been explained by Justice Reed when introduced for use in the federal courts:

"Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act. Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen. It is true that it now submits itself to suit but it must retain privileges for the good of all." [Kaiser Aluminum &

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<sup>6</sup> The Custodian failed to address the GRC's inquiry regarding records retention schedules.  
Paul Kaplan v. Township of Winslow (Camden), 2010-202 – Findings and Recommendations of the Executive Director

Chem. Corp. v. United States, 141 Ct.Cl. 38, 157 F.Supp. 939, 945-46 (1958).]

Counsel states that the justification for a deliberative process privilege also arises out of the desire to prevent disclosure of proposed policies before they have been fully vetted and adopted by a government agency. *See* Jordan v. United States Dep't of Justice, 591 F.2d 753, 773 (D.C.Cir.1978) (explaining that the privilege is designed to ensure that an agency is judged by policies adopted, not policies merely considered). Counsel states that in order to fall within the deliberative process privilege, the following two criteria must be met: (1) the document must be "pre-decisional," meaning "it must have been generated before the adoption of an agency's policy or decision"; and (2) the document must be "deliberative," meaning that it "contains opinions, recommendations, or advice about agency policies." *Id.* at 286 (citing Integrity, *supra.*). Counsel maintains that once these criteria have been met, the privilege applies and a presumption of confidentiality attaches. *Id.* at 286-87.

Counsel states that the e-mail in question meets these criteria. Counsel states that the e-mail was generated so that the governing body could make an ultimate decision regarding the terms and conditions to be used in a request for a proposal concerning the sale of utilities. Counsel states that by its nature, the requested document is "pre-decisional." Counsel asserts that the requested e-mail contains advice and recommendations of the Township Administrator. Counsel maintains that the Township properly invoked the deliberative process privilege as a lawful basis upon which to deny the Complainant's OPRA request.

Counsel argues that the GRC has repeatedly found that documents that are ACD in nature need not be disclosed. *See e.g.*, Toth v. Ewing Township, GRC Case No. 2004-21 (November 2004); Kesner v. N.J. Dept. of Banking and Insurance, GRC Case No. 2003-67 (February 2004); and Edwards v. City of Jersey City, GRC Complaint No. 2002-71 (February 2004). Counsel argues that the fact that some of the information contained in the requested e-mail is factual does not alter this conclusion. Counsel states that, as the Supreme Court held in Education Law Center, a record which contains or involves even factual components is still entitled to deliberative-process protection where, as here, "it was used in the decision-making process and its disclosure would reveal deliberations that occurred during that process." *Id.* at 280.

### **August 23, 2010**

E-mail from the Complainant to the GRC responding to the Custodian's SOI. The Complainant asserts that if a vote of the governing body took place with the use of the requested e-mail, then that qualifies the e-mail as a public document subject to OPRA. The Complainant states that if there are other statements within the e-mail that are outside the scope of the vote and are considered advisory, then these statements should have been redacted. The Complainant states that he has included a video with his complaint that demonstrates that a vote took place via the requested e-mail. The Complainant argues that the video demonstrates that the e-mail was not pre-decisional material and is instead a public record because of the intent to discuss the material contained therein.

## Analysis

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

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

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

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

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

Although the Custodian asserted that the requested records were exempt from disclosure as ACD material, the Complainant’s June 23, 2010 and July 3, 2010 requests are invalid under OPRA. 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). As the court noted in invalidating MAG’s request under OPRA:

“Most 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.* at 549.

The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.*

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),<sup>7</sup> the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."<sup>8</sup>

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), the court enumerated the responsibilities of a custodian and a requestor as follows:

"OPRA identifies the responsibilities of the requestor and the agency relevant to the prompt access the law is designed to provide. The custodian, who is the person designated by the director of the agency, N.J.S.A. 47:1A-1.1, must adopt forms for requests, locate and redact documents, isolate exempt documents, assess fees and means of production, identify requests that require "extraordinary expenditure of time and effort" and warrant assessment of a "service charge," and, when unable to comply with a request, "indicate the specific basis." N.J.S.A. 47:1A-5(a)-(j). The requestor must pay the costs of reproduction and submit the request with information that is essential to permit the custodian to comply with its obligations. N.J.S.A. 47:1A-5(f), (g), (i). *Research is not among the custodian's responsibilities.*" (Emphasis added), NJ Builders, 390 N.J. Super. at 177.

Moreover, the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also quoted N.J.S.A. 47:1A-5.g. in that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." The court further stated that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to...generate new records..."

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<sup>7</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

<sup>8</sup> As stated in Bent, *supra*.



Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), the Council held that “[b]ecause the Complainant’s OPRA requests # 2-5 are not requests for identifiable government records, the 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 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).”

The test under MAG then, is whether a requested record is a *specifically identifiable* government record. If so, the record is disclosable, barring any exemptions to disclosure contained in OPRA. The GRC established the criteria deemed necessary to specifically identify an e-mail communication in Sandoval v. NJ State Parole Board, GRC Complaint No. 2006-167 (October 2008). In Sandoval, the Complainant requested “e-mail...between [two individuals] from April 1, 2005 through June 23, 2006 [using seventeen (17) different keywords].” The Custodian denied the request, claiming that it was overly broad. The Council determined:

“The Complainant in the complaint now before the GRC requested specific e-mails *by recipient, by date range and by content*. Based on that information, the Custodian has identified [numerous] e-mails which fit the specific recipient and date range criteria Complainant requested.” (Emphasis added.) *Id.*

In Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010), the Council examined what constitutes a valid request for e-mails under OPRA. The Council determined that:

“*In accord with MAG, supra, and its progeny, in order to specifically identify an e-mail, OPRA requests must contain (1) the content and/or subject of the e-mail, (2) the specific date or range of dates during which the e-mail was transmitted or the e-mails were transmitted, and (3) a valid e-mail request must identify the sender and/or the recipient thereof.*” (Emphasis in original.) *Id.*

In the instant matter, both the Complainant’s June 23, 2010 and July 3, 2010 requests seek “a copy of the e-mail sent prior to the June 15, 2010 Township meeting taking a survey of or polling the committee members concerning the request for proposal and the sale of the water system.” Although the Complainant’s requests for such record provide a time period (prior to the June 15, 2010 Township meeting), such a time period is of an indefinite and indeterminable range beyond the requirements prescribed in MAG. Further, the requests fail to name a sender and/or recipient of the requested e-mails as required by Elcavage, supra. In order for the Custodian to respond to this request, the Custodian would be required to locate and evaluate all e-mails from every e-mail account used by every employee of the Township from *any* time prior to the Township’s June 15, 2010 meeting and evaluate the contents of such e-mails to determine whether they contain the subject matter sought by the Complainant. Such research is not required of a Custodian. See MAG, supra.

Furthermore, the July 3, 2010 request also seeks “a copy of any replies (handwritten or e-mailed) in reference to [the Complainant’s]... records request.” This request fails to specify identifiable government records sought, as “replies” (whether handwritten or e-mailed) does not identify a specific government record. Moreover, the request fails to specify a particular date or date range, and sender and/or recipient of the reply e-mails or handwritten replies sought and would require the Custodian to conduct research to locate responsive records. *See* MAG, supra; Elcavage, supra.

In Tracey-Coll v. Elmwood Park Board of Education (Bergen), GRC Complaint No. 2009-206 (June 2010), the Council determined that a request which fails to specifically identify government records sought, fails to specify a particular date and would also require the custodian to conduct research to locate responsive records was invalid under OPRA pursuant to MAG, supra, Bent, supra, New Jersey Builders, supra, and Schuler, supra.

Therefore, the Complainant’s June 23, 2010 and July 3, 2010 requests are invalid under OPRA as they fail to name specifically identifiable records, fail to name the senders and/or recipients of the e-mails sought, and fail to identify a specific date range sought; these requests would require research beyond the scope of a custodian’s duties pursuant to MAG, supra, Bent, supra, New Jersey Builders, supra, Schuler, supra, and Tracey-Coll, supra. *See also* Elcavage, supra.

Because the Council has determined that the Complainant’s requests herein are invalid under OPRA, the Council declines to address whether the requested records fall within the definition of a government record set forth at N.J.S.A. 47:1A-1.1.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Complainant’s June 23, 2010 and July 3, 2010 requests are invalid under OPRA as they fail to name specifically identifiable records, fail to name the senders and/or recipients of the e-mails sought, and fail to identify a specific date range sought; these requests would require research beyond the scope of a custodian’s duties pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009); and Tracey-Coll v. Elmwood Park Board of Education (Bergen), GRC Complaint No. 2009-206 (June 2010). *See also* Elcavage v. West Milford Twp., GRC Complaint Nos. 2009-07 and 2009-08 (March 2010).

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