



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
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Commissioner

FINAL DECISION

June 26, 2012 Government Records Council Meeting

Frank R. Ciesla
(on behalf of The Valley Hospital)
Complainant

Complaint No. 2010-38

v.

New Jersey Department of Health & Senior Services,
Division of Health Care Quality and Oversight
Custodian of Record

At the June 26, 2012 public meeting, the Government Records Council ("Council") considered the June 19, 2012 Supplemental 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 the Council's April 27, 2011 Final Decision is not affected by the Appellate Division's decision in Correctional Medical Services, Inc. v. State, ___ N.J. Super. ___, (App. Div. 2012). Specifically, CMS, *supra*, is not applicable to and is distinguishable from the instant complaint because the Complainant sought the requested report under OPRA and not discovery and the GRC determined that the record was in draft form at the time of the Complainant's OPRA request. Thus, the Custodian lawfully denied access to the requested report because said report was still in draft form at the time of the Complainant's OPRA request and thus exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.

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 26th Day of June, 2012

Steven F. Ritardi, Esq., Acting 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: June 27, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
June 26, 2012 Council Meeting**

Frank R. Ciesla
(on behalf of The Valley Hospital)¹
Complainant

GRC Complaint No. 2010-38

v.

**New Jersey Department of Health & Senior Services,
Division of Health Care Quality and Oversight,²**
Custodian of Records

Records Relevant to Complaint: Copy of the New Jersey Department of Health and Senior Services (“DHSS”) staff report to the State Health Planning Board (“SHPB”) regarding the certificate of need (“CN”) application for the transfer of ownership of Pascack Valley Hospital (“PVH”) to Hackensack University Medical Center (“HUMC”) and Legacy Hospital Partners, Inc. (or a subsidiary or affiliate thereof.)

Background

May 24, 2011

Government Records Council’s (“Council”) Interim Order. At its May 24, 2011 public meeting, the Council considered the April 20, 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 Custodian has lawfully denied access to the requested report because said report was still in draft form at the time of the Complainant’s OPRA request and thus exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. See Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), Kohn v. Township of Livingston, GRC Complaint No. 2007-319 (July 2008), Haemmerle v. Township of Washington, GRC Complaint No. 2006-106 (June 2007), and Edwards v. City of Jersey City, GRC Complaint No. 2002-71 (February 2004). Additionally, the Custodian has borne her burden of proving that her denial of access was lawful. N.J.S.A. 47:1A-6.”

¹ The Complainant, an attorney at Giordano, Halleran & Ciesla, (Red Bank, NJ), represents The Valley Hospital.

² Represented by DAG Michael Kennedy, on behalf of the NJ Attorney General.

June 2, 2011

Council's Final Decision distributed to the parties.

July 6, 2011

Complainant's Notice of Appeal. The Complainant appeals this complaint to the Superior Court of New Jersey, Appellate Division.

May 29, 2012

The Superior Court of New Jersey, Appellate Division, remands the matter to allow the GRC the opportunity for further consideration of its Final Decision in light of the recently published opinion in Correctional Medical Services, Inc. v. State, ___ N.J. Super. ___ (App. Div. 2012). The Court notes that in remanding this matter, the Court does not intimate any views as to the applicability of CMS, *supra*, nor about the merits of the Council's Final Decision. The Court orders the GRC to issue a decision by no later than July 16, 2012.³

Analysis

Whether the Custodian unlawfully denied access to the requested report?

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.

³ All parties involved in both the appeal of the GRC's decision and a companion appeal submitted letter briefs arguing their position regarding the Appellate Division's remand. These briefs contain a range of arguments including that CMS does not or does apply and additional arguments that are not relevant to the narrow scope of the Appellate Division's remand.

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 its May 24, 2011 Final Decision, the Council determined that the Custodian lawfully denied access to the requested report because “said report was still in draft form at the time of the Complainant’s OPRA request and thus exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.” [citations omitted]. *Id.* The Complainant subsequently appealed the Council’s Final Decision to the Appellate Division. On May 29, 2012, the Appellate Division remanded the matter to the GRC to allow further consideration of this matter in light of the Appellate Division’s recent decision in CMS and ordered that the GRC issue a decision by no later than July 16, 2012.

In CMS, plaintiff, as a private contractor, provided medical and dental services to New Jersey’s prison inmates under a series of contracts. At the conclusion of the terms of plaintiff’s last contract in September 2008, the State did not renew same and determined that it would impose liquidated damages against plaintiff due to its alleged noncompliance with contract requirements. Plaintiff subsequently filed suit with the trial court on November 10, 2008. In connection with discovery, defendants New Jersey Department of Corrections (“DOC”) and New Jersey Department of Treasury, Division of Purchase and Property, Contract Compliance and Audit Unit (“CCAU”), claimed to have reviewed 47,000 documents, approximately 7,000 of which the State relied on the deliberative process to withhold or redact same. Plaintiff moved to compel disclosure, which the trial court granted on January 7, 2011, reasoning that:

“[t]he instant case, however, does not involve the formulation of government policy. Rather this litigation is a straightforward breach of contract claim, which happens to involve a governmental entity.

The issue in the case is simply whether the State acted properly in assessing liquidated damages against the plaintiff. The agreement required the State to monitor the contractor’s performance in supplying medical services using the [objective performance indicators] developed by the State. The State made decisions concerning the plaintiff’s performance on the standards. The State then determined whether liquidated damages were justified and, if so, the amount of the damages to be assessed. The communications between those agents and employees of the State involved on the issue of the plaintiff’s alleged breach of the contract and the assessment of liquidated damages do not go to any generalized governmental policy, but relate directly to the relationship [of] the parties to the contract.” *Id.* at 11.

Defendants moved for reconsideration and after a hearing on the motion, the trial court adhered to its initial decision. Thus, defendants appealed the trial court’s order

overruling the defendants' assertion of the deliberative process privilege in connection with the production of certain documents through discovery pursuant to a breach of contract litigation.

On appeal, the Court noted that the facts in CMS are not similar to the facts in either In re: Liquidation of Integrity Ins. Co., 165 N.J. 75 (2000) or Education Law Ctr. v. NJ Dept. of Educ., 198 N.J. 274 (2009), because neither case involved claims of a breach of contract aimed directly at the party seeking to withhold documents as privileged. Additionally, the Court noted that its previous opinions similarly offered little assistance since they primarily regarded

“... the applicability of the privilege to OPRA requests conducted for investigative purposes. *See* Fisher v. Division of Law, 400 N.J. Super. 61, 74-75, 946 A.2d 53 (App. Div. 2008)(affirming utilization of deliberative process privilege to shield certain information from disclosure pursuant to an OPRA request by a journalist for records relating to the calculation of a special service charge for production of records identified in a prior OPRA request); Gannett N.J. Partners, L.P. v. Cnty. of Middlesex, 379 N.J. Super. 205, 219-20, 877 A.2d 330 (App. Div. 2005)(following reporter's OPRA request, applying privilege to deliberative portion of handwritten notes of principal planner regarding her tentative views as to the County's course of action in connection with an acquisition of a particular farm that was subject to federal governmental scrutiny); In re Readoption with Amendments of Death Penalty Regulations, 367 N.J. Super. 61, 73-75, 842 A.2d 207 (App. Div.)(in challenge to regulations governing death by lethal injection, considering applicability of privilege pursuant to OPRA and common law, to certain documents withheld by the DOC), *certif. denied*, 182 N.J. 149, 862 A.2d 57 (2004); *see also* Paff v. Dir., Office of Attorney Ethics, 399 N.J. Super. 632, 646-48, 945 A.2d 149 (Law Div. 2007)(determining that reports and analyses created by the Office of Attorney Ethics in connection with its investigation of an attorney who consented to disbarment were protected from disclosure to a third party by the deliberative process privilege).” *Id.* at 20-21.

The Court ultimately held that documents generated by the State in connection with its investigation of compliance by plaintiff with the terms of its contract with the State, its determination to assess liquidated damages against plaintiff, and its computation of such damages, were not protected from discovery by the deliberative process. The Court reasoned that although the documents sought might reflect agency decision making processes regarding the administration of its contract, such processes were not the sort of actual policymaking that the deliberative process privilege was designed to protect. The Court reasoned that:

“... it can certainly be argued that the only ‘decision’ in this case occurred in 2004 when the State determined to enter into a further contract with CMS and adopted the contract terms at issue. Thereafter, the State merely effectuated the contract's terms. If viewed in this fashion, all ‘decisions’ at issue were post-[decisional,] not pre-decisional. Further, it is difficult to

cast any ‘decisions’ following contract formation as fitting into the deliberative mold.” *Id.* at 29.

The Court further determined that the factual materials were also subject to discovery because the defendants failed to meet their burden of proving the documents should be withheld. *Citing Education Law Ctr., Id.* at 280.

The GRC first notes that it determined that the report at issue in this complaint was considered to be inter-agency or intra-agency advisory, consultative, or deliberative (“ACD”) material specifically because it was a draft document at the time of the Complainant’s OPRA request. *See Parave-Fogg v. Lower Alloways Creek Township*, GRC Complaint No. 2006-51 (August 2006), *Kohn v. Township of Livingston*, GRC Complaint No. 2007-319 (July 2008), *Haemmerle v. Township of Washington*, GRC Complaint No. 2006-106 (June 2007), and *Edwards v. City of Jersey City*, GRC Complaint No. 2002-71 (February 2004). The Court in *CMS* never addressed whether any of the documents sought under discovery fell within the category of draft documents.

The decision in *CMS* is also not relevant to this complaint because the Court there was tasked with determining whether the documents at issue could be disclosed to the plaintiff as part of discovery, rather than pursuant to an OPRA request. The Court in *CMS* noted that:

“[g]enerally, pursuant to Rule 4:10-2(a), parties may obtain discovery regarding any non-privileged matter that is relevant to the subject of a pending action or is reasonably calculated to lead to the discovery of admissible evidence. Our discovery rules are to be liberally construed because we adhere to the belief that justice is more likely to be achieved when there has been full disclosure and all parties are conversant with all available facts. *Payton v. New Jersey Turnpike Auth.*, 148 N.J. 524, 535, 691 A.2d 321 (1997) (citing *Catalpa Inv. Group, Inc. v. Franklin Tp. Zoning Bd. of Adjustment*, 254 N.J. Super. 270, 273, 603 A.2d 178 (Law Div.1991)).” *Integrity* at 82.

The Court further noted that several of its prior decisions regarding the deliberative process and OPRA offered little assistance in determining whether the State reasonably withheld or redacted the documents at issue in *CMS*. *Id.* at 20-21.

Although the Court Rules regarding discovery broadly define what is accessible to a party, OPRA defines a government record as “any paper, written or printed book, document ... 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.” *N.J.S.A.* 47:1A-1.1. Additionally, OPRA contains 24 exemptions, including a broader exemption recognizing any other exemptions contained in State or federal statute, executive orders, regulations, etc. *N.J.S.A.* 47:1A-1 et seq. OPRA explicitly exempts access to records that are considered to be “inter-agency or intra-agency advisory, consultative, or deliberative material.” *N.J.S.A.* 47:1A-1.1. The Council, in its Final Decision, set forth the specific case law applying to draft documents. *See Parave-Fogg, Kohn, Haemmerle and*

Edwards. Based on these cases, the Council determined that the report at issue herein fell within the ACD exemption.

The present complaint is further distinguishable from CMS in several important respects. The issue raised on appeal in CMS was the applicability of the deliberative process privilege to government documents relevant to a private party's breach of contract lawsuit where those documents were material to the litigation.

Here, there was no underlying litigation related to the disclosability of the record at issue herein, nor was there any consideration regarding the Rules of Evidence or Rules Governing the Courts of the State of New Jersey as those rules apply to discovery and not OPRA. Indeed, the Court in CMS reasoned that New Jersey's discovery rules are to be liberally construed, albeit certain privileges, including the deliberative process privilege, may still apply.

The Complainant herein sought a copy of a "draft" report possibly containing ACD material that is protected by the deliberative process privilege. However, because the report sought by the Complainant was a "draft" report, the GRC found that the deliberative process privilege applied where the record request fell exclusively within the purview of OPRA as opposed to the dynamics of litigation where the Courts will take into consideration other factors such as relevance, evidential issues or discovery issues. In the context of OPRA, these factors do not apply. In fact, OPRA 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 governmental records readily accessible for inspection, copying or examination. N.J.S.A. 47:1A-1; MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005).

Therefore, the Council's May 24, 2011 Final Decision is not affected by the Appellate Division's decision in CMS. Specifically, CMS, supra, is not applicable to and is distinguishable from the instant complaint because the Complainant sought the requested report under OPRA and not discovery and the GRC determined that the record was in draft form at the time of the Complainant's OPRA request. Thus, the Custodian lawfully denied access to the requested report because said report was still in draft form at the time of the Complainant's OPRA request and thus exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Council's May 24, 2011 Final Decision is not affected by the Appellate Division's decision in Correctional Medical Services, Inc. v. State, ___ N.J. Super. ___, (App. Div. 2012). Specifically, CMS, supra, is not applicable to and is distinguishable from the instant complaint because the Complainant sought the requested report under OPRA and not discovery and the GRC determined that the record was in draft form at the time of the Complainant's OPRA request. Thus, the Custodian lawfully denied access to the requested report because said report was still in draft form at the time of the

Complainant's OPRA request and thus exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

June 19, 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

LORI GRIFA
Commissioner

FINAL DECISION

May 24, 2011 Government Records Council Meeting

Frank R. Ciesla
Complainant

Complaint No. 2010-38

v.

New Jersey Department of Health & Senior Services,
Division of Health Care Quality and Oversight
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the April 20, 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 Custodian has lawfully denied access to the requested report because said report was still in draft form at the time of the Complainant’s OPRA request and thus exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. See Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), Kohn v. Township of Livingston, GRC Complaint No. 2007-319 (July 2008), Haemmerle v. Township of Washington, GRC Complaint No. 2006-106 (June 2007), and Edwards v. City of Jersey City, GRC Complaint No. 2002-71 (February 2004). Additionally, the Custodian has borne her burden of proving that her denial of access was lawful. N.J.S.A. 47:1A-6.

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 24th Day of May, 2011

Robin Berg Tabakin, Chair
Government Records Council



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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: June 2, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

Frank R. Ciesla
(on behalf of The Valley Hospital)¹
Complainant

GRC Complaint No. 2010-38

v.

**New Jersey Department of Health & Senior Services,
Division of Health Care Quality and Oversight²**
Custodian of Records

Records Relevant to Complaint: Copy of the New Jersey Department of Health and Senior Services (“DHSS”) staff report to the State Health Planning Board (“SHPB”) regarding the certificate of need (“CN”) application for the transfer of ownership of Pascack Valley Hospital (“PVH”) to Hackensack University Medical Center (“HUMC”) and Legacy Hospital Partners, Inc. (or a subsidiary or affiliate thereof.)

Request Made: January 7, 2010

Response Made: January 19, 2010

Custodian: Michelle Maiello

GRC Complaint Filed: February 25, 2010³

Background

January 7, 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.

January 19, 2010

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the seventh (7th) business day following receipt of such request. The Custodian states that no staff recommendations were distributed to the members of the SHPB; therefore, no records responsive to the OPRA request exist.

January 19, 2010

E-mail from the Complainant to the Custodian. The Complainant states that he understands that staff recommendations were not yet distributed. The Complainant states

¹ The Complainant, an attorney at Giordano, Halleran & Ciesla, (Red Bank, NJ), represents The Valley Hospital.

² Represented by DAG Michael Kennedy, on behalf of the NJ Attorney General.

³ The GRC received the Denial of Access Complaint on said date.

that he also understands that a report with recommendations was prepared. The Complainant states that this report is the record sought in his OPRA request.

January 21, 2010

Letter from the Custodian to the Complainant. The Custodian states that 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 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.

The Custodian states that DHSS has classified the information contained in the requested report as advisory, consultative or deliberative (“ACD”) material. The Custodian states that based on the foregoing, access to the requested record is denied.

February 25, 2010

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

- Complainant’s OPRA request dated January 7, 2010.
- E-mail from the Custodian to the Complainant dated January 19, 2010.
- E-mail from the Complainant to the Custodian dated January 19, 2010.
- Letter from the Custodian to the Complainant dated January 21, 2010.

The Complainant states that on behalf of The Valley Hospital (“Valley”), he submitted an OPRA request to DHSS on January 7, 2010 seeking the report relevant to this complaint. The Complainant states that the Custodian responded in writing on January 19, 2010 stating that staff recommendations were not distributed to the members of the SHPB; therefore no records responsive exist. The Complainant states that on information and belief, it appears the requested report was not distributed to the SHPB because the applicant requested that the certificate of need (“CN”) be deferred because the report was adverse to the application.

The Complainant states that he wrote to the Custodian on January 19, 2010 indicating that even though the report was not distributed, it was his understanding that the report was prepared and reiterated that he was seeking a copy of that report. The Complainant states that the Custodian responded on January 21, 2010 denying access to

the requested report on the basis that DHSS classified the information contained in the report as ACD material.

The Complainant states that the report at issue here deals with a CN filed with respect to Pascack Valley Hospital (“PVH”) in Bergen County, New Jersey. The Complainant states that in September 2007 PVH filed a petition with the United States Bankruptcy Court, District of New Jersey under Chapter 11. The Complainant states that by November 2007 PVH had terminated its employees and submitted an application to DHSS for a CN to close PVH. The Complainant states that hearings were conducted before the SHPB, which recommended that the CN to close PVH be granted and that the PVH licenses remain inactive for twenty-four (24) months. The Complainant states that any purchaser of PVH who wanted to reestablish a hospital at that site would have to comply with all legal requirements and commence operation prior to the expiration of the twenty-four (24) month period on December 28, 2009.

The Complainant states that in December 2007, the Bankruptcy Court approved the sale of PVH’s assets to a joint venture formed by Hackensack University Medical Center (“HUMC”). The Complainant states that on July 31, 2008, HUMC applied to DHSS to transfer ownership of PVH assets to HUMC and to reopen the old PVH as a hospital. The Complainant states that on May 15, 2009, DHSS determined that the application for a CN for transfer of PVH licenses to the HUMC joint venture was complete and the application was submitted to the SHPB for a public hearing to be held on July 23, 2009. The Complainant states that on July 7, 2009, HUMC requested a six (6) month deferment of the hearing. The Complainant states that according to HUMC, this deferment was requested in order to complete negotiation discussions with Valley and Englewood Hospital and Medical Center (“Englewood”), which both objected to the CN application. The Complainant states that neither Valley nor Englewood had knowledge of HUMC’s request for deferment. The Complainant states that the request for deferment raised speculation as to whether the recommendations being made by DHSS staff to the SHPB was adverse to HUMC.

The Complainant states that on December 10, 2009, HUMC sought an extension of the twenty-four (24) month inactivity period. The Complainant states that while the request was pending, HUMC also filed a complaint against DHSS, its Commissioner, Valley and Englewood for declaratory relief.⁴

The Complainant argues that on its face, although the Custodian is denying access to the requested report as ACD material, the report is not ACD in nature. The Complainant argues that had the HUMC not requested a deferment of the hearing at the last moment, the report and all related information would have been forwarded to the SHPB and released to the public. The Complainant argues that the public, including Valley, would have been able to appear at the SHPB meeting to present their position on the staff recommendations based on release of said report.

⁴ The Complainant notes that the background facts are set forth in an opinion issued by the court in the action filed by HUMC. The Complainant notes that the court granted a motion to transfer the matter to the Appellate Division.

The Complainant argues that a staff report to the SHPB is not privileged because such report becomes a public document once it is submitted to the SHPB; thus the requested report is a public record. The Complainant argues that the SHPB takes the report into consideration when making recommendations to the Commissioner of DHSS. The Complainant argues that if a final decision of the Commissioner is appealed to the Appellate Division, the staff report is part of the record sent to the Appellate Division. The Complainant argues that the fact that HUMC requested a deferral of the hearing does not make the requested report privileged. The Complainant asserts that the requested report is an important part of the ongoing administrative and court proceedings with respect to the CN application and should be disclosed.

The Complainant contends that in Education Law Center v. New Jersey Department of Education, 198 N.J. 274 (2009), the Supreme Court considered the application of this very exemption to records of the New Jersey Department of Education (“DOE”). The Complainant asserts that in Education Law Center, *supra*, the court held that in applying the ACD exemption, it must assess the records requested “against the backdrop of an agency's deliberative efforts in order to determine a document's nexus to that process and its capacity to expose the agency's deliberative processes.” *Id.* at 281. The Complainant argues that in this complaint, the requested report becomes a public record upon submission to the SHPB; thus, there can be no claim that disclosing the report would expose the deliberative process of DHSS. The Complainant argues that the report sought is meant to be a public record as part of the process for which it was created.

The Complainant states that pursuant to OPRA, DHSS bears the burden of proving a lawful denial of access. N.J.S.A. 47:1A-6. The Complainant asserts that it cannot meet this burden because the requested report that DHSS has claimed to be ACD material is intended to be a public document.

The Complainant states that OPRA provides that “... government records shall be readily accessible ... by the citizens of this State ... and any limitations on the right of access accorded by [OPRA] shall be construed in favor of the public's right of access.” N.J.S.A. 47:1A-1. The Complainant states that the court in Education Law Center, *supra*, recognized both the statutory right and the common law right of a citizen to access government records. *Id.* at 283.⁵ The Complainant further states that the court in Education Law Center, *supra*, explored the purpose behind the ACD exemption, which is “...to ensure free and uninhibited communication within governmental agencies so that the best possible decisions can be reached...” *Id.* at 286. The Complainant states that the court also reasoned that “[t]he 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 ...” *Id.* at 286 (Citation omitted.) The Complainant reiterates that with respect to the requested report, it is public once submitted to the SHPB regardless of the decision of the SHPB or Commissioner of DHSS; thus, the public policy underlying the exemption is inapplicable to this matter.

⁵ The GRC notes that it has no jurisdiction to adjudicate common law right of access issues. *See Rosenblum v. Borough of Closter*, 2006 N.J. Super. Unpub. LEXIS 1444, 4-5 (App. Div. Dec. 5, 2006). *Frank R. Ciesla (on behalf of The Valley Hospital) v. New Jersey Department of Health & Senior Services, Division of Health Care Quality and Oversight*, 2010-38 – Findings and Recommendations of the Executive Director

The Complainant states that assuming the GRC upholds the denial of access in this complaint, the ACD privilege is a qualified one and can be overridden if the need for the records outweighs the public agency's interest in confidentiality. *Id.* at 287 (Citation omitted.) The Complainant states that in this complaint, DHSS's need to keep the requested report confidential is very low because the report is designed to become a public record and would have been disclosed to the public had HUMC not deferred the hearing at the last minute. The Complainant argues that once the report was forwarded to SHPB, Valley would have had access to it, thus, there is no harm in disclosure. The Complainant further contends that Valley has a need for the report in connection with litigation involving HUMC.⁶

Additionally, the Complainant states that the court set forth four (4) factors to be considered in determining whether the requestor's need outweighs a public agency's interest in confidentiality: "(1) the relevance of the evidence; (2) the availability of other evidence; (3) the government's role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." *Id.* at 287 (Citation Omitted.) The Complainant contends that an application of these four (4) factors in the instant complaint favors disclosure of the requested report. The Complainant contends that there is no other source for the requested report. The Complainant contends that HUMC is also suing DHSS, which has an active role in the administrative actions at issue. The Complainant further contends that because the requested report was meant to be a public record, disclosure would not hinder frank and independent discussion regarding contemplated decisions. The Complainant reiterates that it is clear that Valley's need for the report outweighs DHSS's need for confidentiality.

The Complainant finally asserts that the requested record was meant to be public and should be disclosed because it will not expose DHSS's decision making process. The Complainant asserts that in applying the balancing test, which also applies under the common law right of access, it is clear that Valley's need for access outweighs DHSS's need for confidentiality.

The Complainant does not agree to mediate this complaint.

March 10, 2010

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

March 10, 2010

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension of time until March 19, 2010 to submit the requested SOI.

March 10, 2010

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension of time until March 19, 2010 to submit the requested SOI.

⁶ The Complainant notes that discussing Valley's need for the record could result in disclosure of Valley's litigation strategy; however, Valley's strong need for the requested record still outweighs DHSS's low interest in confidentiality.

March 17, 2010

E-mail from the Custodian's Counsel to the GRC. Counsel's requests a second (2nd) extension of time until March 23, 2010 to submit the requested SOI.

March 17, 2010

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel a second (2nd) extension of time until March 23, 2010 to submit the requested SOI.

March 23, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated January 7, 2010.
- E-mail from the Custodian to the Complainant dated January 19, 2010.
- E-mail from the Complainant to the Custodian dated January 19, 2010.
- Letter from the Custodian to the Complainant dated January 21, 2010.
- Legal Certification of Mr. John Calabria ("Mr. Calabria"), Director of the Certificate of Need and Healthcare Facilities Licensing.

The Custodian certifies that her search for the requested report involved asking the analyst who had been assigned to review the certificate of need ("CN") for a copy of the staff recommendations that were distributed to the SHPB; said analyst advised the Custodian that the recommendations had not yet been distributed because the SHPB had not met to review the CN applications. The Custodian also certifies that subsequent to the Complainant's e-mail on January 19, 2010, the Custodian went back to the analyst who advised that the draft staff recommendations were prepared and forwarded to Mr. Calabria. The Custodian certifies that no document other than the staff recommendations was prepared.

The Custodian certifies that Mr. Calabria advised her that the staff recommendations for the CN application have not yet been finalized. The Custodian certifies that the recommendations remain in draft form because HUMC asked that consideration of the CN application be deferred for six (6) months, thus a final draft of the staff recommendations has not been completed.

The Custodian also certifies that whether any records responsive to the 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 ("DARM") is not applicable in the instant complaint.

The Custodian certifies that she received the Complainant's OPRA request on January 7, 2010. The Custodian states that she responded in writing on January 19, 2010 stating that recommendations were not submitted to the members of to SHPB; therefore, no records responsive to the request exist. The Custodian states that the Complainant wrote to her on January 19, 2010 stating that he understood that recommendations had not been distributed to the members of the SHPB, but that he believed the staff report sought was prepared. The Custodian certifies that based on advice of Mr. Calabria that the report was still in draft form, the Custodian responded to the Complainant on January

21, 2010 stating that access to the requested report was denied because DHSS classified the report as ACD material.

Mr. Calabria certifies that as part of the CN process *N.J.A.C. 8:33-1 et seq.*, an applicant must submit a great deal of complex information and statistics. Mr. Calabria certifies that DHSS assists the SHPB in its review function by providing an analysis of this information and makes recommendations regarding CN applications. Mr. Calabria certifies that the analysis and recommendations may be revised at any time prior to their transmittal to the SHPB. Mr. Calabria certifies that the SHPB and the Commissioner of DHSS consider the recommendations as part of their independent review of the CN application.

Mr. Calabria certifies that it is common for staff recommendations to undergo multiple revisions during the internal staff review process prior to their finalization and transmittal to the SHPB. Mr. Calabria certifies that the staff recommendations for the HUMC CN application have not yet been finalized; therefore, the requested report remains in draft form because HUMC has requested that the hearing be deferred for six (6) months and work on the report has been stayed. Mr. Calabria certifies that based on the foregoing, no final document has been prepared.

The Custodian's Counsel submits a legal brief in support of DHSS's position. Counsel states that the Complainant is seeking disclosure of the requested report prepared in response to a CN application submitted by HUMC. Counsel contends that the requested report is not subject to disclosure because it is in draft form. N.J.S.A. 47:1A-1.1.

Counsel states that as a general matter, draft documents are ACD communications. Counsel states that although OPRA broadly defines a "government record" as "... any paper, written or printed book, document ... that has been made, maintained or kept on file in the course of [an agency's] official business ... or that has been received ..." N.J.S.A. 47:1A-1.1; the statute also includes several exemptions from disclosure. See Bergen County Improvement Auth. V. North Jersey Media, 370 N.J. Super. 504, 516 (App. Div. 2004). Counsel states that OPRA expressly provides that "inter-agency or intra-agency advisory, consultative, or deliberative material" is not included in the definition of a government record. N.J.S.A. 47:1A-1.1.

Counsel states that the ACD exemption is equivalent to the deliberative process privilege, which protects from disclosure pre-decisional records that reflect an agency's deliberations. See In re Readoption of N.J.A.C. 10A:23, 367 N.J. Super. 61, 73-74 (App. Div. 2004), cert. den. 182 N.J. 149 (2004) and In re Liq. Of Integrity Ins. Co., 165 N.J. 75 (2000). Counsel states that as a result, the provisions of OPRA "shields from disclosure documents 'deliberative in nature, containing opinions, recommendations, or advice about agency policies' and 'generated before the adoption of an agency's policy or decision.'" Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), quoting Gannett New Jersey Partners LP v. County of Middlesex, 379 N.J. Super. 205, 219 (App. Div. 2005).

Counsel states that the courts have consistently held that draft records of a public agency fall within the deliberative process privilege. See U.S. v. Farley, 11 F.3d 1385 (7th Cir. 1993); Pies v. U.S. Internal Rev. Serv., 668 F.2d 1350 (D.C. Cir. 1981); N.Y.C. Managerial Employee Ass'n. v. Dinkins, 807 F. Supp. 955 (S.D.N.Y. 1992); Archer v. Cirrincione, 722 F.Supp. 1118 (S.D. N.Y. 1989); Coalition to Save Horsebarn Hill v. Freedom of Info. Comm., 73 Conn. App. 89, 806 A.2d 1130 (Conn. App. Ct. 2002); pet. for cert. den. 262 Conn. 932, 815 A.2d 132 (2003). Counsel states that in Coalition, the court explained that the entire draft document is deliberative because in draft form, it “reflect[s] that aspect of the agency's function that precedes formal and informed decision making.” *Id.* at 95, quoting Wilson v. Freedom of Info. Comm., 181 Conn. 324, 332-33, 435 A.2d 353 (1980).

Counsel acknowledges the Complainant’s argument that because the requested report will be a public record once released to the SHPB, any drafts of the report should likewise be subject to disclosure. Counsel argues, however, that the Complainant’s argument is not supported by the court’s holding in Education Law Center v. New Jersey Department of Education, 198 N.J. 274 (2009). Counsel states that in Education Law Center, the New Jersey Supreme Court determined that the documents at issue in that case, known as “Simulation Memos,” which included suggested alternatives for a funding formula which subsequently was made public, were exempt from disclosure as deliberative documents. There the Court found that:

“If communication[s] that formed part of an agency's pre-decisional process could be disclosed after the decision has been released, one of the major justifications for the [deliberative process] privilege in the first place--maintaining the free flow of communication within an agency--would be rendered meaningless ... release of all pre-decisional informational tools used by DOE in the course of its deliberative activities could chill, in the future, the robust examination of governmental courses of action.” *Id.* at 300-301.

Counsel states that as certified by Mr. Calabria, the draft recommendations are regularly subject to revision as DHSS considers the complex information presented in CN applications. Counsel argues that the fact that the requested report will someday be public is immaterial. Counsel argues that releasing the draft version of the requested report could have an adverse effect on the free flow of communication within DHSS, a potential harm which must be avoided at all costs, as the court explains in Education Law Center, *supra*.

Counsel contends that the report at issue is exempt from disclosure pursuant to OPRA as a pre-decisional report that reflects the deliberations of DHSS concerning the CN application before it: therefore, the Custodian properly denied this request.

March 31, 2010

The Complainant’s response to the Custodian’s SOI. The Complainant asserts that in the SOI, DHSS changed its basis for denying access to the requested report. The Complainant states that the Custodian initially denied access because the report was considered ACD material; however, the Custodian’s Counsel in the SOI argued the report

was a “draft.” The Complainant alleges that Counsel altered the reason for denying access to the requested report in response to the Complainant pointing out that the report is a public record.

The Complainant states that OPRA provides that a custodian must “... indicate the specific basis ...” for denying access to a request. N.J.S.A. 47:1A-5.g. The Complainant further states that under OPRA, a custodian “... shall have the burden of proving that the denial of access is authorized by law.” N.J.S.A. 47:1A-6. The Complainant argues that the initial basis for denying access to a record forms the basis for which a requestor files a complaint; therefore, DHSS cannot change that basis. The Complainant further argues that the Custodian has not borne her burden of proving a lawful denial of access.

The Complainant states that OPRA’s purpose is to promote openness in government by giving the public access to government records. The Complainant states that “any limitations on the right of access accorded by [OPRA] shall be construed in favor of the public's right of access...” N.J.S.A. 47:1A-1. The Complainant reiterates his arguments from the Denial of Access Complaint that the requested report is meant to be part of the public record. The Complainant contends that because DHSS has not previously raised the argument that the requested report is a draft, DHSS cannot now rely on that basis to argue that an otherwise public record is covered under the cited exemption.

The Complainant further contends that based on the timing of HUMC’s request for a deferment of the hearing, which came sixteen (16) days prior to said hearing, it is unlikely that the requested report would have been revised prior to dissemination to the SHPB. The Complainant argues that the timing is important to demonstrate that no changes would have been made to the report prior to being sent to the SHPB. The Complainant states that HUMC requested a deferment of the hearing on July 7, 2009 and SHPB sent out a notice of cancellation on July 9, 2009. The Complainant alleges that ordinarily, meeting packets are sent to the SHPB one (1) week prior to the meeting in order for SHPB members to review the materials; therefore, the packets likely would have went out on July 10, 2009 or July 13, 2009. The Complainant further alleges that the packets would have to be prepared one (1) to two (2) days ahead of time to allow for collating and copying. The Complainant argues that based on the foregoing, it is unlikely that any changes would have been made to the requested report in the small window of time between the hearing cancellation and date of preparation for mailing.

The Complainant contends that it is interesting that DHSS does not address the fact that the ACD exemption is a qualified exemption that can be overridden if the need for the report outweighs the public agency’s interest in disclosure. The Complainant reiterates from the Denial of Access Complaint that DHSS’s interest in confidentiality is likely low because the requested report is intended to become a public record. The Complainant further reiterates that there is ongoing litigation between HUMC and Valley and that Valley has a critical need for the requested report in connection with that litigation. The Complainant further reiterates that the record is not available anywhere else. The Complainant further notes that DHSS is also a party to the litigation. The

Complainant asserts that he has made the requisite showing of a need for the requested report that overrides DHSS's interest in confidentiality.⁷

April 1, 2010

Letter from the Custodian's Counsel to the GRC. Counsel refutes the Complainant's claim that DHSS has changed its basis for denying access to the requested report. Counsel states that per both the certifications of the Custodian and Mr. Calabria in the SOI, the staff recommendations were never finalized and remain in draft form. Counsel states that the Custodian advised in her letter to the Complainant on January 21, 2010 that DHSS deemed the requested report to be ACD material exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Counsel contends that as stated by the Custodian in her written response to the Complainant on January 19, 2010, the requested report is considered exempt from disclosure as ACD material because they are in draft form.

Counsel states that the Complainant also speculates that the requested report would not be altered prior to submission to the SHPB; however, this is only speculation. Counsel notes that per Mr. Calabria's certification, staff recommendations such as those contained in the requested report are subject to multiple revisions prior to submission to the SHPB. Counsel further notes that the fact remains that no final version of the report exists, only a draft version.

Counsel finally states that the Complainant has raised the issue of whether he has demonstrated a common law right of access to the requested report. Counsel argues that when measured against DHSS's interest in preserving the free-flow of ideas during the deliberative process, the Complainant's interest pales in comparison.⁸ Counsel argues that the requested report actually falls squarely within the definition of ACD material in that said report reflects DHSS's deliberative function that precedes formal and informed decision making.

Analysis

Whether the Custodian unlawfully denied access to the requested report?

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*

⁷ See FN. No. 5.

⁸ See FN. No. 5.

kept on file ... or that has been received in the course of his or its official business ... The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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

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

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

The Complainant filed this complaint after the Custodian denied access to the requested report as ACD material pursuant to N.J.S.A. 47:1A-1.1. The Complainant argued that the report should be disclosed because it would have become a public record once provided to the SHPB. The Complainant argued that had the HUMC not requested a deferment of the hearing at the last moment, the report and all related information would have been forwarded to the SHPB and released to the public.

The Custodian and Mr. Calabria subsequently certified in the SOI that the requested report had not yet been finalized and that said report remained in draft form. Counsel further stated that as certified by Mr. Calabria, the draft recommendations are regularly subject to revision as DHSS considers the complex information and statistics presented in CN applications. Counsel further argued that whether the requested report will someday become public is immaterial.

The Complainant argued in his response to the SOI that the DHSS changed its reasons for the denial of access. The Complainant argued that the Custodian initially denied access to the requested report under the ACD exemption. The Complainant argued that the Custodian’s Counsel thereafter argued in the SOI that the report was a draft document. The Complainant contended that because DHSS has not previously raised the argument that the requested report is a draft, DHSS cannot now rely on that basis to argue that an otherwise public record is covered under the cited exemption.

As stated by the Custodian’s Counsel in the SOI, draft documents are advisory, consultative and deliberative communications. Although OPRA broadly defines a “government record” as information either “made, maintained or kept on file in the course of [an agency’s] official business,” or “received” by an agency in the course of its official business, N.J.S.A. 47:1A-1.1, the statute also excludes from this definition a variety of documents and information. *Ibid.* See Bergen County Improvement Auth. v. North Jersey Media, 370 N.J. Super. 504, 516 (App. Div. 2004). The statute expressly provides that “inter-agency or intra-agency advisory, consultative, or deliberative

material” is not included within the definition of a government record. N.J.S.A. 47:1A-1.1.

This exemption is equivalent to the deliberative process privilege, which protects from disclosure pre-decisional records that reflect an agency’s deliberations. In re Readoption of N.J.A.C. 10A:23, 367 N.J. Super. 61, 73-74 (App. Div. 2004), cert. den. 182 N.J. 149 (2004); *see also* In re Liq. Of Integrity Ins. Co., 165 N.J. 75 (2000). As a result, OPRA “shields from disclosure documents ‘deliberative in nature, containing opinions, recommendations, or advice about agency policies,’ and ‘generated before the adoption of an agency’s policy or decision.’” Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), quoting Gannet New Jersey Partners LP v. County of Middlesex, 379 N.J. Super. 205, 219 (App. Div. 2005).

The courts have consistently held that draft records of a public agency fall within the deliberative process privilege. See U.S. v. Farley, 11 F.3d 1385 (7th Cir. 1993); Pies v. U.S. Internal Rev. Serv., 668 F.2d 1350 (D.C. Cir. 1981); N.Y.C. Managerial Employee Ass’n, v. Dinkins, 807 F.Supp., 955 (S.D.N.Y. 1992); Archer v. Cirrincione, 722 F. Supp. 1118 (S.D. N.Y. 1989); Coalition to Save Horsebarn Hill v. Freedom of Info. Comm., 73 Conn. App. 89, 806 A.2d 1130 (Conn. App. Ct. 2002); pet. for cert. den. 262 Conn. 932, 815 A.2d 132 (2003). As explained in Coalition, the entire draft document is deliberative because in draft form, it “‘reflect[s] that aspect of the agency’s function that precedes formal and informed decision making.’” *Id.* at 95, quoting Wilson v. Freedom of Info. Comm., 181 Conn. 324, 332-33, 435 A.2d 353 (1980). The New Jersey Appellate Division also has reached this conclusion with regard to draft documents. In the unreported section of In re Readoption, *supra*, the court reviewed an OPRA request to the Department of Corrections (“DOC”) for draft regulations and draft statutory revisions. The court stated that these drafts were “all clearly pre-decisional and reflective of the deliberative process.” *Id.* at 18. It further held:

“[t]he trial judge ruled that while appellant had not overcome the presumption of non-disclosure as to the entire draft, it was nevertheless entitled to those portions which were eventually adopted. Appellant appeals from the portions withheld and DOC appeals from the portions required to be disclosed. We think it plain that all these drafts, in their entirety, are reflective of the deliberative process. On the other hand, appellant certainly has full access to all regulations and statutory revisions ultimately adopted. We see, therefore, no basis justifying a conclusion that the presumption of nondisclosure has been overcome. *Ibid.* (Emphasis added.)”

Moreover, in Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), the Council held that “...the Custodian has not unlawfully denied access to the requested meeting minutes as the Custodian certifies that at the time of the request said minutes had not been approved by the governing body and as such, they constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.” The GRC held in Kohn v. Township of Livingston, GRC Complaint No. 2007-319 (July 2008), that draft documents are ACD material until the time that the draft documents are officially approved by the governing body. In Haemmerle v. Township

of Washington, GRC Complaint No. 2006-106 (June 2007), the Council held that a letter drafted by the Mayor which was neither finalized nor sent to the residents of the Township of Washington, was pre-decisional as well as deliberative and therefore exempt from public disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1.

The court similarly held that memos containing draft procedures and protocols were entirely protected from disclosure. *Id.* at 19. *See also* Edwards v. City of Jersey City, GRC Complaint No. 2002-71 (February 2004)(noting that in general, drafts are deliberative materials).

In the instant complaint, both the Custodian and Mr. Calabria certified that the requested report was still in draft form and had not yet been sent to the SHPB at the time of the Complainant's OPRA request. Moreover, Mr. Calabria certified that DHSS assists the SHPB in its review function by providing an analysis of the complex information and statistics submitted with the application and makes recommendations regarding CN applications. Mr. Calabria further certified that alterations to the report can be made at any time prior to the report being sent to the SHPB. Based on the foregoing facts, the Custodian's denial of access to the requested report is consistent with the Council's previous rulings on draft documents. Moreover, the facts of this complaint indicate that the requested report was a pre-decisional document that reflects DHSS's review of HUMC's CN application.

Therefore, the Custodian has lawfully denied access to the requested report because said report was still in draft form at the time of the Complainant's OPRA request and thus exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1. *See* Parave-Fogg, supra, Kohn, supra, Haemmerle, supra, and Edwards v. City of Jersey City, GRC Complaint No. 2002-71 (February 2004). Additionally, the Custodian has borne her burden of proving that her denial of access was lawful. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has lawfully denied access to the requested report because said report was still in draft form at the time of the Complainant's OPRA request and thus exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. *See* Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), Kohn v. Township of Livingston, GRC Complaint No. 2007-319 (July 2008), Haemmerle v. Township of Washington, GRC Complaint No. 2006-106 (June 2007), and Edwards v. City of Jersey City, GRC Complaint No. 2002-71 (February 2004). Additionally, the Custodian has borne her burden of proving that her denial of access was lawful. N.J.S.A. 47:1A-6.

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Approved By: Catherine Starghill, Esq.
Executive Director

April 20, 2011