



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**RICHARD E. CONSTABLE, III**  
*Commissioner*

**FINAL DECISION**

**March 22, 2013 Government Records Council Meeting**

Robert Maschke  
Complainant

Complaint No. 2011-261

v.

Winslow Township Fire District #1 (Camden)  
Custodian of Record

At the March 22, 2013 public meeting, the Government Records Council (“Council”) considered the March 15, 2013 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:

1. Because the Custodian on March 5, 2013, disclosed to the Complainant the 2010 Exit Conference Report redacted as directed in the Council’s Order and submitted to the GRC on March 7, 2013, certified confirmation of compliance, the Custodian complied in a timely manner with the terms of the Council’s February 26, 2013 Interim Order.
2. Although the Custodian did initially deny the Complainant access to the requested 2010 Exit Conference Report, the Custodian did so believing that the entire record was exempt from disclosure as advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-1.1. Subsequently, when ordered by the Council to disclose the requested record in redacted format, the Custodian did so in a timely manner in full compliance with the Council’s Order. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

Final Decision Rendered by the  
Government Records Council  
On The 22<sup>nd</sup> Day of March, 2013



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

Robin Berg Tabakin, Esq., Chair  
Government Records Council

**Decision Distribution Date: March 26, 2013**

STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL

Supplemental Findings and Recommendations of the Executive Director  
March 22, 2013 Council Meeting

Robert Maschke<sup>1</sup>  
Complainant

GRC Complaint No. 2011-261

v.

Winslow Township Fire District #1 (Camden)<sup>2</sup>  
Custodian of Records

**Records Relevant to Complaint:** A copy of the exit audit prepared by Bowman & Company for the year 2010.<sup>3</sup>

**Request Made:** June 5, 2011

**Response Made:** June 9, 2011

**Custodian:** Lorraine Pataky

**GRC Complaint Filed:** August 5, 2011<sup>4</sup>

**Background**

At its February 26, 2013 public meeting, the Government Records Council (“Council”) considered the February 19, 2013 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Custodian provided the GRC with a legal certification and nine (9) copies of the unredacted record requested for the *in camera* examination prior to December 28, 2012, the Custodian complied in a timely manner with the terms of the Council’s December 18, 2012 Interim Order.
2. Because Exhibit 1 of the report, “Exit Conference Summary of Audit Findings,” contains inter-agency or intra-agency advisory, consultative, or deliberative material exempt from disclosure pursuant to N.J.S.A. 47: 1A-1.1., said exhibit shall be redacted in its entirety and the Custodian shall disclose the balance of the report to the Complainant.
3. **The Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in paragraph 2 above within five (5) business days from**

---

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

<sup>2</sup> Represented by David C. Patterson, Esq., of Maressa, Patterson, LLC (Berlin, NJ).

<sup>3</sup> There were other records requested that are not relevant to this complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

**receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**

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

The Council distributed its Interim Order to all parties on February 27, 2013. The Order was received by the Custodian on February 28, 2013.<sup>5</sup> As such, the Custodian was required to submit compliance to the GRC by the close of business on March 7, 2013. On March 5, 2013, the Custodian disclosed to the Complainant via e-mail a copy of the requested 2010 Exit Conference Report with Exhibit 1 redacted. On the same date, the Custodian forwarded a copy of the correspondence to the GRC. By certification dated March 7, 2013, the Custodian certified that on March 5, 2013 she e-mailed the Complainant a copy of the 2010 Exit Conference Report with redactions as directed by the Council in its Interim Order.

### Analysis

#### Compliance

The Council's February 26, 2013 Interim Order required the Custodian, within five (5) business days from receipt of said Order, to provide the requested 2010 Exit Conference Report with Exhibit 1 redacted to the Complainant. On March 5, 2013, the third (3<sup>rd</sup>) business day following the Custodian's receipt of the Council's Interim Order, the Custodian disclosed to the Complainant the 2010 Exit Conference Report redacted as directed in the Council's Order. On March 7, 2013, the fifth (5<sup>th</sup>) business day following the Custodian's receipt of the Council's Order, the Custodian submitted a certification to the GRC setting forth the actions she took in compliance with the provisions of said Order.

Accordingly, because the Custodian on March 5, 2013, disclosed to the Complainant the 2010 Exit Conference Report redacted as directed in the Council's Order and submitted to the GRC on March 7, 2013, certified confirmation of compliance, the Custodian complied in a timely manner with the terms of the Council's February 26, 2013 Interim Order.

#### Knowing & Willful

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

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

---

<sup>5</sup> UPS Next Day Air® Proof of Delivery revealed that the Order was delivered to the Custodian on February 28, 2013 at 9:50 a.m.

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

The Custodian certified in her August 15, 2011 Statement of Information that she denied the Complainant access to the requested record because the record was prepared by an auditor for Winslow Township Fire District #1 ("District") as an internal discussion document and it was marked as confidential. As such, the Custodian certified that the requested record was a deliberative document for discussion purposes only between the auditor and District personnel and exempt from disclosure under OPRA. An *in camera* examination by the GRC revealed the requested record did indeed contain inter-agency or intra-agency advisory, consultative, or deliberative ("ACD") material exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1; however, such material was limited to Exhibit 1. As such, the Council ordered the record disclosed with Exhibit 1 redacted in its entirety. The Custodian thereafter complied in a timely manner with the terms of the Council's Order.

Although the Custodian did initially deny the Complainant access to the requested 2010 Exit Conference Report, the Custodian did so believing that the entire record was exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1. Subsequently, when ordered by the Council to disclose the requested record in redacted format, the Custodian did so in a timely manner in full compliance with the Council's Order. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian on March 5, 2013, disclosed to the Complainant the 2010 Exit Conference Report redacted as directed in the Council's Order and submitted to the GRC on March 7, 2013, certified confirmation of compliance, the Custodian complied in a timely manner with the terms of the Council's February 26, 2013 Interim Order.
2. Although the Custodian did initially deny the Complainant access to the requested 2010 Exit Conference Report, the Custodian did so believing that the entire record was exempt from disclosure as advisory, consultative, or deliberative material

pursuant to N.J.S.A. 47:1A-1.1. Subsequently, when ordered by the Council to disclose the requested record in redacted format, the Custodian did so in a timely manner in full compliance with the Council's Order. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

March 15, 2013



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

February 26, 2013 Government Records Council Meeting

Robert Maschke  
Complainant

Complaint No. 2011-261

v.

Winslow Township Fire District #1 (Camden)  
Custodian of Record

At the February 26, 2013 public meeting, the Government Records Council (“Council”) considered the February 19, 2013 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian provided the GRC with a legal certification and nine (9) copies of the unredacted record requested for the *in camera* examination prior to December 28, 2012, the Custodian complied in a timely manner with the terms of the Council’s December 18, 2012 Interim Order.
2. Because Exhibit 1 of the report, “Exit Conference Summary of Audit Findings,” contains inter-agency or intra-agency advisory, consultative, or deliberative material exempt from disclosure pursuant to N.J.S.A. 47: 1A-1.1., said exhibit shall be redacted in its entirety and the Custodian shall disclose the balance of the report to the Complainant.
3. **The Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in paragraph 2 above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.<sup>1</sup>**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

---

<sup>1</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

Interim Order Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of February, 2013

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

Robin Berg Tabakin, Esq., Chair  
Government Records Council

**Decision Distribution Date: February 27, 2013**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
February 26, 2013 Council Meeting**

**Robert Maschke<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-261**

v.

**Winslow Township Fire District #1 (Camden)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** A copy of the exit audit prepared by Bowman & Company for the year 2010.<sup>3</sup>

**Request Made:** June 5, 2011

**Response Made:** June 9, 2011

**Custodian:** Lorraine Pataky

**GRC Complaint Filed:** August 5, 2011<sup>4</sup>

**Record Submitted for *In Camera* Examination:** Township of Winslow Fire District No. 1 Exit Conference Report for the year ended December 31, 2010 (“report”) prepared by Bowman & Company (“Bowman”). The report is seventeen (17) pages in length excluding the cover page.

**Background**

**December 18, 2012**

Government Records Council’s Interim Order. At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the October 23, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* examination of the seventeen (17) page exit conference report resulting from an audit of the District’s financial statements for the year ended December 31, 2010, to determine the validity of the Custodian’s assertion that the record constitutes inter-agency or intra-agency advisory, consultative, or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

---

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

<sup>2</sup> Represented by David C. Patterson, Esq., of Maressa, Patterson, LLC (Berlin, NJ).

<sup>3</sup> There were other records requested that are not relevant to this complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

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

### **December 19, 2012**

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

### **December 24, 2012**

Certification of the Custodian dated December 19, 2012, attaching nine (9) copies of the unredacted report. This certification was submitted in response to the Council's Interim Order.

## **Analysis**

### **Whether the Custodian complied with the Council's December 18, 2012 Interim Order?**

At its December 18, 2012 public meeting, the Council determined that because the Custodian asserted that the requested record was lawfully denied as inter-agency or intra-agency advisory, consultative, or deliberative ("ACD") material exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1., the Council must determine whether the legal conclusion asserted by the Custodian was properly applied to the record at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005). Therefore, the Council ordered the GRC to conduct an *in camera* review of the requested record to determine the validity of the Custodian's assertion that the requested record was properly denied.

Accordingly, the Council ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted record, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order. Because the evidence of record reveals that the Council's Order was delivered to the Custodian on or before December 20, 2012, the Custodian was required to comply with the terms of the Order no later than December 28, 2012.<sup>5</sup> The Custodian provided the GRC with a legal

---

<sup>5</sup> UPS Next Day Air® Proof of Delivery revealed that the Order was delivered to the Custodian on December 20, 2012 at 10:59 a.m.  
Robert Maschke v. Winslow Township Fire District #1 (Camden), 2011-261 – *In Camera* Findings and Recommendations of the Executive Director

certification and nine (9) copies of the unredacted record requested for the *in camera* examination on December 24, 2012.<sup>6</sup>

Accordingly, because the Custodian provided the GRC with a legal certification and nine (9) copies of the unredacted record requested for the *in camera* examination prior to December 28, 2012, the Custodian complied in a timely manner with the terms of the Council's December 18, 2012 Interim Order.

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

The Custodian asserted that she lawfully denied the Complainant access to the requested record because it constitutes ACD material exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Conversely, the Complainant asserted that that he has reviewed all of the lawful reasons for withholding a record from disclosure under OPRA but the reason cited by the Custodian was not among them.

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

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

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

---

<sup>6</sup> The Custodian did not provide a redaction index because there was only one (1) record and that record was asserted to be exempt from disclosure in its entirety.  
Robert Maschke v. Winslow Township Fire District #1 (Camden), 2011-261 – *In Camera* Findings and Recommendations of the Executive Director 3

(1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

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

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

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

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

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

- (1) The initial burden falls on the government agency to establish that matters are both *pre-decisional* and *deliberative*.

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

Once it has been determined that a record is deliberative, there is a presumption against disclosure and the party seeking the document has the burden of establishing his or her compelling or substantial need for the record.

- a. That burden can be met by a showing of:
  - i. the importance of the information to the requesting party,
  - ii. its availability from other sources **and**
  - iii. the effect of disclosure on frank and independent discussion of contemplated government policies.

In the instant complaint, the GRC conducted an *in camera* examination on the submitted report. The report contains boilerplate provisions with respect to the scope of services, responsibilities of the parties, and certain factual findings of Bowman. This material is not therefore exempt from disclosure as ACD material notwithstanding Bowman's confidentiality statement on page 8 of the report.<sup>7</sup> However, Exhibit 1 titled

---

<sup>7</sup> This paragraph states, "[t]his report is intended solely for the information and use of those charged with governance and management of the Township of Winslow Fire District No. 1, and is not intended to be, Robert Maschke v. Winslow Township Fire District #1 (Camden), 2011-261 – *In Camera* Findings and Recommendations of the Executive Director 5

“Exit Conference Summary of Audit Findings” does contain advice and recommendations from Bowman to members of the District, and as such Exhibit 1 is ACD material exempt from disclosure pursuant to N.J.S.A. 47: 1A-1.1. Because Exhibit 1 is an attachment to the report and not part of the report proper, the Council concludes that although the exhibit does contain ACD material it does not render the entire report exempt from disclosure as ACD material. The exhibit can be effectively redacted by severing it from the balance of the report.

Accordingly, because Exhibit 1 of the report, “Exit Conference Summary of Audit Findings,” contains ACD material exempt from disclosure pursuant to N.J.S.A. 47: 1A-1.1., said exhibit shall be redacted in its entirety and the Custodian shall disclose the balance of the report to the Complainant.

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

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

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian provided the GRC with a legal certification and nine (9) copies of the unredacted record requested for the *in camera* examination prior to December 28, 2012, the Custodian complied in a timely manner with the terms of the Council’s December 18, 2012 Interim Order.
2. Because Exhibit 1 of the report, “Exit Conference Summary of Audit Findings,” contains inter-agency or intra-agency advisory, consultative, or deliberative material exempt from disclosure pursuant to N.J.S.A. 47: 1A-1.1., said exhibit shall be redacted in its entirety and the Custodian shall disclose the balance of the report to the Complainant.
3. **The Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in paragraph 2 above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**<sup>8</sup>

---

and should not be distributed to, or used by, anyone other than these specified parties. It is not to be distributed, copied, used, circulated, quoted, or excerpted for any other purpose.”

<sup>8</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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

Prepared By: John E. Stewart, Esq.

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

February 19, 2013



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

December 18, 2012 Government Records Council Meeting

Robert Maschke  
Complainant

Complaint No. 2011-261

v.

Winslow Township Fire District #1 (Camden)  
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council ("Council") considered the October 23, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* examination of the seventeen (17) page exit conference report resulting from an audit of the District's financial statements for the year ended December 31, 2010, to determine the validity of the Custodian's assertion that the record constitutes inter-agency or intra-agency advisory, consultative, or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see paragraph 1 above), a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>3</sup> that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

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

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



Interim Order Rendered by the  
Government Records Council  
On The 18<sup>th</sup> Day of December, 2012

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: December 19, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 18, 2012 Council Meeting**

**Robert Maschke<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-261**

v.

**Winslow Township Fire District #1 (Camden)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** A copy of the exit audit prepared by Bowman & Company for the year 2010.<sup>3</sup>

**Request Made:** June 5, 2011

**Response Made:** June 9, 2011

**Custodian:** Lorraine Pataky

**GRC Complaint Filed:** August 5, 2011<sup>4</sup>

**Background**

**June 5, 2011**

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.<sup>5</sup>

**June 9, 2011**

Custodian's response to the OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the fourth (4<sup>th</sup>) business day following receipt of such request. The Custodian states that access to the requested record is denied because it was prepared for the Winslow Township Fire District #1 ("District") for internal use and was marked accordingly by the preparer.

**August 5, 2011**

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

- Complainant's OPRA request dated June 5, 2011
- Custodian's response to the OPRA request dated June 9, 2011

---

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

<sup>2</sup> Represented by David C. Patterson, Esq., of Maressa, Patterson, LLC (Berlin, NJ).

<sup>3</sup> There were other records requested that are not relevant to this complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

<sup>5</sup> The Complainant did not specify a preferred method of delivery.

The Complainant states that he provided his OPRA request to the Custodian on June 5, 2011, and that the Custodian responded to the request on June 9, 2011. The Complainant also states that the Custodian denied him access to the requested record because the accounting firm stated that said record is not for public distribution. The Complainant further states that he has reviewed all of the lawful reasons for withholding a record from disclosure under OPRA but the reason cited by the Custodian was not among them.

The Complainant does not agree to mediate this complaint.

**August 8, 2011**

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

**August 15, 2011<sup>6</sup>**

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated June 5, 2011
- Custodian’s response to the OPRA request dated June 9, 2011

The Custodian certifies that the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services is not applicable; however, the Custodian also certifies that the requested record may be disposed of on written notice to and with consent of the Bureau of Archives pursuant to N.J.S.A. 47:3-17.

The Custodian certifies that she received the OPRA records request on June 5, 2011 and responded to the request on June 9, 2011. The Custodian further certifies that the record responsive to the request is a seventeen (17) page exit conference report resulting from an audit of the financial statements for the year ended December 31, 2010.

The Custodian further certifies that she denied the Complainant access to the requested record because the record was prepared by the District’s auditor as an internal discussion document and it contains the following statement:

“This report is intended solely for the information and use of those charged with governance and management of the [District], and is not intended to be, and should not be distributed to, or use (sic) by, anyone other than these specified parties. It is not to be distributed, copied, used, circulated, quoted, or excerpted for any other purpose.”

---

<sup>6</sup> The Custodian did not certify to the search undertaken to locate the records responsive or whether any records responsive to the Complainant’s OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007) because the Custodian certified that no search was necessary.

The Custodian certifies that the requested record is a deliberative document for discussion purposes only between the auditor and District personnel. The Custodian also certifies that the requested record is not a public record and the auditor's statement indicates that it cannot be disclosed.

### Analysis

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

OPRA provides that:

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

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business...[t]he terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material." N.J.S.A. 47:1A-1.1. (Emphasis added.)

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.

There is no dispute between the parties that the Custodian received the OPRA request on June 5, 2011 and responded to the request in a timely manner on June 9, 2011.

The Custodian certified that she denied the Complainant access to the requested record, a seventeen (17) page exit conference report resulting from an audit of the District's financial statements for the year ended December 31, 2010, because the record was prepared by the District's auditor as an internal discussion document and it contains a statement that asserts the report is intended solely for the information and use of District personnel.

A confidentiality statement or similar disclaimer placed on a record by its author does not, in and of itself, render such record exempt from disclosure. See Ungaro v. Town of Dover (Morris), GRC Complaint No. 2008-115 (November 2009), which held that the custodian unlawfully denied access to a record that was otherwise subject to disclosure because it contained a confidentiality clause. Therefore, the Custodian cannot point to such a statement as a valid reason for denying access. The Custodian had a duty to provide a legal explanation and statutory citation for denying the Complainant access to the requested record; however, the Custodian failed to do so.

Further, the evidence of record reveals that the record responsive to the Complainant's request was received by the District in the course of its official business. As such, it would ordinarily satisfy the definition of a government record under OPRA. Here, however, the Custodian certified that the requested record is a "deliberative document." Although the Custodian failed to provide a statutory citation for denying the Complainant access to the document, deliberative documents may be exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1., which provides that inter-agency or intra-agency advisory, consultative, or deliberative ("ACD") material is excluded from the definition of a government record.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC<sup>7</sup> in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The Court stated that:

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

The Court also stated that:

"[t]he statute also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review."

Further, the Court stated that:

---

<sup>7</sup> Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005). Robert Maschke v. Winslow Township Fire District #1 (Camden), 2011-261 – Findings and Recommendations of the Executive Director

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

Therefore, pursuant to Paff, *supra*, the GRC must conduct an *in camera* examination of the seventeen (17) page exit conference report resulting from an audit of the District’s financial statements for the year ended December 31, 2010, to determine the validity of the Custodian’s assertion that the record constitutes ACD material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

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

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

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* examination of the seventeen (17) page exit conference report resulting from an audit of the District’s financial statements for the year ended December 31, 2010, to determine the validity of the Custodian’s assertion that the record constitutes inter-agency or intra-agency advisory, consultative, or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver<sup>8</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see paragraph 1 above), a document or redaction index<sup>9</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>10</sup> that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**

<sup>8</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>9</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>10</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

Prepared By: John E. Stewart, Esq.

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

October 23, 2012<sup>11</sup>

---

<sup>11</sup> This complaint was prepared and scheduled for adjudication at the Council's October 30, 2012 meeting; however, said meeting was cancelled due to Hurricane Sandy. Additionally, the Council's November 27, 2012 was cancelled due to lack of quorum.