



**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 24, 2015 Government Records Council Meeting**

David Cavagnaro  
Complainant

Complaint No. 2014-197

v.

Borough of Point Pleasant Beach (Ocean)  
Custodian of Record

At the February 24, 2015 public meeting, the Government Records Council (“Council”) considered the February 17, 2015 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. The Custodian complied with the Council’s January 30, 2015 Interim Order because she responded in the prescribed time frame providing the Report, without redactions, to the Complainant and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the original Custodian unlawfully denied access to the Report, she timely complied with the Council’s December 16, 2014 Interim Order. Further, the current Custodian timely complied with the Council’s January 30, 2015 Interim Order. Additionally, the evidence of record does not indicate that the original Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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 24<sup>th</sup> Day of February, 2015

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, 2015**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
February 24, 2015 Council Meeting**

**David Cavagnaro<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-197**

v.

**Borough of Point Pleasant Beach (Ocean)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hardcopy via pickup of the Engineer's report ("Report") on different measurement styles and his requirements for which Council requested and authorized payment.

**Custodian of Record:** Eileen Farrell<sup>3</sup>  
**Request Received by Custodian:** March 26, 2014  
**Response Made by Custodian:** March 26, 2014  
**GRC Complaint Received:** May 16, 2014

**Background**

**January 30, 2015 Council Meeting:**

At its January 30, 2015 public meeting, the Council considered the January 20, 2015 *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. The Custodian complied with the Council's December 16, 2014 Interim Order because she submitted nine (9) copies of the Report to the GRC and certified confirmation of compliance to the Executive Director within the extended time frame to comply.
2. The Custodian unlawfully denied access to the requested record because the Report does not meet the two-prong "inter-agency or intra-agency advisory, consultative, or deliberative" material test. N.J.S.A. 47:1A-6. Specifically, the Report does not contain advice, recommendations or opinions and is merely for informational

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

<sup>2</sup> Represented by Kevin B. Riordan, Esq. (Toms River, NJ).

<sup>3</sup> The original Custodian of Record was Maryann Ellsworth. However, Ms. Ellsworth retired on December 31, 2014. Additionally, Janet Mutter was named in the complaint as the custodian of record.

purposes. Thus, the Custodian must disclose the Report to the Complainant without redactions.

3. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth 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>4</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.

#### Procedural History:

On February 3, 2015, the Council distributed its Interim Order to all parties. On February 5, 2015, the Custodian e-mailed a copy of the Report to the Complainant. Further, the Custodian made hardcopies available for pickup or delivery via U.S. mail upon remittance of \$0.70.

On the same day, the Custodian responded to the Council's Interim Order. The Custodian certified that she provided the Report to the Complainant via e-mail in accordance with the Order. The Custodian further noted that she also gave the Complainant the option of retrieving a hard copy of the Report either by mail or in person upon payment of the appropriate copy cost.

#### Analysis

#### Compliance

At its January 30, 2015 meeting, the Council ordered the original Custodian to disclose the Report to the Complainant without redactions and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On February 3, 2015, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on February 10, 2015.

On February 5, 2015, the second (2<sup>nd</sup>) business day after receipt of the Council's Order, the Custodian disclosed the Report to the Complainant and provided certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's January 30, 2015 Interim Order because she responded in the prescribed time frame providing the Report, without redactions, to

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<sup>4</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.

the Complainant and simultaneously provided certified confirmation of compliance to the Executive Director.

### **Knowing & Willful**

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states “. . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder 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 (id.; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the original Custodian unlawfully denied access to the Report, she timely complied with the Council’s December 16, 2014 Interim Order. Further, the current Custodian timely complied with the Council’s January 30, 2015 Interim Order. Additionally, the evidence of record does not indicate that the original Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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. The Custodian complied with the Council’s January 30, 2015 Interim Order because she responded in the prescribed time frame providing the Report, without redactions, to the Complainant and simultaneously provided certified confirmation of compliance to the Executive Director.

2. Although the original Custodian unlawfully denied access to the Report, she timely complied with the Council's December 16, 2014 Interim Order. Further, the current Custodian timely complied with the Council's January 30, 2015 Interim Order. Additionally, the evidence of record does not indicate that the original Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the original 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: Frank F. Caruso  
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo  
Deputy Executive Director

February 17, 2015



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

January 30, 2015 Government Records Council Meeting

David Cavagnaro  
Complainant

Complaint No. 2014-197

v.

Borough of Point Pleasant Beach (Ocean)  
Custodian of Record

At the January 30, 2015 public meeting, the Government Records Council (“Council”) considered the January 20, 2015 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 complied with the Council’s December 16, 2014 Interim Order because she submitted nine (9) copies of the Report to the GRC and certified confirmation of compliance to the Executive Director within the extended time frame to comply.
2. The Custodian unlawfully denied access to the requested record because the Report does not meet the two-prong “inter-agency or intra-agency advisory, consultative, or deliberative” material test. N.J.S.A. 47:1A-6. Specifically, the Report does not contain advice, recommendations or opinions and is merely for informational purposes. Thus, the Custodian must disclose the Report to the Complainant without redactions.
3. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth 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.

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<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 30<sup>th</sup> Day of January, 2015

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 3, 2015**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
January 30, 2015 Council Meeting**

**David Cavagnaro<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-197**

v.

**Borough of Point Pleasant Beach (Ocean)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hardcopy via pickup of the Engineer's report on different measurement styles and his requirements for which Council requested and authorized payment.

**Custodian of Record:** Maryann Ellsworth<sup>3</sup>  
**Request Received by Custodian:** March 26, 2014  
**Response Made by Custodian:** March 26, 2014  
**GRC Complaint Received:** May 16, 2014

**Records Submitted for *In Camera* Examination:** Engineer's Report dated February 21, 2014 ("Report")(14 pages)

**Background**

**December 16, 2014 Council Meeting:**

At its December 16, 2014 public meeting, the Council considered the December 9, 2014 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 GRC must conduct an *in camera* review of the responsive Report to determine the validity of the Custodian's assertion that the same is "inter-agency or intra-agency advisory, consultative, or deliberative" material exempt from disclosure under OPRA. *See Paff v. NJ Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver<sup>4</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 1 above), a document or redaction**

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

<sup>2</sup> Represented by Kevin B. Riordan, Esq. (Toms River, NJ).

<sup>3</sup> Janet Mutter was named in the complaint as the custodian of record.

David Cavagnaro v. Borough of Point Pleasant Beach (Ocean), 2014-197 – *In Camera* Findings and Recommendations of the Executive Director

**index<sup>5</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>6</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.

#### Procedural History:

On December 17, 2014, the Council distributed its Interim Order to all parties. On December 26, 2014, the fifth (5<sup>th</sup>) business day after receipt of the Order, Eileen Farrell, Deputy Clerk, sought an extension of time until January 5, 2015, which the GRC granted.

On December 31, 2014, the Custodian responded to the Council's Interim Order. The Custodian certified that she is providing nine (9) copies of the Report, which is composed of a two (2) page letter, seven (7) pages of measurement sketches, and five (5) pages of surrounding municipality codes and calculations. The Custodian certified that the Borough of Point Pleasant Beach's ("Borough") Council requested the Report at its January 7, 2014 meeting to gain a better understanding of building height measurements prior to considering possible changes to the Borough's land use regulations. The Custodian noted that she consulted with the Borough attorney prior to denying access, as is the typical guidance given by the GRC.

#### Analysis

#### Compliance

On December 16, 2014, the Council ordered the Custodian to submit nine (9) copies of the Report for an *in camera* review with a document index and further to provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On December 17, 2014, the Council distributed its Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Because the Borough was closed on December 24, and 25, 2014, the last day to comply was December 26, 2014.

On December 26, 2014, the Custodian's Counsel sought an extension until January 5, 2015 to respond, which the GRC granted. On December 31, 2014, the Custodian responded to the Interim Order providing nine (9) copies of the Report and certified confirmation of compliance to the Executive Director.

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<sup>4</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>5</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>6</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."

Therefore, the Custodian complied with the Council's December 16, 2014 Interim Order because she submitted nine (9) copies of the Report to the GRC and certified confirmation of compliance to the Executive Director within the extended time frame to comply.

### **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. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful. N.J.S.A. 47:1A-6.

OPRA provides that the definition of a government record ". . . shall not include . . . inter-agency or intra-agency advisory, consultative, or deliberative [(“ACD”)] material." N.J.S.A. 47:1A-1.1. When this exception is invoked, a governmental entity may "withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." Educ. Law Center v. N.J. Dep't of Educ., 198 N.J. 274, 285 (2009)(citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975)). The custodian claiming an exception to the disclosure requirements under OPRA on this basis must initially satisfy two conditions: (1) the document must be pre-decisional, meaning that the document was generated prior to the adoption of the governmental entity's policy or decision; and (2) the document must reflect the deliberative process, which means that it must contain opinions, recommendations, or advice about agency policies. Id. at 286 (internal citations and quotations omitted).

The key factor in this determination is whether the contents of the document reflect "formulation or exercise of . . . policy-oriented judgment or the process by which policy is formulated." Id. at 295 (adopting the federal standard for determining whether material is "deliberative" and quoting Mapother v. Dep't of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). Once the governmental entity satisfies these two threshold requirements, a presumption of confidentiality is established, which the requester may rebut by showing that the need for the materials overrides the government's interest in confidentiality. Id. at 286-87.

The GRC conducted an *in camera* examination on the Report. The Report is composed of three (3) distinct parts as follows. The letter provides information as to the Borough's current method of building height measurements in use. The sketch pages provide different examples of measurements in various cases in flood or non-flood zones. The remaining pages summarize surrounding municipal ordinances on the issue.

As noted in both the Custodian's Statement of Information ("SOI") and compliance, the Borough Council requested the Report for purposes of gaining more knowledge of building height measurements in anticipation of possible changes to its land use regulations. However, the Report, on its face, does not meet the two-prong ACD test set forth in Educ. Law Ctr., because there are no opinions, recommendations or advice present therein. The Engineer does not provide advice, recommendations, or his opinions of which measurement system would work best for the Borough. He simply provides standard information as requested by the Council. Notwithstanding

that Council requested the Report to become more knowledgeable about the issue of building height measurements, there was no content therein linking same to on-going deliberations at the time of the request.

Thus, the Custodian unlawfully denied access to the requested record because the Report does not meet the two-prong ACD material test. N.J.S.A. 47:1A-6. Specifically, the Report does not contain advice, recommendations or opinions and is merely for informational purposes. Thus, the Custodian must disclose the Report to the Complainant without redactions.

### **Knowing & Willful**

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. The Custodian complied with the Council's December 16, 2014 Interim Order because she submitted nine (9) copies of the Report to the GRC and certified confirmation of compliance to the Executive Director within the extended time frame to comply.
2. The Custodian unlawfully denied access to the requested record because the Report does not meet the two-prong "inter-agency or intra-agency advisory, consultative, or deliberative" material test. N.J.S.A. 47:1A-6. Specifically, the Report does not contain advice, recommendations or opinions and is merely for informational purposes. Thus, the Custodian must disclose the Report to the Complainant without redactions.
3. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth 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>7</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.

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<sup>7</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.

Prepared By: Frank F. Caruso  
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo, Esq.  
Deputy Executive Director

January 20, 2015



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
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CHRIS CHRISTIE  
Governor

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Commissioner

INTERIM ORDER

December 16, 2014 Government Records Council Meeting

David Cavagnaro  
Complainant

Complaint No. 2014-197

v.

Borough of Point Pleasant Beach (Ocean)  
Custodian of Record

At the December 16, 2014 public meeting, the Government Records Council (“Council”) considered the December 9, 2014 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 GRC must conduct an *in camera* review of the responsive Report to determine the validity of the Custodian’s assertion that the same is “inter-agency or intra-agency advisory, consultative, or deliberative” material exempt from disclosure under OPRA. See Paff, 379 N.J. Super. at 346; 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 No. 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 16<sup>th</sup> Day of December, 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: December 17, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 16, 2014 Council Meeting**

**David Cavagnaro<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-197**

v.

**Borough of Point Pleasant Beach (Ocean)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hardcopy via pickup of the Engineer's report ("Report") on different measurement styles and his requirements for which Council requested and authorized payment.

**Custodian of Record:** Maryann Ellsworth<sup>3</sup>  
**Request Received by Custodian:** March 26, 2014  
**Response Made by Custodian:** March 26, 2014  
**GRC Complaint Received:** May 16, 2014

**Background<sup>4</sup>**

**Request and Response:**

On March 26, 2014, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On the same day, Janet Mutter responded in writing on behalf of the Custodian stating that, per Custodian's Counsel, the Report is exempt as "inter-agency or intra-agency advisory, consultative, or deliberative" ("ACD") material. Ms. Mutter noted that once deliberations have concluded, she would provide the Report to the Complainant.

**Denial of Access Complaint:**

On May 16, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant stated that, on January 7, 2014, Borough of Point Pleasant Beach ("Borough") Council ordered the Engineer to prepare the Report and authorized payment for same. The Complainant stated that he contacted the Engineer

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

<sup>2</sup> Represented by Kevin B. Riordan, Esq. (Toms River, NJ).

<sup>3</sup> Janet Mutter was named in the complaint as the custodian of record.

<sup>4</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.



on February 14, 2014 about the Report who advised that he would be providing same to the Council “in the next couple days.” Further, the Complainant noted that Engineer agreed to share the Report with him, but never forwarded same; thus, the Complainant submitted the OPRA request at issue. The Complainant stated that, subsequent to this request, he asked the Council for a status of deliberations on three (3) occasions. The Complainant averred that each time he inquired about the Report, the Council advised that deliberations were ongoing and that there was no date for disclosure of the Report.

The Complainant contended that he did not believe the Report was exempt as ACD material. The Complainant argued that the Report does not relate to a personnel or litigation matter. Further, the Complainant argued that, despite regular requests for the Report at Council meetings, the Council did not discuss or release the Report.

Statement of Information:

On May 23, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that the Borough received the Complainant’s OPRA request on March 26, 2014. The Custodian certified that, because she was not at work, Ms. Mutter forwarded the OPRA request and report to Custodian’s Counsel for his input. The Custodian affirmed that Counsel responded advising that access to the Report should be denied under N.J.S.A. 47:1A-1.1. The Custodian certified that Ms. Mutter responded on March 26, 2014 advising the Complainant that access to the Report was denied under the ACD exemption.

The Custodian certified that the Report, a 14-page document prepared by the Engineer, discusses various methods of measuring heights of structures and the advantages or disadvantages of each. The Custodian averred that the Council requested the Report to better understand the issue of whether present height ordinances were adequate in light of the changing landscape due to Hurricane Sandy. The Custodian contended that this issue posed many questions that have not yet been answered. The Custodian noted that Council, at its May 20, 2014 meeting, announced that the Zoning and Planning Boards were meeting with Custodian’s Counsel and the Council Building Committee to discuss these issues. The Custodian further noted that the Council was still gathering advice and no decision on the issue has been made.

The Custodian contended that the Report is exempt as ACD material. The Custodian stated that although OPRA defines a “government record” broadly, it expressly exempts access to ACD material. N.J.S.A. 47:1A-1.1. The Custodian stated that the ACD exemption includes the “common law deliberative process privilege.” Educ. Law Ctr. v. NJ Dep’t of Educ., 198 N.J. 274, 284 (2009). The Custodian stated that the privilege “is necessary to ensure free and uninhibited communication within governmental agencies so that the best possible decisions can be reached.” Id. at 286. Further, the Custodian averred that:

The justification for a deliberative process privilege also arises out of the desire to prevent disclosure of proposed policies before they have been fully vetted and adopted by a government agency, as well as the desire to prevent the confusion that could result from release of information concerning matters that do not bear on an agency's chosen outcome.

Id. (internal citations omitted).

The Custodian stated that, in order to invoke the ACD exemption, an agency must prove that the record at issue: 1) is pre-decisional (*i.e.* generated prior to the adoption of a policy or decision); and 2) is deliberative (*i.e.* contains opinions, recommendations or advice). Id. The Custodian also noted that purely factual material does not reflect deliberative process unless said information is used in the development of, or deliberation on, a possible action. Id. at 295.

Regarding the Report, the Custodian contended that it is clear that same is an ACD record exempt from disclosure. Specifically, the Custodian asserted that the Report contains the Engineer's discussion of various methods of measuring heights and how the Borough might implement same in response to issues arising from Hurricane Sandy.

### Analysis

#### 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. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Paff v. NJ Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council<sup>5</sup> that accepted the custodian's legal conclusion for the denial of access without further review. The Appellate Division noted 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." Id. The Court stated that:

[OPRA] 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-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

Further, the Court found that:

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<sup>5</sup> Paff v. NJ Dep't of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

We 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-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

Here, the Complainant filed his complaint with the GRC on disputing that the responsive Report was exempt as ACD material. N.J.S.A. 47:1A-1.1. Specifically, the Complainant argued that the Report did not pertain to personnel or litigation matters. However, in the SOI, the Custodian argued that the Report was created to provide the Borough Council to supplement their discussion on the sufficiency of ordinances following Hurricane Sandy. The Custodian also suggested that recommendations are present in the Report. However, the GRC must review same in order to determine the full applicability of the ACD exemption to the Report.

Therefore, the GRC must conduct an *in camera* review of the responsive Report to determine the validity of the Custodian's assertion that the same is ACD material exempt from disclosure under OPRA. *See Paff v. NJ Dep't of Labor, Bd. of Review*, 379 N.J. Super. 346 (App. Div. 2005); N.J.S.A. 47:1A-1.1.

### **Knowing & Willful**

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. The GRC must conduct an *in camera* review of the responsive Report to determine the validity of the Custodian's assertion that the same is "inter-agency or intra-agency advisory, consultative, or deliberative" material exempt from disclosure under OPRA. *See Paff*, 379 N.J. Super. at 346; N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver<sup>6</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 1 above), a document or redaction index<sup>7</sup>, as well as a legal certification from the Custodian, in accordance with**

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<sup>6</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>7</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

**N.J. Court Rule 1:4-4,<sup>8</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.

Prepared By: Frank F. Caruso  
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo, Esq.  
Acting Executive Director

December 9, 2014

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<sup>8</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."