



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

February 25, 2014 Government Records Council Meeting

Larry A. Kohn  
Complainant

Complaint No. 2013-123

v.

Township of Livingston (Essex)  
Custodian of Record

At the February 25, 2014 public meeting, the Government Records Council (“Council”) considered the February 18, 2014 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 the Complainant has failed to establish in his request for reconsideration of the Council’s October 29, 2013 Final Decision that either 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on extraordinary circumstances. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Council already factored into the totality of the circumstances those issues raised by the Complainant in support of his argument that the Custodian unlawfully denied him access to the “budget binder.” A township’s budget is an immediate access record. N.J.S.A. 47:1A-5(e). The requested “budget binder” is not such a record, but it did constitute ACD material. N.J.S.A. 47:1A-1.1. Further, the record indicates that the “budget binder” became available for review on May 13, 2013, subsequent to the filing of the instant complaint. Thus, the Complainant’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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



Final Decision Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of February, 2014

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: February 26, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***Reconsideration***  
**Supplemental Findings and Recommendations of the Executive Director**  
**February 25, 2014 Council Meeting**

**Larry A. Kohn<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2013-123**

v.

**Township of Livingston (Essex)<sup>2</sup>**  
**Custodial Agency**

**Records Relevant to Complaint:**

1. Minutes Budget Meetings 1/28/13, 1/29/13 and 1/31/13
2. Minutes Conference meeting 3/11/13
3. Mayor & Council Budget Workbook include all material etc. handed out during budget meetings

**Custodian of Record:** Glenn Turtletaub  
**Request Received by Custodian:** April 10, 2013  
**Response Made by Custodian:** April 26, 2013  
**GRC Complaint Received:** April 29, 2013

Background<sup>3</sup>

December 20, 2013 Council Meeting:

At its December 20, 2013 public meeting, the Council considered the December 10, 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, found that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i),

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

<sup>2</sup> Represented by Sharon L. Weiner, Esq., of Murphy, McKeon, P.C. (Riverdale, NJ).

<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. The Custodian did not unlawfully deny access to the documents requested in Items #1 and #2; to the contrary, the Custodian has provided evidence to support his certification that the records responsive to this portion of the Complainant's OPRA request were disclosed. N.J.S.A. 47:1A-6; Bent v. Township of Stafford Police Department, GRC Complaint No. 2004-07 (March 11, 2004).
3. The responsive documents are reflective of the deliberative process and are exempt from access as ACD material because they contain recommendations about Township policy and were generated before the Township made a decision regarding its Municipal Budget. *See* N.J.S.A. 47:1A-1.1; In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 84-85 (2000). *See also* Education. Law Center v. New Jersey Department of Education, 198 N.J. 274, 304 (2009). Thus, the Custodian did not unlawfully deny access to the responsive records. *See* N.J.S.A. 47:1A-6.

#### Procedural History:

On December 23, 2013, the Council distributed its Final Decision to all parties. On December 31, 2013, the GRC received the Complainant's request for a "Stay of a Final Decision." On January 9, 2014, the GRC sought clarification, via email, from the Complainant regarding whether he intended to file an appeal with the Appellate Division of the Superior Courts of New Jersey or request reconsideration with the GRC. The GRC granted the Complainant ten (10) business days from the Complainant's receipt of that email to respond. On January 16, 2014 the GRC received the Complainant's request for reconsideration of the Council's Final Decision asserting mistake and extraordinary circumstances.

The Complainant disputes the Council's holding that the Custodian lawfully denied access to the requested "budget binder" because the documents are "advisory, consultative, or deliberative" ("ACD") materials exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1. The Complainant argues that he has previously received budget work papers from the Custodian, and that the Custodian did not comply with N.J.A.C. 5:30-3.5 regarding "[d]etail in support of current budget appropriation." The Complainant further argues that the requested records are immediate access records. N.J.S.A. 47:1A-5(e).

#### Reconsideration

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

In the matter before the Council, the GRC received the Complainant's initial request for a "Stay of a Final Decision" on December 31, 2013, five (5) business days from the Issuance of the Council's December 20, 2013 Final Decision. The GRC sought clarification from the Complainant and, on January 9, 2014, granted him ten (10) business days to request reconsideration. The Complainant sought a request for reconsideration of the Council's Order on January 16, 2014, five (5) business days from the GRC's email seeking clarification.

Applicable case law holds that:

A party should not seek reconsideration merely based upon dissatisfaction with a decision. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, 242 N.J. Super. at 401. "Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement." Ibid.

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

As the moving party, the Complainant was required to establish one of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings*, 295 N.J. Super. at 384. The Complainant failed to establish that the complaint should be reconsidered based on mistake or extraordinary circumstances. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See D'Atria*, 242 N.J. Super. at 401.

Specifically, the Council already factored into the totality of the circumstances those issues raised by the Complainant in support of his argument that the Custodian unlawfully denied him access to the "budget binder." A township's budget is an immediate access record. N.J.S.A. 47:1A-5(e). The requested "budget binder" is not such a record, but it did constitute ACD material. N.J.S.A. 47:1A-1.1. Further, the record indicates that the "budget binder" became available for review on May 13, 2013, subsequent to the filing of the instant complaint. Thus, the Complainant's request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D'Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Complainant has failed to establish in his request for reconsideration of the Council's October 29, 2013 Final

Decision that either 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on extraordinary circumstances. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Council already factored into the totality of the circumstances those issues raised by the Complainant in support of his argument that the Custodian unlawfully denied him access to the “budget binder.” A township’s budget is an immediate access record. N.J.S.A. 47:1A-5(e). The requested “budget binder” is not such a record, but it did constitute ACD material. N.J.S.A. 47:1A-1.1. Further, the record indicates that the “budget binder” became available for review on May 13, 2013, subsequent to the filing of the instant complaint. Thus, the Complainant’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Robert T. Sharkey, Esq.  
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.  
Senior Counsel

February 18, 2014



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
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CHRIS CHRISTIE  
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FINAL DECISION

December 20, 2013 Government Records Council Meeting

Larry A. Kohn  
Complainant

Complaint No. 2013-123

v.

Township of Livingston (Essex)  
Custodian of Record

At the December 20, 2013 public meeting, the Government Records Council (“Council”) considered the December 10, 2013 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. The Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian did not unlawfully deny access to the documents requested in Items #1 and #2; to the contrary, the Custodian has provided evidence to support his certification that the records responsive to this portion of the Complainant’s OPRA request were disclosed. N.J.S.A. 47:1A-6; Bent v. Twp. of Stafford Police Dep’t., GRC Complaint No. 2004-07 (March 11, 2004).
3. The responsive documents are reflective of the deliberative process and are exempt from access as ACD material because they contain recommendations about Township policy and were generated before the Township made a decision regarding its Municipal Budget. *See* N.J.S.A. 47:1A-1.1; In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85 (2000). *See also* Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 304 (2009). Thus, the Custodian did not unlawfully deny access to the responsive records. *See* 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 20th Day of December, 2013

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: December 23, 2013**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 20, 2013 Council Meeting**

**Larry A. Kohn<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-123**

v.

**Township of Livingston (Essex)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

1. Minutes Budget Meetings 1/28/13, 1/29/13 and 1/31/13
2. Minutes Conference meeting 3/11/13
3. Mayor & Council Budget Workbook include all material etc. handed out during budget meetings

**Custodian of Record:** Glenn Turtletaub

**Request Received by Custodian:** April 10, 2013

**Response Made by Custodian:** April 26, 2013

**GRC Complaint Received:** April 29, 2013

**Background<sup>3</sup>**

**Request and Response:**

On April 10, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 26, 2013, twelve (12) business days later, the Custodian responded in writing disclosing the requested meeting minutes and stating that the requested “Budget Workbook” and accompanying materials could not be provided at that time because the documents constituted advisory, consultative, or deliberative (“ACD”) materials.

**Denial of Access Complaint:**

On April 29, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he received no reply to his

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

<sup>2</sup> The Custodian is represented by Sharon L. Weiner, Esq. (Riverdale, NJ).

<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

April 10, 2013 OPRA request. The record indicates that the complaint was prepared on April 24, 2013, two (2) days before the Custodian provided his initial response.

Statement of Information:

On May 3, 2013, the Custodian requested an extension of time until May 17, 2013 to file a Statement of Information (“SOI”). On May 17, 2013, the Custodian filed his SOI. The Custodian certifies that he received the Complainant’s OPRA request on April 10, 2013 and responded on April 26, 2013. The Custodian further certifies that he provided the minutes for three budget meetings in January, 2013 (“Item #1”) and the minutes for a conference meeting in March, 2013 (“Item #2”) to the Complainant via email on April 26, 2013.

The Custodian states that the Township of Livingston (“Township”) Attorney advised that the documents encompassed by the Complainant’s request for the “Budget Workbook” and accompanying materials (“Item #3”) are considered exempt as ACD material until the budget is approved. The Custodian further states that Item #3 consists of several hundred pages of material, known as the “Budget Binder,” presented by the Township Manager and Township Chief Financial Officer as the “2013 Township of Livingston Municipal Funding Proposal.” The Custodian asserts that the Township properly withheld disclosure of Item #3 as ACD material in line with its past practices and GRC decisions. The Custodian additionally states, however, that because the Township’s Municipal Budget was adopted on May 13, 2013, the requested “Budget Binder” is “available for review, is offered to [the Complainant], and is available to any others who submit valid OPRA requests.”

The Custodian also asserts that he did not knowingly and willfully violate OPRA because the late response to the Complainant was due to the extended absence of two (2) employees in the Township Clerk’s Office, rather than an intentional effort by the Custodian to deny access to the records. The Custodian contends that he provided all responsive documents not exempt from disclosure at the time of the request and, as such, did not unreasonably deny access under the totality of the circumstances.

Analysis<sup>4</sup>

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>5</sup> Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of

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<sup>4</sup> There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

<sup>5</sup> A custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Here, the Complainant made his OPRA request on April 10, 2013, and the Custodian responded in writing on April 26, 2013, twelve (12) business days later, disclosing some records and denying access to others.

Therefore, the Custodian did not bear his burden of proof that he timely responded to the Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

### **Unlawful Denial of Access**

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. For example, government records “shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.” N.J.S.A. 47:1A-1.1. 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.

### **Items #1 and #2**

In Bent v. Twp. of Stafford Police Dep’t, GRC Complaint No. 2004-07 (March 11, 2004), the GRC evaluated a custodian’s certification that all records responsive to the complainant’s request had been provided. The GRC found that “in the absence of compelling evidence of [a] lack of truthfulness on the part of a [c]ustodian, the Council will not engage in speculative fact-finding when that [c]ustodian has certified as to the truthfulness of his or her response.” Id.

Here, the Custodian certified that all documents responsive to Items #1 and #2 were disclosed to the Complainant on April 26, 2013, two (2) days after the complaint was drafted but three (3) days before it was received by the GRC. The Custodian’s SOI included this April 26, 2013 response, and showed the attached meeting minutes.

Therefore, the Custodian did not unlawfully deny access to the documents requested in Items #1 and #2; to the contrary, the Custodian has provided evidence to support his certification that the records responsive to this portion of the Complainant’s OPRA request were disclosed. N.J.S.A. 47:1A-6; Bent, GRC 2004-07.

Item #3

In O’Shea v. W. Milford Bd. of Educ., GRC Complaint No. 2004-93 (April 2006), the Council stated that:

[N]either 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 predecisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies.

Id. (citing In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004)); *see also* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975) (stating that deliberative process privilege permits government agencies to withhold documents that reflect advisory opinions, recommendations, and deliberations submitted as part of processes by which governmental decisions and policies are formulated).

The New Jersey Supreme Court ruled that a record containing or involving factual components is entitled to deliberative process protection under OPRA’s ACD exemption when the document was used in the decision-making process and its disclosure would reveal deliberations that occurred during that process. *See* Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274, 280-81 (2009). In Integrity Ins. Co., the Court addressed the question of whether the Commissioner of Insurance could protect certain records from disclosure that she claimed contained opinions, recommendations, or advice regarding agency policy. Id. at 81. The Court adopted a qualified deliberative process privilege, noting 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. . . . Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies.

Id. at 84-85 (citations omitted).

The Court further set out procedural guidelines:

The 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.

Id. at 88 (citations omitted).

Here, the Custodian argued that the documents requested in Item #3 consist of financial data, narrative, recommendations, personnel discussions, and other material presented, prior to the official adoption of the Municipal Budget in May, to the Township Council as part of the Township Manager's and Township Chief Financial Officer's 2013 funding proposal. The Custodian adequately argued that requested documents meet both prongs of the Integrity Ins. Co. test: (1) the materials were generated before the Township adopted its Municipal Budget; and (2) the materials are comprised of recommendations, opinions, and advice regarding Township budgetary policy. While the Custodian has established the deliberative nature of the requested documents, the Complainant has not demonstrated a compelling or substantial need for the materials in light of the resulting presumption against disclosure. *See Integrity Ins. Co.*, 165 N.J. at 88.

Therefore, the responsive documents are reflective of the deliberative process and are exempt from access as ACD material because they contain recommendations about Township policy and were generated before the Township made a decision regarding its Municipal Budget. *See N.J.S.A. 47:1A-1.1; Integrity Ins. Co.*, 165 N.J. at 84-85. *See also Educ. Law Ctr.*, 198 N.J. at 304. Thus, the Custodian did not unlawfully deny access to the responsive records. *See N.J.S.A. 47:1A-6.*

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian did not bear his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian did not unlawfully deny access to the documents requested in Items #1 and #2; to the contrary, the Custodian has provided evidence to support his certification that the records responsive to this portion of the Complainant's OPRA request were disclosed. N.J.S.A. 47:1A-6; Bent v. Twp. of Stafford Police Dep't., GRC Complaint No. 2004-07 (March 11, 2004).
3. The responsive documents are reflective of the deliberative process and are exempt from access as ACD material because they contain recommendations about Township policy and were generated before the Township made a decision regarding its

Municipal Budget. *See* N.J.S.A. 47:1A-1.1; In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85 (2000). *See also* Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 304 (2009). Thus, the Custodian did not unlawfully deny access to the responsive records. *See* N.J.S.A. 47:1A-6.

Prepared By: Robert T. Sharkey, Esq.  
Case Manager

Approved By: Brandon D. Minde, Esq.  
Executive Director

December 10, 2013