

FINAL DECISION

December 14, 2006 Government Records Council Meeting

Thomas Allegretta
Complainant

Complaint No. 2005-132

v.

Borough of Fairview
Custodian of Record

At the December 14, 2006 public meeting, the Government Records Council (“Council”) considered the December 7, 2006 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 Custodian has substantially complied with the Council’s November 15, 2006 Interim Order.

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 14th Day of December, 2006

Vincent P. Maltese, Chairman
Government Records Council

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

Robin Berg Tabakin, Vice Chairman & Secretary
Government Records Council

Decision Distribution Date: December 19, 2006

**Supplemental Findings and Recommendations of the Executive Director
December 14, 2006 Council Meeting**

Thomas Allegretta¹
Complainant

GRC Complaint No. 2005-132

v.

Borough of Fairview²
Custodian of Records

Records Relevant to Complaint: All closed session minutes for all Council meetings for the months of December 1997, November 1999, October 2001, March 2002, December 2002, and January 2003.

Request Made: May 17, 2005

Response Made: May 25, 2005

Custodian: Diane Testa

GRC Complaint Filed: June 30, 2005

Background

November 15, 2006

Government Records Council's ("Council") Interim Order. At the November 15, 2006 public meeting, the Government Records Council ("Council") considered the November 8, 2006 *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 regarding the closed session minutes of the Mayor and Council of the Borough of Fairview held on December 3, 2002 (authorizing #02-318):

1. **Page 1:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers contained in Page 1 and the Custodian must provide access to this portion of the requested records.

¹ No legal representation listed.

² Represented by John Schettino, Esq. of Piekarsky and Schettino, LLC., located in Hackensack, NJ.

2. **Page 1, paragraph 1:** This portion of the requested minutes is not exempt from disclosure. The Custodian has not provided a lawful basis for denial of access to this portion of the requested records as it does not constitute attorney-client privileged material (N.J.S.A. 47:1A-1.1.) as claimed by the Custodian. Therefore, the Custodian unlawfully denied access to Page 1, paragraph 1 and the Custodian must provide access to this portion of the requested record.
3. **Page 1, paragraphs 2-6:** The Custodian's claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1.) does not apply to this portion of the requested minutes. While the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 1, paragraphs 2-6 of the requested minutes (with the exception of the identity of the speakers), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
4. **Page 1, paragraphs 8-13:** The Custodian's claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1.) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 1, paragraphs 8-13 of the requested minutes (with the exception of the identity of the speakers), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
5. **Page 1, paragraph 14:** The Custodian lawfully denied access to Page 1, paragraph 14 of the requested minutes (with the exception of the identity of the speaker) as attorney-client privileged material, which is exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1. as ACD material.
6. **Page 2:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 2 and the Custodian must provide access to this portion of the requested records.
7. **Page 2, paragraphs 1-5:** The Custodian lawfully denied access to **Page 2, paragraphs 1-5** of the requested minutes (with the exception of the identity of the speakers) as attorney-client privileged material, which is exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1. as ACD material.
8. **Page 2, paragraph 6:** This portion of the requested minutes is not exempt from disclosure. The Custodian has not provided a lawful basis for denial of access to this portion of the requested records as it does not constitute attorney-client privileged material (N.J.S.A. 47:1A-1.1.) as claimed by the Custodian. Therefore, the Custodian unlawfully denied access to Page 2, paragraph 6 and the Custodian must provide access to this portion of the requested record.
9. **Page 2, paragraph 7:** The Custodian's claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1.) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 1, paragraphs 8-13 of the requested minutes (with the exception of the identity of

the speakers), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

10. **Page 2, paragraph 8:** This portion of the requested minutes is not exempt from disclosure. The Custodian has not provided a lawful basis for denial of access to this portion of the requested records, as they do not constitute attorney-client privileged material (N.J.S.A. 47:1A-1.1) as claimed by the Custodian. Therefore, the Custodian unlawfully denied access to Page 2, paragraph 8, and the Custodian must provide access to this portion of the requested record.
11. **Page 2, paragraphs 9-14:** The Custodian's claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 1, paragraphs 8-13 of the requested minutes (with the exception of the identity of the speakers), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
12. **Page 3:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 3 and the Custodian must provide access to this portion of the requested records.
13. **Page 3:** The Custodian's claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 3 of the requested minutes (with the exception of the title of the document, the identities of the speakers and the page numbers), because it is ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
14. **Page 4:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 4 and the Custodian must provide access to this portion of the requested records.
15. **Page 4, paragraph 1, line 1:** The Custodian has not provided a lawful basis for denial of access to **Page 4, paragraph 1, line 1**. This portion of the requested records does not contain attorney-client privileged material (N.J.S.A. 47:1A-1.1) as claimed by the Custodian. Therefore, the Custodian unlawfully denied access to Page 4, paragraph 1, line 1 and the Custodian must provide access to this portion of the requested records.
16. **Page 4:** The Custodian's claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 4 of the requested minutes (with the exception of Page 4, paragraph 1, line 1, the title of the document, the identities of the speakers and the page numbers), because

it is ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

17. **Page 5:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 5 and the Custodian must provide access to this portion of the requested records.
18. **Page 5, paragraphs 1-6:** The Custodian's claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 5, paragraphs 1-6 of the requested minutes (with the exception of the identity of the speakers), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
19. **Page 5, paragraphs 7-10:** The Custodian lawfully denied access to Page 5, paragraphs 7-10 of the requested minutes (with the exception of the identity of the speakers) as attorney-client privileged material, which is exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1 as ACD material.
20. **Page 6:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 6, and the Custodian must provide access to this portion of the requested records.
21. **Page 6 paragraphs 1-6:** The Custodian lawfully denied access to Page 6, paragraphs 1-6 of the requested minutes (with the exception of the identity of the speakers) as attorney-client privileged material, which is exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1 as ACD material.
22. **Page 6, paragraphs 7-10:** The Custodian's claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 6, paragraphs 7-10 of the requested minutes (with the exception of the identity of the speakers), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
23. **Page 6 paragraphs 11-15:** The Custodian lawfully denied access to Page 6 paragraphs 11-15 of the requested minutes (with the exception of the identity of the speakers) as attorney-client privileged material, which is exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1 as ACD material.
24. **Page 7:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 7 and the Custodian must provide access to this portion of the requested records.

25. **Page 7:** The Custodian lawfully denied access to Page 7 of the requested minutes (with the exception of the title of the document, the identities of the speakers and the page numbers) as attorney-client privileged material, which is exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1 as ACD material.
26. **Page 8:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 8, and the Custodian must provide access to this portion of the requested records.
27. **Page 8:** The Custodian lawfully denied access to Page 8 of the requested minutes (with the exception of the title of the document, the identities of the speakers and the page numbers) as attorney-client privileged material, which is exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1 as ACD material.
28. **Page 9:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers, and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 9 and the Custodian must provide access to this portion of the requested records.
29. **Page 9, paragraphs 1-7:** The Custodian lawfully denied access to **Page 9, paragraphs 1-7** of the requested minutes (with the exception of the identity of the speakers) as attorney-client privileged material, which is exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1 as ACD material.
30. **Page 9, paragraph 8:** The Custodian's claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to **Page 9, paragraph 8** of the requested minutes (with the exception of the identity of the speaker), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
31. **Page 9, paragraphs 9-19:** The Custodian lawfully denied access to Page 9, paragraphs 9-19 of the requested minutes (with the exception of the identity of the speaker) as attorney-client privileged material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is also exempt from access pursuant to N.J.S.A. 47:1A-1.1 as information generated by a public employer containing statements of strategy and negotiating position and ACD material.
32. **Page 10:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 10 and the Custodian must provide access to this portion of the requested records.

33. **Page 10, paragraphs 1-14:** The Custodian lawfully denied access to Page 10, paragraphs 1-14 of the requested minutes (with the exception of the identity of the speaker) as attorney-client privileged material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is also exempt from access pursuant to N.J.S.A. 47:1A-1.1, as information generated by a public employer containing statements of strategy and negotiating position and ACD material.
34. **Page 10:** The Custodian has not provided a lawful basis for denial of access to the balance of Page 10. Therefore, the Custodian unlawfully denied access to Page 10 (with the exception of with the exception of **Page 10, paragraphs 1-14**, the title of the document, the identities of the speakers and the page numbers) and the Custodian must provide access to this portion of the requested records.
35. **Page 11:** The Custodian has not provided a lawful basis for denial of access to Page 11 of the requested record. Therefore, the Custodian unlawfully denied access to Page 11 and the Custodian must provide access to this portion of the requested records.

And, the Council, therefore, found that regarding the closed session minutes of the Mayor and Council of the Borough of Fairview held on December 3, 2002 (authorizing #02-319):

36. **Page 1:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers contained in Page 1 and the Custodian must provide access to this portion of the requested records.
37. **Page 1:** The Custodian lawfully denied access to **Page 1** of the requested minutes (with the exception of the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers) as information generated by a public employer containing statements of strategy and negotiating position, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1, as ACD material.
38. **Page 2:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 2 and the Custodian must provide access to this portion of the requested records.
39. **Page 2, paragraphs 1-7:** The Custodian lawfully denied access to Page 2, paragraphs 1-7 of the requested minutes (with the exception of the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers) as information generated by a public employer containing statements of strategy and negotiating position, which are

exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1, as ACD material.

40. **Page 2, paragraphs 8-15:** The Custodian's claimed exemption for information generated on behalf of a public employer relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 2, paragraphs 8-15 of the requested minutes (with the exception of the identity of the speakers), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
41. **Page 2, paragraph 16:** The Custodian has not provided a lawful basis for denial of access to this portion the requested records. Therefore, the Custodian unlawfully denied access to Page 2, paragraph 16 and the Custodian must provide access to this portion of the requested records.
42. **Page 2, paragraph 17:** The Custodian's claimed exemption for information generated on behalf of a public employer relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 2, paragraph 17 of the requested minutes (with the exception of the identity of the speaker), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
43. **Page 2, paragraph 18:** The Custodian has not provided a lawful basis for denial of access to this portion the requested records. Therefore, the Custodian unlawfully denied access to Page 2, paragraph 18 and the Custodian must provide access to this portion of the requested records.
44. **Page 3:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers, and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 3 and the Custodian must provide access to this portion of the requested records.
45. **Page 3, paragraphs 1-4:** The Custodian's claimed exemption for information generated on behalf of a public employer relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 3, paragraphs 1-4 of the requested minutes (with the exception of the identity of the speaker), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
46. **Page 3, paragraph 5:** The Custodian has not provided a lawful basis for denial of access to this portion the requested records. Therefore, the Custodian unlawfully denied access to Page 3, paragraph 5, and the Custodian must provide access to this portion of the requested records.
47. **Page 3, paragraphs 6-16:** The Custodian's claimed exemption for information generated on behalf of a public employer relating to collective negotiation

strategy and negotiating position (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 3, paragraphs 6-16 of the requested minutes (with the exception of the identity of the speaker), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

48. **Page 3, paragraph 17:** The Custodian lawfully denied access to Page 3, paragraph 17 of the requested minutes (with the exception of the identity of the speaker) as information generated by a public employer containing statements of strategy and negotiating position, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is also exempt from access pursuant to N.J.S.A. 47:1A-1.1 as attorney-client privileged material and ACD material.
49. **Page 4:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers, and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 4 and the Custodian must provide access to this portion of the requested records.
50. **Page 4, paragraph 1:** The Custodian lawfully denied access to Page 4, paragraph 1 of the requested minutes (with the exception of the identity of the speaker) as information generated by a public employer containing statements of strategy and negotiating position, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is also exempt from access pursuant to N.J.S.A. 47:1A-1.1 as attorney-client privileged material and ACD material.
51. **Page 4, paragraph 2:** The Custodian lawfully denied access to **Page 4, paragraph 2** of the requested minutes (with the exception of the identity of the speaker) as information generated by a public employer containing statements of strategy and negotiating position, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1 as ACD material.
52. **Page 4, paragraphs 3-8:** The Custodian lawfully denied access to **Page 4, paragraphs 3-8** of the requested minutes (with the exception of the identity of the speaker) as information generated by a public employer containing statements of strategy and negotiating position, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is also exempt from access pursuant to N.J.S.A. 47:1A-1.1 as attorney-client privileged material and ACD material.
53. **Page 4, paragraph 9:** The Custodian has not provided a lawful basis for denial of access to this portion the requested records. Therefore, the Custodian unlawfully denied access to Page 4, paragraph 9 and the Custodian must provide access to this portion of the requested records.
54. **Page 4, paragraphs 10-14:** The Custodian's claimed exemption for information generated on behalf of a public employer relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not

provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 4, paragraphs 10-14 of the requested minutes (with the exception of the identity of the speaker), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

55. **Page 5:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers, and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 5 and the Custodian must provide access to this portion of the requested records.
56. **Page 5:** The Custodian's claimed exemption for information generated on behalf of a public employer relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to **Page 5** of the requested minutes (with the exception of the identity of the speaker), because it is ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
57. **Page 6:** The Custodian has not provided a lawful basis for denial of access to Page 6 of the requested record. Therefore, the Custodian unlawfully denied access to Page 6 and the Custodian must provide access to this portion of the requested records.
58. The Custodian shall comply with "1. - 57." within five (5) business days from receipt of this decision on the basis of the Council's above determination and provide certified confirmation to the Executive Director that the Custodian has complied with the Council's decision.

November 21, 2006

Council's Interim Order distributed to the parties.

December 4, 2006

Custodian's response to the Council's Interim Order. The Custodian legally certifies that she provided the Complainant the requested record, in a form redacted pursuant to the provisions of the Council's Interim Order by Monday, December 4, 2006.

Analysis

Whether the Custodian complied with the Council's November 15, 2006 Interim Order?

The Custodian legally certifies that she provided the Complainant the requested record, in a form redacted pursuant to the provisions of the Council's Interim Order by

Monday, December 4, 2006. The Custodian has, therefore, substantially complied with the Council's November 15, 2006 Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has substantially complied with the Council's November 15, 2006 Interim Order.

Prepared By:

Sayantani Dasgupta, Esq.
In-House Counsel

Approved By:

Catherine Starghill, Esq.
Executive Director

December 7, 2006

INTERIM ORDER 1

November 15, 2006 Government Records Council Meeting

Thomas Allegretta
Complainant

Complaint No. 2005-132

v.

Borough of Fairview
Custodian of Record

At the November 15, 2006 public meeting, the Government Records Council (“Council”) considered the November 8, 2006 *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 regarding the closed session minutes of the Mayor and Council of the Borough of Fairview held on December 3, 2002 (authorizing #02-318):

59. **Page 1:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers contained in Page 1 and the Custodian must provide access to this portion of the requested records.
60. **Page 1, paragraph 1:** This portion of the requested minutes is not exempt from disclosure. The Custodian has not provided a lawful basis for denial of access to this portion of the requested records as it does not constitute attorney-client privileged material (N.J.S.A. 47:1A-1.1.) as claimed by the Custodian. Therefore, the Custodian unlawfully denied access to Page 1, paragraph 1 and the Custodian must provide access to this portion of the requested record.
61. **Page 1, paragraphs 2-6:** The Custodian’s claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1.) does not apply to this portion of the requested minutes. While the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 1, paragraphs 2-6 of the requested minutes (with the exception of the identity of the speakers), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
62. **Page 1, paragraphs 8-13:** The Custodian’s claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1.) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 1, paragraphs 8-13 of the requested minutes (with the exception of the identity of the speakers), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

- 63. Page 1, paragraph 14:** The Custodian lawfully denied access to Page 1, paragraph 14 of the requested minutes (with the exception of the identity of the speaker) as attorney-client privileged material, which is exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1 as ACD material.
- 64. Page 2:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 2 and the Custodian must provide access to this portion of the requested records.
- 65. Page 2, paragraphs 1-5:** The Custodian lawfully denied access to **Page 2, paragraphs 1-5** of the requested minutes (with the exception of the identity of the speakers) as attorney-client privileged material, which is exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1 as ACD material.
- 66. Page 2, paragraph 6:** This portion of the requested minutes is not exempt from disclosure. The Custodian has not provided a lawful basis for denial of access to this portion of the requested records as it does not constitute attorney-client privileged material (N.J.S.A. 47:1A-1.1) as claimed by the Custodian. Therefore, the Custodian unlawfully denied access to Page 2, paragraph 6 and the Custodian must provide access to this portion of the requested record.
- 67. Page 2, paragraph 7:** The Custodian's claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 1, paragraphs 8-13 of the requested minutes (with the exception of the identity of the speakers), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
- 68. Page 2, paragraph 8:** This portion of the requested minutes is not exempt from disclosure. The Custodian has not provided a lawful basis for denial of access to this portion of the requested records, as they do not constitute attorney-client privileged material (N.J.S.A. 47:1A-1.1) as claimed by the Custodian. Therefore, the Custodian unlawfully denied access to Page 2, paragraph 8, and the Custodian must provide access to this portion of the requested record.
- 69. Page 2, paragraphs 9-14:** The Custodian's claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 1, paragraphs 8-13 of the requested minutes (with the exception of the identity of the speakers), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
- 70. Page 3:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document,

the identities of the speakers and the page numbers contained in Page 3 and the Custodian must provide access to this portion of the requested records.

71. **Page 3:** The Custodian's claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1.) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 3 of the requested minutes (with the exception of the title of the document, the identities of the speakers and the page numbers), because it is ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
72. **Page 4:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 4 and the Custodian must provide access to this portion of the requested records.
73. **Page 4, paragraph 1, line 1:** The Custodian has not provided a lawful basis for denial of access to **Page 4, paragraph 1, line 1.** This portion of the requested records does not contain attorney-client privileged material (N.J.S.A. 47:1A-1.1.) as claimed by the Custodian. Therefore, the Custodian unlawfully denied access to Page 4, paragraph 1, line 1 and the Custodian must provide access to this portion of the requested records.
74. **Page 4:** The Custodian's claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1.) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 4 of the requested minutes (with the exception of Page 4, paragraph 1, line 1, the title of the document, the identities of the speakers and the page numbers), because it is ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
75. **Page 5:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 5 and the Custodian must provide access to this portion of the requested records.
76. **Page 5, paragraphs 1-6:** The Custodian's claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1.) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 5, paragraphs 1-6 of the requested minutes (with the exception of the identity of the speakers), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
77. **Page 5, paragraphs 7-10:** The Custodian lawfully denied access to Page 5, paragraphs 7-10 of the requested minutes (with the exception of the identity of the speakers) as attorney-client privileged material, which is exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1. as ACD material.

78. **Page 6:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 6, and the Custodian must provide access to this portion of the requested records.
79. **Page 6 paragraphs 1-6:** The Custodian lawfully denied access to Page 6, paragraphs 1-6 of the requested minutes (with the exception of the identity of the speakers) as attorney-client privileged material, which is exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1 as ACD material.
80. **Page 6, paragraphs 7-10:** The Custodian's claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 6, paragraphs 7-10 of the requested minutes (with the exception of the identity of the speakers), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
81. **Page 6 paragraphs 11-15:** The Custodian lawfully denied access to Page 6 paragraphs 11-15 of the requested minutes (with the exception of the identity of the speakers) as attorney-client privileged material, which is exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1 as ACD material.
82. **Page 7:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 7 and the Custodian must provide access to this portion of the requested records.
83. **Page 7:** The Custodian lawfully denied access to Page 7 of the requested minutes (with the exception of the title of the document, the identities of the speakers and the page numbers) as attorney-client privileged material, which is exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1 as ACD material.
84. **Page 8:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 8, and the Custodian must provide access to this portion of the requested records.
85. **Page 8:** The Custodian lawfully denied access to Page 8 of the requested minutes (with the exception of the title of the document, the identities of the speakers and the page numbers) as attorney-client privileged material, which is exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1 as ACD material.
86. **Page 9:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers, and the page numbers.

Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 9 and the Custodian must provide access to this portion of the requested records.

87. **Page 9, paragraphs 1-7:** The Custodian lawfully denied access to **Page 9, paragraphs 1-7** of the requested minutes (with the exception of the identity of the speakers) as attorney-client privileged material, which is exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1 as ACD material.
88. **Page 9, paragraph 8:** The Custodian's claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to **Page 9, paragraph 8** of the requested minutes (with the exception of the identity of the speaker), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
89. **Page 9, paragraphs 9-19:** The Custodian lawfully denied access to Page 9, paragraphs 9-19 of the requested minutes (with the exception of the identity of the speaker) as attorney-client privileged material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is also exempt from access pursuant to N.J.S.A. 47:1A-1.1 as information generated by a public employer containing statements of strategy and negotiating position and ACD material.
90. **Page 10:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 10 and the Custodian must provide access to this portion of the requested records.
91. **Page 10, paragraphs 1-14:** The Custodian lawfully denied access to Page 10, paragraphs 1-14 of the requested minutes (with the exception of the identity of the speaker) as attorney-client privileged material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is also exempt from access pursuant to N.J.S.A. 47:1A-1.1 as information generated by a public employer containing statements of strategy and negotiating position and ACD material.
92. **Page 10:** The Custodian has not provided a lawful basis for denial of access to the balance of Page 10. Therefore, the Custodian unlawfully denied access to Page 10 (with the exception of with the exception of **Page 10, paragraphs 1-14**, the title of the document, the identities of the speakers and the page numbers) and the Custodian must provide access to this portion of the requested records.
93. **Page 11:** The Custodian has not provided a lawful basis for denial of access to Page 11 of the requested record. Therefore, the Custodian unlawfully denied access to Page 11 and the Custodian must provide access to this portion of the requested records.

Regarding the closed session minutes of the Mayor and Council of the Borough of Fairview held on December 3, 2002 (authorizing #03-319):

94. **Page 1:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers contained in Page 1 and the Custodian must provide access to this portion of the requested records.
95. **Page 1:** The Custodian lawfully denied access to **Page 1** of the requested minutes (with the exception of the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers) as information generated by a public employer containing statements of strategy and negotiating position, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1, as ACD material.
96. **Page 2:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 2 and the Custodian must provide access to this portion of the requested records.
97. **Page 2, paragraphs 1-7:** The Custodian lawfully denied access to Page 2, paragraphs 1-7 of the requested minutes (with the exception of the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers) as information generated by a public employer containing statements of strategy and negotiating position, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1, as ACD material.
98. **Page 2, paragraphs 8-15:** The Custodian's claimed exemption for information generated on behalf of a public employer relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 2, paragraphs 8-15 of the requested minutes (with the exception of the identity of the speakers), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
99. **Page 2, paragraph 16:** The Custodian has not provided a lawful basis for denial of access to this portion the requested records. Therefore, the Custodian unlawfully denied access to Page 2, paragraph 16 and the Custodian must provide access to this portion of the requested records.
100. **Page 2, paragraph 17:** The Custodian's claimed exemption for information generated on behalf of a public employer relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not

provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 2, paragraph 17 of the requested minutes (with the exception of the identity of the speaker), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

101. **Page 2, paragraph 18:** The Custodian has not provided a lawful basis for denial of access to this portion the requested records. Therefore, the Custodian unlawfully denied access to Page 2, paragraph 18 and the Custodian must provide access to this portion of the requested records.
102. **Page 3:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers, and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 3 and the Custodian must provide access to this portion of the requested records.
103. **Page 3, paragraphs 1-4:** The Custodian's claimed exemption for information generated on behalf of a public employer relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 3, paragraphs 1-4 of the requested minutes (with the exception of the identity of the speaker), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
104. **Page 3, paragraph 5:** The Custodian has not provided a lawful basis for denial of access to this portion the requested records. Therefore, the Custodian unlawfully denied access to Page 3, paragraph 5, and the Custodian must provide access to this portion of the requested records.
105. **Page 3, paragraphs 6-16:** The Custodian's claimed exemption for information generated on behalf of a public employer relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 3, paragraphs 6-16 of the requested minutes (with the exception of the identity of the speaker), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
106. **Page 3, paragraph 17:** The Custodian lawfully denied access to Page 3, paragraph 17 of the requested minutes (with the exception of the identity of the speaker) as information generated by a public employer containing statements of strategy and negotiating position, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is also exempt from access pursuant to N.J.S.A. 47:1A-1.1. as attorney-client privileged material and ACD material.
107. **Page 4:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers, and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in

Page 4 and the Custodian must provide access to this portion of the requested records.

108. **Page 4, paragraph 1:** The Custodian lawfully denied access to Page 4, paragraph 1 of the requested minutes (with the exception of the identity of the speaker) as information generated by a public employer containing statements of strategy and negotiating position, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is also exempt from access pursuant to N.J.S.A. 47:1A-1.1 as attorney-client privileged material and ACD material.
109. **Page 4, paragraph 2:** The Custodian lawfully denied access to **Page 4, paragraph 2** of the requested minutes (with the exception of the identity of the speaker) as information generated by a public employer containing statements of strategy and negotiating position, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1 as ACD material.
110. **Page 4, paragraphs 3-8:** The Custodian lawfully denied access to **Page 4, paragraphs 3-8** of the requested minutes (with the exception of the identity of the speaker) as information generated by a public employer containing statements of strategy and negotiating position, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is also exempt from access pursuant to N.J.S.A. 47:1A-1.1 as attorney-client privileged material and ACD material.
111. **Page 4, paragraph 9:** The Custodian has not provided a lawful basis for denial of access to this portion the requested records. Therefore, the Custodian unlawfully denied access to Page 4, paragraph 9 and the Custodian must provide access to this portion of the requested records.
112. **Page 4, paragraphs 10-14:** The Custodian's claimed exemption for information generated on behalf of a public employer relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 4, paragraphs 10-14 of the requested minutes (with the exception of the identity of the speaker), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
113. **Page 5:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers, and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 5 and the Custodian must provide access to this portion of the requested records.
114. **Page 5:** The Custodian's claimed exemption for information generated on behalf of a public employer relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to **Page 5** of the requested minutes (with the exception of the identity of the speaker),

because it is ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

115. **Page 6:** The Custodian has not provided a lawful basis for denial of access to Page 6 of the requested record. Therefore, the Custodian unlawfully denied access to Page 6 and the Custodian must provide access to this portion of the requested records.

116. **The Custodian shall comply with “1. - 57.” within five (5) business days from receipt of this decision on the basis of the Council’s above determination and provide certified confirmation to the Executive Director that the Custodian has complied with the Council’s decision.**

Interim Order Rendered by the
Government Records Council
On The 15th Day of November, 2006

Vincent P. Maltese, Chairman
Government Records Council

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

Robin Berg Tabakin, Vice Chairman & Secretary
Government Records Council

Decision Distribution Date: November 21, 2006

***In Camera* Findings and Recommendations of the Executive Director
November 15, 2006 Council Meeting**

Thomas Allegretta³
132

GRC Complaint No. 2005-132

Complainant

v.

Borough of Fairview⁴
Custodian of Records

Records Relevant to Complaint:

All closed session minutes for all Council meetings for the months of December 1997, November 1999, October 2001, March 2002, December 2002, and January 2003.

~~Request Made: May 17, 2005~~

~~Response Made: May 25, 2005~~

~~Custodian: Diane Testa~~

~~GRC Complaint filed: June 30, 2005~~

Background

July 13, 2006

Interim Order of the Government Records Council. At the July 13, 2006 public meeting, the Government Records Council (“Council”) considered the July 6, 2006 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 found that:

1. With regard to 10/16/2001 R01-264, pursuant to N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. the Custodian’s failure to properly notify the Complainant of a lawful basis for denial of access and the delay in access to these records constitutes a deemed unlawful denial of access.
2. The potential reasons for denying access to 12/3/2002 R-02-318 and 12/3/2002 R-02-319 claimed by the Custodian are compelling, but it cannot be determined whether the facts of this complaint support the denial of access to the redacted portions of the requested records. Therefore, an *in camera* review of these unredacted requested records is necessary to determine what information, if any, is exempt from disclosure.

³ No legal representation listed.

⁴ Represented by John Schettino, Esq. of Piekarsky and Schettino, LLC., located in Hackensack, NJ.

3. The document 05/17/2005 R-05131 was not made, maintained or kept on file at the time of the Complainant's May 17, 2005 OPRA request therefore, there is no denial of access to this document.
4. With regard to 12/17/2002 R-02-335, pursuant to N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. the Custodian's failure to properly notify the Complainant of a lawful basis for denial of access and the delay in access to these records constitutes a deemed unlawful denial of access.
5. With regard to the closed session minutes indicated in the Custodian's index as 12/30/97 pursuant to N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g., the Custodian's failure to properly notify the Complainant of a lawful basis for denial of access or delay in access to these records constitutes a deemed unlawful denial of access.
6. The Custodian has acted improperly in not redacting the requested documents according to GRC guidelines.
7. Based on N.J.S.A. 47:1A-7.b., the GRC does not have authority adjudicate whether a Custodian has complied with OPMA or any statute other than OPRA.
8. In light of the legal standards set forth above and the fact that the Custodian has ultimately released those documents for which no specific exemption might exist, the Custodian's actions do not meet the legal standard for a knowing and willful violation pursuant to OPRA or unreasonable denial of access under the totality of the circumstances in this case. However, the Custodian's actions do appear to be at least negligent regarding his knowledge of OPRA.

July 19, 2006

Interim Decision and *in camera* letter requesting documents sent to both parties.

July 26, 2006

Certification of the Custodian with the following attachments:

- Six (6) copies of the unredacted requested records,
- Legally certified index dated January 4, 2006, and
- Legal certification stating that the documents provided are the meeting minutes, 12/3/2002 R-02-318 and 12/3/2002 R-02-319, requested for the *in camera* inspection.

Analysis

Whether the Custodian lawfully denied access to the requested eleven (11) pages of minutes; “*Closed Session Minutes of the Mayor and Council of the Borough of Fairview: Held on December 3, 2002 at the Fairview Council Chambers Authorizing #02-318*”?

OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or*

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

OPRA states that:

“[a] government record shall not include **the following information which is deemed to be confidential** for the purposes of [OPRA] as amended and supplemented...information generated by or on behalf of public employers or public employees in connection with... *any record within the attorney-client privilege... collective negotiations, including documents and statements of strategy or negotiating position...*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

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.” That privilege has long been recognized by federal courts. See Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958); NLRB v. Sears, Roebuck, & Co., 421 U.S. 132, 150 (1975). It has also been codified in the federal Freedom of Information Act (“FOIA”). 5 U.S.C. §552(b)(5). Most recently, the New Jersey Supreme Court adopted the privilege. In re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000).

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.
 - c. Deliberative materials do not include purely factual materials.

- d. 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.
- e. 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*.
- f. 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*.
- g. 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*.

The Custodian in this case has asserted that the requested executive session minutes 12/3/2002 R-02-318 cannot be disclosed pursuant to N.J.S.A. 47:1A-1.1., because the documents contain information protected under the attorney-client privilege.

After completing the *in camera* inspection of 12/3/2002 R-02-318, the Council should find that:

Page 1: The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers. This portion of the requested records does not contain attorney-client privileged material (N.J.S.A. 47:1A-1.1.) as claimed by the Custodian. This information does not reflect communications between a client and his attorney for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. There is no other apparent exemption in OPRA that applies to this information. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers contained in **Page 1** and the Custodian must provide access to this portion of the requested records.

Page 1, paragraph 1 is not exempt from disclosure. The Custodian has not provided a lawful basis for denial of access to this portion of the requested records as it does not constitute attorney-client privileged material (N.J.S.A. 47:1A-1.1.) as claimed by the Custodian. This information does not reflect communications between a client and his attorney for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. There is no other apparent exemption in OPRA that applies to this information. Therefore, the Custodian

unlawfully denied access to **Page 1, paragraph 1** and the Custodian must provide access to this portion of the requested record.

Page 1, paragraphs 2-6 of the requested minutes (with the exception of the identity of the speakers) contain information and opinions relating to retirement benefits that may be offered to a certain named employee. This information is advisory, consultative and deliberative (“ACD material”) material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. These portions of the minutes are *pre-decisional* in that they were generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they contain opinions, recommendations and advice about policy as well as proposals, suggestions, and other subjective information which reflect the personal opinions of the speaker, rather than the policy of the agency. While the Custodian asserts that the requested records contain information that is attorney-client privileged material (N.J.S.A. 47:1A-1.1), this exemption does not apply to this portion of the requested minutes. **Page 1, paragraphs 2-6** do not reflect communications between a client and his attorney for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer.

Therefore, although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to **Page 1, paragraphs 2-6** of the requested minutes (with the exception of the identity of the speakers), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Page 1, paragraph 7 is exempt from disclosure (with the exception of the identity of the speaker) pursuant to N.J.S.A. 47:1A-1.1, because it is attorney-client privileged information as asserted by the Custodian. This portion of the requested record contains legal advice exchanged between the Borough Attorney and the Council regarding retirement benefits that may be offered to a certain named employee for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. Therefore, this information is exempt from disclosure (with the exception of the identity of the speaker) pursuant to N.J.S.A. 47:1A-1.1 because it is protected by the attorney-client privilege.

Additionally, **Page 1, paragraph 7** is ACD material. This information is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. This portion of the minutes is ACD material in that it contains opinions regarding the retirement benefits that may be offered to a certain named employee. This portion of the minutes is *pre-decisional* in that it was generated before the agency adopted or reached its decision. This portion of the minutes is also *deliberative* in that it contains opinions, recommendations and advice about policy as well as proposals, suggestions, and other subjective information which reflect the personal opinions of the speaker, rather than the policy of the agency. Therefore, this information is also exempt from disclosure (with the exception of the identity of the speaker) pursuant to N.J.S.A. 47:1A-1.1 as ACD material.

Based on the conclusions above, the Custodian lawfully denied access to **Page 1, paragraph 7** of the requested minutes (with the exception of the identity of the speaker) as attorney-client privileged material, which is exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1 as ACD material.

Page 1, paragraphs 8-13 of the requested minutes (with the exception of the identity of the speakers) contain information and opinions relating to retirement benefits that may be offered to a certain named employee. This information is ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. These portions of the minutes are *pre-decisional* in that they were generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they contain opinions, recommendations and advice about policy as well as proposals, suggestions, and other subjective information which reflect the personal opinions of the speaker, rather than the policy of the agency. While the Custodian asserts that the requested records contain information that is attorney-client privileged material (N.J.S.A. 47:1A-1.1), this exemption does not apply to this portion of the requested minutes. **Page 1, paragraphs 8-13** do not reflect communications between a client and his attorney for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer.

Therefore, although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to **Page 1, paragraphs 8-13** of the requested minutes (with the exception of the identity of the speaker), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Page 1, paragraph 14 is exempt from disclosure (with the exception of the identity of the speaker) pursuant to N.J.S.A. 47:1A-1.1, because it is attorney-client privileged information as asserted by the Custodian. This portion of the requested record contains legal advice exchanged between the Borough Attorney and the Council regarding retirement benefits that may be offered to a certain named employee for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. Therefore, this information is exempt from disclosure (with the exception of the identity of the speaker) pursuant to N.J.S.A. 47:1A-1.1 because it is protected by the attorney-client privilege.

Additionally, **Page 1, paragraph 14** is ACD material. This information is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. These portions of the minutes are ACD material in that it contains opinions regarding the retirement benefits that may be offered to a certain named employee. These portions of the minutes are *pre-decisional* in that they were generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they contain opinions, recommendations and advice about policy as well as proposals, suggestions, and other subjective information which reflect the personal opinions of the speaker, rather than the policy of the agency. Therefore, this

information is also exempt from disclosure (with the exception of the identity of the speaker) pursuant to N.J.S.A. 47:1A-1.1 as ACD material.

Based on the conclusions above, the Custodian lawfully denied access to **Page 1, paragraph 14** of the requested minutes (with the exception of the identity of the speaker) as attorney-client privileged material, which is exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1 as ACD material.

Page 2: The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. This portion of the requested records does not contain attorney-client privileged material (N.J.S.A. 47:1A-1.1) as claimed by the Custodian. This information does not reflect communications between a client and his attorney for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. There is no other apparent exemption in OPRA that applies to this information. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in **Page 2** and the Custodian must provide access to this portion of the requested records.

Page 2, paragraphs 1-5 are exempt from disclosure (with the exception of the identity of the speaker) pursuant to N.J.S.A. 47:1A-1.1, because they are attorney-client privileged information as asserted by the Custodian. These portions of the requested record contain legal advice exchanged between the Borough Attorney and the Council regarding retirement benefits that may be offered to a certain named employee for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. Therefore, this information is exempt from disclosure (with the exception of the identity of the speaker) pursuant to N.J.S.A. 47:1A-1.1 because it is protected by the attorney-client privilege.

Additionally, **Page 2, paragraphs 1-5** are ACD material. This information is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. These portions of the minutes are ACD material in that they contain opinions regarding the retirement benefits that may be offered to a certain named employee. These portions of the minutes are *pre-decisional* in that they were generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they contain opinions, recommendations and advice about policy as well as proposals, suggestions, and other subjective information which reflect the personal opinions of the speaker, rather than the policy of the agency. Therefore, this information is also exempt from disclosure (with the exception of the identity of the speaker) pursuant to N.J.S.A. 47:1A-1.1 as ACD material.

Based on the conclusions above, the Custodian lawfully denied access to **Page 2, paragraphs 1-5** of the requested minutes (with the exception of the identity of the speaker) as attorney-client privileged material, which are exempt from access pursuant

to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1. as ACD material.

Page 2, paragraph 6 is not exempt from disclosure. The Custodian has not provided a lawful basis for denial of access to this portion of the requested records as it does not constitute attorney-client privileged material (N.J.S.A. 47:1A-1.1.) as claimed by the Custodian. This information does not reflect communications between a client and his attorney for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. There is no other apparent exemption in OPRA that applies to this information. Therefore, the Custodian unlawfully denied access **Page 2, paragraph 6** of the requested minutes and the Custodian must provide access to this portion of the requested records.

Page 2, paragraph 7 of the requested minutes (with the exception of the identity of the speaker) contains information and opinions relating to retirement benefits that may be offered to a certain named employee. This information is ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. This portion of the minutes is *pre-decisional* in that it was generated before the agency adopted or reached its decision. This portion of the minutes is also *deliberative* in that it may inaccurately reflect or prematurely disclose the views of the agency, suggesting an agency position that which is only a personal opinion. While the Custodian asserts that the requested records contain information that is attorney-client privileged material (N.J.S.A. 47:1A-1.1), this exemption does not apply to this portion of the requested minutes. **Page 2, paragraph 7** does not reflect communications between a client and his attorney for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer.

Therefore, although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to **Page 2, paragraph 7** of the requested minutes (with the exception of the identity of the speaker), because it is ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Page 2, paragraph 8 is not exempt from disclosure. The Custodian has not provided a lawful basis for denial of access to this portion of the requested records as it does not constitute attorney-client privileged material (N.J.S.A. 47:1A-1.1.) as claimed by the Custodian. This information does not reflect communications between a client and his attorney and his attorney for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. There is no apparent exemption in OPRA that applies to this information. Therefore, the Custodian unlawfully denied access **Page 2, paragraph 8** of the requested minutes and the Custodian must provide access to this portion of the requested records.

Page 2, paragraphs 9-14 of the requested minutes (with the exception of the identity of the speakers) contain information and opinions relating to retirement benefits that may be offered to a certain named employee. This information is ACD material, which

is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. These portions of the minutes are *pre-decisional* in that they were generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they may inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is only a personal opinion. While the Custodian asserts that the requested records contain information that is attorney-client privileged material (N.J.S.A. 47:1A-1.1), this exemption does not apply to this portion of the requested minutes. **Page 2, paragraphs 9-14** does not reflect communications between a client and his attorney for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer.

Therefore, although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to **Page 2, paragraphs 9-14** of the requested minutes (with the exception of the identity of the speaker), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Page 3: The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. This portion of the requested records does not contain attorney-client privileged material (N.J.S.A. 47:1A-1.1) as claimed by the Custodian. This information does not reflect communications between a client and his attorney for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. There is no other apparent exemption in OPRA that applies to this information. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in **Page 3** and the Custodian must provide access to this portion of the requested records.

Page 3 of the requested minutes (with the exception of the title of the document, the identities of the speakers and the page numbers) contains information and opinions relating to retirement benefits that may be offered to a certain named employee. This information is ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. These portions of the minutes are *pre-decisional* in that they were generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they may inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is only a personal opinion. While the Custodian asserts that the requested records contain information that is attorney-client privileged material (N.J.S.A. 47:1A-1.1), this exemption does not apply to this portion of the requested minutes. **Page 3** does not reflect communications between a client and his attorney for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer.

Therefore, although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to **Page 3** of the requested minutes (with the exception of the title of the document, the identities of the speakers

and the page numbers), because it is ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Page 4: The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. This portion of the requested records does not contain attorney-client privileged material (N.J.S.A. 47:1A-1.1.) as claimed by the Custodian. This information does not reflect communications between a client and his attorney for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. There is no other apparent exemption in OPRA that applies to this information. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers contained in **Page 4** and the Custodian must provide access to this portion of the requested records.

The Custodian has not provided a lawful basis for denial of access to **Page 4, paragraph 1, line 1**. This portion of the requested records does not contain attorney-client privileged material (N.J.S.A. 47:1A-1.1.) as claimed by the Custodian. This information does not reflect communications between a client and his attorney for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. There is no other apparent exemption in OPRA that applies to this information. Therefore, the Custodian unlawfully denied access to Page 4, paragraph 1, line 1 and the Custodian must provide access to this portion of the requested records.

Page 4 of the requested minutes (with the exception of line 1, the title of the document, the names of the speakers and the page numbers) contains discussion of a certain named employee's request for a raise. This information is ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. This portion of the minutes is *pre-decisional* in that it was generated before the agency adopted or reached its decision. This portion of the minutes is also *deliberative* in that it contains opinions, recommendations and advice about policy as well as proposals, suggestions, and other subjective information which reflect the personal opinions of the speaker, rather than the decision of the agency. While the Custodian asserts that the requested records contain information that is attorney-client privileged material (N.J.S.A. 47:1A-1.1), this exemption does not apply to this portion of the requested minutes. **Page 4** does not reflect communications between a client and his attorney for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer.

Therefore, although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to **Page 4** of the requested minutes (with the exception of the title of the document, the identities of the speakers and the page numbers), because it is ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Page 5: The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. This portion of the requested record does not contain attorney-client privileged material (N.J.S.A. 47:1A-1.1.) as claimed by the Custodian. This information does not reflect communications between a client and his attorney for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. There is no other apparent exemption in OPRA that applies to this information. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers contained in **Page 5** and the Custodian must provide access to this portion of the requested records.

Page 5, paragraphs 1-6 of the requested minutes (with the exception of the names of the speakers) contain discussion of a certain named employee's request for a raise. This information is ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. These portions of the minutes are *pre-decisional* in that they were generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they contain opinions, recommendations and advice about policy as well as proposals, suggestions, and other subjective information which reflect the personal opinions of the speaker, rather than the decision of the agency. While the Custodian asserts that the requested records contain information that is attorney-client privileged material (N.J.S.A. 47:1A-1.1.), this exemption does not apply to this portion of the requested minutes. **Page 5, paragraphs 1-6** do not reflect communications between a client and his attorney for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer.

Therefore, although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to **Page 5, paragraphs 1-6** of the requested minutes (with the exception of the title of the document, the identities of the speakers and the page numbers), because it is ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Page 5, paragraphs 7-10 are exempt from disclosure (with the exception of the identity of the speakers) pursuant to N.J.S.A. 47:1A-1.1, because they contain attorney-client privileged information as asserted by the Custodian. This portion of the requested record contains legal advice exchanged between the Borough Attorney and the Council regarding police negotiations and settlements for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. Therefore, this information is exempt from disclosure (with the exception of the identity of the speakers) pursuant to N.J.S.A. 47:1A-1.1 because it is protected by the attorney-client privilege.

Additionally, **Page 5, paragraphs 7-10** are ACD material. This information is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. These portions of the minutes are ACD material in that they discuss proposed

changes to the police contract. This information is *pre-decisional* in that it was generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they contain proposals, suggestions, and other subjective information which reflect the personal opinions of the speaker, rather than the policy of the agency. Therefore, this information is also exempt from disclosure (with the exception of the identity of the speaker) pursuant to N.J.S.A. 47:1A-1.1 as ACD material.

Based on the conclusions above, the Custodian lawfully denied access to **Page 5, paragraphs 7-10** of the requested minutes (with the exception of the identity of the speaker) as attorney-client privileged material, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is also exempt from access pursuant to N.J.S.A. 47:1A-1.1., as ACD material.

Page 6: The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. This portion of the requested records does not contain attorney-client privileged material (N.J.S.A. 47:1A-1.1.) as claimed by the Custodian. This information does not reflect communications between a client and his attorney for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. There is no other apparent exemption in OPRA that applies to this information. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers contained in **Page 6** and the Custodian must provide access to this portion of the requested records.

Page 6 paragraphs 1-6 are exempt from disclosure (with the exception of the identity of the speakers) pursuant to N.J.S.A. 47:1A-1.1, because they are attorney-client privileged information as asserted by the Custodian. This portion of the requested record contains legal advice exchanged between the Borough Attorney and the Council regarding police negotiations and settlements for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. Therefore, this information is exempt from disclosure (with the exception of the identity of the speakers) pursuant to N.J.S.A. 47:1A-1.1 because it is protected by the attorney-client privilege.

Additionally, **Page 6 paragraphs 1-6** are ACD material. This information is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. These portions of the minutes are ACD material in that they discuss police negotiations and settlements. These portions of the minutes are *pre-decisional* in that they were generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they may inaccurately reflect or prematurely disclose the views of the agency, suggesting an agency position that which is only a personal opinion.

Based on the conclusions above, the Custodian lawfully denied access to **Page 6 paragraphs 1-6** of the requested minutes (with the exception of the identity of the speakers) as attorney-client privileged material, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is also exempt from access pursuant to N.J.S.A. 47:1A-1.1 as ACD material.

Page 6, paragraphs 7-10 of the requested minutes (with the exception of the identity of the speakers) contain information and opinions relating to police negotiations and settlements. This information is ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. These portions of the minutes are *pre-decisional* in that they were generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they may inaccurately reflect or prematurely disclose the views of the agency, suggesting an agency position that is only a personal opinion. While the Custodian asserts that the requested records contain information that is attorney-client privileged material (N.J.S.A. 47:1A-1.1), this exemption does not apply to this portion of the requested minutes. **Page 6 paragraphs 7-10** do not reflect communications between a client and his attorney for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer.

Therefore, although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to **Page 6 paragraphs 7-10** of the requested minutes (with the exception of the identity of the speakers), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Page 6 paragraphs 11-15 are exempt from disclosure (with the exception of the identity of the speakers) pursuant to N.J.S.A. 47:1A-1.1, because they are attorney-client privileged information as asserted by the Custodian. This portion of the requested record contains legal advice exchanged between the Borough Attorney and the Council regarding police negotiations and settlements for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. Therefore, this information is exempt from disclosure (with the exception of the identity of the speakers) pursuant to N.J.S.A. 47:1A-1.1 because it is protected by the attorney-client privilege.

Additionally, **Page 6 paragraphs 11-15** are ACD material. This information is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. These portions of the minutes are ACD material in that they discuss police negotiations and settlements. These portions of the minutes are *pre-decisional* in that they were generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they may inaccurately reflect or prematurely disclose the views of the agency, suggesting an agency position that is only a personal opinion.

Based on the conclusions above, the Custodian lawfully denied access to **Page 6 paragraphs 11-15** of the requested minutes (with the exception of the identity of the speaker) as attorney-client privileged material, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is also exempt from access pursuant to N.J.S.A. 47:1A-1.1, as ACD material.

Page 7: The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. This portion of the requested records does not contain attorney-client privileged material (N.J.S.A. 47:1A-1.1.) as claimed by the Custodian. This information does not reflect communications between a client and his attorney for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. There is no other apparent exemption in OPRA that applies to this information. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers contained in **Page 7** and the Custodian must provide access to this portion of the requested records.

The balance of **Page 7** is exempt from disclosure (with the exception of the title of the document, the identities of the speakers and the page numbers) pursuant to N.J.S.A. 47:1A-1.1, because it is attorney-client privileged information as asserted by the Custodian. This portion of the requested record contains legal advice exchanged between the Borough Attorney and the Council regarding police negotiations and settlements for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. Therefore, this information is exempt from disclosure (with the exception of the title of the document, the identities of the speakers and the page numbers) pursuant to N.J.S.A. 47:1A-1.1 because it is protected by the attorney-client privilege.

Additionally, **Page 7** is ACD material. This information is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. This portion of the minutes is ACD material in that it discusses police negotiations and settlements. This portion of the minutes is *pre-decisional* in that it was generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they may inaccurately reflect or prematurely disclose the views of the agency, suggesting an agency position that is only a personal opinion.

Based on the conclusions above, the Custodian lawfully denied access to **Page 7** of the requested minutes (with the exception of the title of the document, the identities of the speakers and the page numbers) as attorney-client privileged material, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is also exempt from access pursuant to N.J.S.A. 47:1A-1.1, as ACD material.

Page 8: The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. This portion of the requested records does not contain attorney-client privileged material (N.J.S.A.

47:1A-1.1.) as claimed by the Custodian. This information does not reflect communications between a client and his attorney for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. There is no other apparent exemption in OPRA that applies to this information. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers contained in **Page 8** and the Custodian must provide access to this portion of the requested records.

The balance of **Page 8** is exempt from disclosure (with the exception of the title of the document, the identities of the speakers and the page numbers) pursuant to N.J.S.A. 47:1A-1.1, because it is attorney-client privileged information as asserted by the Custodian. This portion of the requested record contains legal advice exchanged between the Borough Attorney and the Council regarding police negotiations and settlements for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. Therefore, this information is exempt from disclosure (with the exception of the title of the document, the identities of the speakers and the page numbers) pursuant to N.J.S.A. 47:1A-1.1 because it is protected by the attorney-client privilege.

Additionally, **Page 8** is ACD material. This information is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. This portion of the minutes is ACD material in that it discusses police negotiations and settlements. This portion of the minutes is *pre-decisional* in that it was generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they may inaccurately reflect or prematurely disclose the views of the agency, suggesting an agency position that is only a personal opinion.

Based on the conclusions above, the Custodian lawfully denied access to **Page 8** of the requested minutes (with the exception of the identity of the speaker) as attorney-client privileged material, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is also exempt from access pursuant to N.J.S.A. 47:1A-1.1, as ACD material.

Page 9: The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. This portion of the requested records does not contain attorney-client privileged material (N.J.S.A. 47:1A-1.1) as claimed by the Custodian. This information does not reflect communications between a client and his attorney for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. There is no other apparent exemption in OPRA that applies to this information. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers contained in **Page 9** and the Custodian must provide access to this portion of the requested records.

Page 9, paragraphs 1-7 are exempt from disclosure (with the exception of the title of the document, the identities of the speakers and the page numbers) pursuant to N.J.S.A. 47:1A-1.1, because they are attorney-client privileged information as asserted by the Custodian. This portion of the requested record contains legal advice exchanged between the Borough Attorney and the Council regarding police negotiations and settlements for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. Therefore, this information is exempt from disclosure (with the exception of the title of the document, the identities of the speakers and the page numbers) pursuant to N.J.S.A. 47:1A-1.1 because it is protected by the attorney-client privilege.

Additionally, **Page 9, paragraphs 1-7** is ACD material. This information is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. This portion of the minutes is ACD material in that it discusses police negotiations and settlements. This portion of the minutes is *pre-decisional* in that it was generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they may inaccurately reflect of prematurely disclose the views of the agency, suggesting as agency position that which is only a personal opinion.

Based on the conclusions above, the Custodian lawfully denied access to **Page 9, paragraphs 1-7** of the requested minutes (with the exception of the identity of the speaker) as attorney-client privileged material, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is also exempt from access pursuant to N.J.S.A. 47:1A-1.1., as ACD material.

Page 9, paragraph 8 of the requested minutes (with the exception of the identity of the speaker) contains information and opinions relating to police negotiations and settlements. This information is ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. This portion of the minutes are *pre-decisional* in that they were generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they may inaccurately reflect of prematurely disclose the views of the agency, suggesting as agency position that which is only a personal opinion. While the Custodian asserts that the requested records contain information that is attorney-client privileged material (N.J.S.A. 47:1A-1.1), this exemption does not apply to this portion of the requested minutes. **Page 9, paragraph 8** does not reflect communications between a client and his attorney for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer.

Therefore, although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to **Page 9, paragraph 8** of the requested minutes (with the exception of the identity of the speaker), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Page 9, paragraphs 9-19 is exempt from disclosure (with the exception of the title of the document, the identities of the speakers and the page numbers) pursuant to N.J.S.A. 47:1A-1.1, because it is attorney-client privileged information as asserted by the Custodian. This portion of the requested record contains legal advice exchanged between the Borough Attorney and the Council regarding the proposals being presented in PBA negotiations for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. Therefore, this information is exempt from disclosure (with the exception of the title of the document, the identities of the speakers and the page numbers) pursuant to N.J.S.A. 47:1A-1.1 because it is protected by the attorney-client privilege.

Additionally, **Page 9, paragraphs 9-19** is ACD material. This information is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. These portions of the minutes are ACD material in that they discuss proposed plans for overall changes to police officer assignments. This information is *pre-decisional* in that it was generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they contain proposals, suggestions, and other subjective information which reflect the personal opinions of the speaker, rather than the policy of the agency. Therefore, this information is also exempt from disclosure (with the exception of the identity of the speaker) pursuant to N.J.S.A. 47:1A-1.1 as ACD material.

Finally, **Page 9, paragraphs 9-19** is also exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 because it is information generated by a public employer containing statements of strategy and negotiating position as it relates to the police contract.

Based on the conclusions above, the Custodian lawfully denied access to **Page 9, paragraphs 9-19** of the requested minutes (with the exception of the identity of the speaker) as attorney-client privileged material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is also exempt from access pursuant to N.J.S.A. 47:1A-1.1 as information generated by a public employer containing statements of strategy and negotiating position and ACD material.

Page 10: The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. This portion of the requested records does not contain attorney-client privileged material (N.J.S.A. 47:1A-1.1) as claimed by the Custodian. This information does not reflect communications between a client and his attorney for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. There is no other apparent exemption in OPRA that applies to this information. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers contained in **Page 10** and the Custodian must provide access to this portion of the requested records.

Page 10, paragraphs 1-14 are exempt from disclosure (with the exception of the title of the document, the identities of the speakers and the page numbers) pursuant to N.J.S.A. 47:1A-1.1, because they are attorney-client privileged information as asserted by the Custodian. This portion of the requested record contains legal advice exchanged between the Borough Attorney and the Council regarding the proposals being presented in PBA negotiations for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. Therefore, this information is exempt from disclosure (with the exception of the title of the document, the identities of the speakers and the page numbers) pursuant to N.J.S.A. 47:1A-1.1 because it is protected by the attorney-client privilege.

Additionally, **Page 10, paragraphs 1-14** are ACD material. This information is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. These portions of the minutes are ACD material in that they discuss proposed plans for overall changes to police officer assignments. This information is *pre-decisional* in that it was generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they contain proposals, suggestions, and other subjective information which reflect the personal opinions of the speaker, rather than the policy of the agency. Therefore, this information is also exempt from disclosure (with the exception of the identity of the speaker) pursuant to N.J.S.A. 47:1A-1.1 as ACD material.

Finally, **Page 10, paragraphs 1-14** is also exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 because it is information generated by a public employer containing statements of strategy and negotiating position as it relates to the police contract.

Based on the conclusions above, the Custodian lawfully denied access to **Page 10, paragraphs 1-14** of the requested minutes (with the exception of the identity of the speaker) as attorney-client privileged material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is also exempt from access pursuant to N.J.S.A. 47:1A-1.1, as information generated by a public employer containing statements of strategy and negotiating position and ACD material.

The balance of **Page 10** is not exempt from disclosure. The Custodian has not provided a lawful basis for denial of access to this portion of the requested records as it does not constitute attorney-client privileged material (N.J.S.A. 47:1A-1.1.) as claimed by the Custodian. This information does not reflect communications between a client and his attorney for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. There is no other apparent exemption in OPRA that applies to this information. Therefore, the Custodian unlawfully denied access to the balance of page 10 of the requested minutes and the Custodian must provide access to this portion of the requested records.

Page 11: The Custodian has not provided a lawful basis for denial of access to this portion of the requested record. This portion of the requested records does not contain

attorney-client privileged material (N.J.S.A. 47:1A-1.1.) as claimed by the Custodian. This information does not reflect communications between a client and his attorney for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. There is no other apparent exemption in OPRA that applies to this information. Therefore, the Custodian unlawfully denied access to **Page 11** and the Custodian must provide access to this portion of the requested records.

Whether the Custodian lawfully denied access to the requested six (6) pages of minutes, “Closed Session Minutes of the Mayor and Council of the Borough of Fairview: Held on December 3, 2002 at the Fairview Council Chambers Authorizing #02-319)”?

OPRA defines a government record as:

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

OPRA states that:

“[a] government record shall not include **the following information which is deemed to be confidential** for the purposes of [OPRA] as amended and supplemented...information generated by or on behalf of public employers or public employees in connection with... *any record within the attorney-client privilege... collective negotiations, including documents and statements of strategy or negotiating position...*” (Emphasis added.) N.J.S.A. 47:1A-1.1

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.” That privilege has long been recognized by federal courts. *See Kaiser Alum. & Chem. Corp. v. United States*, 157 F. Supp. 939 (1958); *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 150 (1975). It has also been codified in the federal Freedom of Information Act (“FOIA”). 5 U.S.C. §552(b)(5). Most recently, the New Jersey Supreme Court adopted the privilege. *In re Liquidation of Integrity Insurance Co.*, 165 N.J. 75 (2000).

The judiciary set forth the legal standard for applying the deliberative process privilege as follows:

- (2) 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.
- c. Deliberative materials do not include purely factual materials.
- d. 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.
- e. 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*.
- f. 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*.
- g. 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*.

The Custodian in this case has asserted that the requested executive session minutes 12/3/2002 R-02-319 cannot be disclosed pursuant to N.J.S.A. 47:1A-1.1 because the documents contain information generated by a public employer regarding contract negotiations and strategy.

After completing the *in camera* inspection of 12/3/2002 R-02-319, the Council should find that:

Page 1: The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers. This portion of the requested records does not relate to collective negotiations strategy or negotiating position (N.J.S.A. 47:1A-1.1.) as claimed by the Custodian. There is no other apparent exemption in OPRA that applies to this information. Therefore, the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers contained in **Page 1** are disclosable. The Custodian unlawfully denied access to these portions of the record.

The Custodian lawfully denied access to **Page 1** of the requested minutes (with the exception of the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers) because it is information generated by a public employer containing statements of strategy and negotiating

position as it relates to pay and hours for the position of dispatcher, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Additionally, the information contained in **Page 1** (with the exception of the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers) is ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. These portions of the minutes are *pre-decisional* in that they were generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they contain proposals, suggestions, and other subjective information which reflect the personal opinions of the speaker, rather than the policy of the agency. Therefore, this information is also exempt from disclosure (with the exception of the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers) pursuant to N.J.S.A. 47:1A-1.1 as ACD material.

Based on the conclusions above, the Custodian lawfully denied access to **Page 1** of the requested minutes (with the exception of the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers) as information generated by a public employer containing statements of strategy and negotiating position, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1, as ACD material.

Page 2: The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. This portion of the requested records does not relate to collective negotiations strategy or negotiating position (N.J.S.A. 47:1A-1.1.) as claimed by the Custodian. There is no other apparent exemption in OPRA that applies to this information. Therefore, the title of the document, the identities of the speakers and the page numbers contained on **Page 2** are disclosable. The Custodian unlawfully denied access to these portions of the record.

The Custodian lawfully denied access to **Page 2, paragraphs 1-7** of the requested minutes (with the exception of the identity of the speaker) because they contain information generated by a public employer containing statements of strategy and negotiating position as it relates to pay and hours for the position of dispatcher, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Additionally, the information contained in **Page 2, paragraphs 1-7** (with the exception of the identity of the speaker) are ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. These portions of the minutes are *pre-decisional* in that they were generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they contain proposals, suggestions, and other subjective information which reflect the personal opinions of the speaker, rather than the policy of the agency. Therefore, **Page 2, paragraphs 1-7** are also exempt from disclosure

(with the exception of the identity of the speaker) pursuant to N.J.S.A. 47:1A-1.1 as ACD material.

Based on the conclusions above, the Custodian lawfully denied access to **Page 2, paragraphs 1-7** of the requested minutes (with the exception of the identity of the speaker) as information generated by a public employer containing statements of strategy and negotiating position, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1, as ACD material.

The Custodian lawfully denied access to **Page 2, paragraphs 8-15** of the requested minutes (with the exception of the identity of the speaker) because they contain proposed plans for overall changes to police officer assignments. This information is ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. These portions of the minutes are *pre-decisional* in that they were generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they contain opinions, recommendations and advice about policy as well as proposals, suggestions, and other subjective information which reflect the personal opinions of the speaker, rather than the policy of the agency. While the Custodian asserts that the requested records contain information generated on behalf of a public employer relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1), this exemption does not apply to this portion of the requested minutes.

Therefore, although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to **Page 2, paragraphs 8-15** of the requested minutes (with the exception of the identity of the speaker), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Page 2, paragraph 16 is not exempt from disclosure because the statement made is not relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1) as claimed by the Custodian. There is no other apparent exemption in OPRA that applies to this information. Therefore, the Custodian unlawfully denied access to **Page 2, paragraph 16** and this portion of the record must be disclosed.

The Custodian lawfully denied access to **Page 2, paragraph 17** of the requested minutes (with the exception of the identity of the speaker) because it contains proposed plans for overall changes to police officer assignments. This information is ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. These portions of the minutes are *pre-decisional* in that they were generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they contain opinions, recommendations and advice about policy as well as proposals, suggestions, and other subjective information which reflect the personal opinions of the speaker, rather than the policy of the agency. While the Custodian asserts that **Page 2, paragraph 17** contains information generated on behalf of a public employer relating

to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1), this exemption does not apply to this portion of the requested minutes.

Therefore, although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to **Page 2, paragraph 17** of the requested minutes (with the exception of the identity of the speaker), because it is ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Page 2, paragraph 18 is not exempt from disclosure because the statement made is not relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1.) as claimed by the Custodian. There is no other apparent exemption in OPRA that applies to this information. Therefore, the Custodian unlawfully denied access to **Page 2, paragraph 18** and this portion of the record must be disclosed.

Page 3: The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. This portion of the requested records does not relate to collective negotiations strategy or negotiating position (N.J.S.A. 47:1A-1.1.) as claimed by the Custodian. There is no other apparent exemption in OPRA that applies to this information. Therefore, the title of the document, the identities of the speakers and the page numbers contained on **Page 3** are disclosable. The Custodian unlawfully denied access to these portions of the record.

The Custodian lawfully denied access to **Page 3, paragraphs 1-4** of the requested minutes (with the exception of the identity of the speaker) because they contain proposed plans for overall changes to police officer assignments. This information is ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. These portions of the minutes are *pre-decisional* in that they were generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they contain opinions, recommendations and advice about policy as well as proposals, suggestions, and other subjective information which reflect the personal opinions of the speaker, rather than the policy of the agency. While the Custodian asserts that the requested records contain information generated on behalf of a public employer relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1), this exemption does not apply to this portion of the requested minutes.

Therefore, although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to **Page 3, paragraphs 1-4** of the requested minutes (with the exception of the identity of the speaker), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Page 3, paragraph 5 is not exempt from disclosure because the statement made is not relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1.) as claimed by the Custodian. There is no other apparent exemption in OPRA that applies to this information. Therefore, the Custodian denied access to **Page 3, paragraph 5** and this portion of the record must be disclosed.

The Custodian lawfully denied access to **Page 3, paragraphs 6-16** of the requested minutes (with the exception of the identity of the speaker and sentence 1) because they contain proposed plans for overall changes to police officer assignments. This information is ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. These portions of the minutes are *pre-decisional* in that they were generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they contain opinions, recommendations and advice about policy as well as proposals, suggestions, and other subjective information which reflect the personal opinions of the speaker, rather than the policy of the agency. While the Custodian asserts that the requested records contain information generated on behalf of a public employer relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1), this exemption does not apply to this portion of the requested minutes.

Therefore, although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to **Page 3, paragraphs 6-16** of the requested minutes (with the exception of the identity of the speaker and sentence 1), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Page 3, paragraph 17 contains legal advice exchanged between the Borough Attorney and the Council regarding the proposed plans for overall changes to police officer assignments for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. Therefore, this information is exempt from disclosure (with the exception of the identity of the speaker) pursuant to N.J.S.A. 47:1A-1.1 because it is protected by the attorney-client privilege.

Additionally, **Page 3, paragraph 17** is ACD material. This information is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. These portions of the minutes are ACD material in that they discuss proposed plans for overall changes to police officer assignments. This information is *pre-decisional* in that it was generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they contain proposals, suggestions, and other subjective information which reflect the personal opinions of the speaker, rather than the policy of the agency. Therefore, this information is also exempt from disclosure (with the exception of the identity of the speaker) pursuant to N.J.S.A. 47:1A-1.1 as ACD material.

Finally, **Page 3, paragraph 17** is also exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 because it is information generated by a public employer containing statements of strategy and negotiating position as it relates to the police contract.

Based on the conclusions above, the Custodian lawfully denied access to **Page 3, paragraph 17** of the requested minutes (with the exception of the identity of the

speaker) as information generated by a public employer containing statements of strategy and negotiating position, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is also exempt from access pursuant to N.J.S.A. 47:1A-1.1 as attorney-client privileged material and ACD material.

Page 4: The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. This portion of the requested records does not relate to collective negotiations strategy or negotiating position (N.J.S.A. 47:1A-1.1), as claimed by the Custodian. There is no other apparent exemption in OPRA that applies to this information. Therefore, the title of the document, the identities of the speakers and the page numbers contained on **Page 4** are disclosable. The Custodian unlawfully denied access to these portions of the record.

Page 4, paragraph 1 contains legal advice exchanged between the Borough Attorney and the Council regarding the proposed plans for overall changes to police officer assignments for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. Therefore, this information is exempt from disclosure (with the exception of the identity of the speaker) pursuant to N.J.S.A. 47:1A-1.1 because it is protected by the attorney-client privilege.

Additionally, **Page 4, paragraph 1** is ACD material. This information is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. These portions of the minutes are ACD material in that they discuss proposed plans for overall changes to police officer assignments. This information is *pre-decisional* in that it was generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they contain proposals, suggestions, and other subjective information which reflect the personal opinions of the speaker, rather than the policy of the agency. Therefore, this information is also exempt from disclosure (with the exception of the identity of the speaker) pursuant to N.J.S.A. 47:1A-1.1 as ACD material.

Finally, **Page 4, paragraph 1** is also exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 because it is information generated by a public employer containing statements of strategy and negotiating position as it relates to the police contract.

Based on the conclusions above, the Custodian lawfully denied access to **Page 4, paragraph 1** of the requested minutes (with the exception of the identity of the speaker) as information generated by a public employer containing statements of strategy and negotiating position, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is also exempt from access pursuant to N.J.S.A. 47:1A-1.1 as attorney-client privileged material and ACD material.

The Custodian lawfully denied access to **Page 4, paragraph 2** of the requested minutes (with the exception of the identity of the speaker) because they contain

information generated by a public employer containing statements of strategy and negotiating position as it relates to pay and hours for the position of dispatcher, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Additionally, the information contained in **Page 4, paragraph 2** (with the exception of the identity of the speaker) is ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. This portion of the minutes is *pre-decisional* in that it was generated before the agency adopted or reached its decision. This portion of the minutes is also *deliberative* in that it contains proposals, suggestions, and other subjective information which reflect the personal opinions of the speaker, rather than the policy of the agency. Therefore, **Page 4, paragraph 2** is also exempt from disclosure (with the exception of the identity of the speaker) pursuant to N.J.S.A. 47:1A-1.1 as ACD material.

Based on the conclusions above, the Custodian lawfully denied access to **Page 4, paragraph 2** of the requested minutes (with the exception of the identity of the speaker) as information generated by a public employer containing statements of strategy and negotiating position, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1 as ACD material.

Page 4, paragraphs 3-8 contain legal advice exchanged between the Borough Attorney and the Council regarding the proposed plans for overall changes to police officer assignments for which confidentiality between the attorney and client is required in order for the attorney to perform his ethical duties as a lawyer. Therefore, this information is exempt from disclosure (with the exception of the identity of the speaker) pursuant to N.J.S.A. 47:1A-1.1 because it is protected by the attorney-client privilege.

Additionally, **Page 4, paragraphs 3-8** are ACD material. This information is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. These portions of the minutes are ACD material in that they discuss proposed plans for overall changes to police officer assignments. This information is *pre-decisional* in that it was generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they contain proposals, suggestions, and other subjective information which reflect the personal opinions of the speaker, rather than the policy of the agency. Therefore, this information is also exempt from disclosure (with the exception of the identity of the speaker) pursuant to N.J.S.A. 47:1A-1.1 as ACD material.

Finally, **Page 4, paragraphs 3-8** are also exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 because it is information generated by a public employer containing statements of strategy and negotiating position as it relates to the police contract.

Based on the conclusions above, the Custodian lawfully denied access to **Page 4, paragraphs 3-8** of the requested minutes (with the exception of the identity of the

speaker) as information generated by a public employer containing statements of strategy and negotiating position, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is also exempt from access pursuant to N.J.S.A. 47:1A-1.1 as attorney-client privileged material and ACD material.

Page 4, paragraph 9 is not exempt from disclosure because the statement made is not relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1.) as claimed by the Custodian. There is no other apparent exemption in OPRA that applies to this information. Therefore, the Custodian unlawfully denied access to **Page 4, paragraph 9** and this portion of the record must be disclosed.

The Custodian lawfully denied access to **Page 4, paragraphs 10-14** of the requested minutes (with the exception of the identity of the speaker) because they contain information and opinions about proposed holiday hours of the Borough. This information is ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. These portions of the minutes are *pre-decisional* in that they were generated before the agency adopted or reached its decision. These portions of the minutes are also *deliberative* in that they contain opinions, recommendations and advice about policy as well as proposals, suggestions, and other subjective information which reflect the personal opinions of the speaker, rather than the policy of the agency. While the Custodian asserts that the requested records contain information generated on behalf of a public employer relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1), this exemption does not apply to this portion of the requested minutes.

Therefore, although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to **Page 4, paragraphs 10-14** of the requested minutes (with the exception of the identity of the speaker), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Page 5: The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. This portion of the requested records does not relate to collective negotiations, strategy or negotiating position (N.J.S.A. 47:1A-1.1.) as claimed by the Custodian. There is no other apparent exemption in OPRA that applies to this information. Therefore, the title of the document, the identities of the speakers and the page numbers contained on **Page 5** are disclosable. The Custodian unlawfully denied access to these portions of the record.

The Custodian lawfully denied access to the balance of **Page 5** of the requested minutes (with the exception of the title of the document, the identities of the speakers and the page numbers) because it contains information and opinions about proposed holiday hours of the Borough. This information is ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. This portion of the minutes is *pre-decisional* in that it was generated before the agency adopted or reached its decision. This portion of the minutes is also *deliberative* in that it contains opinions, recommendations and advice about policy as well as

proposals, suggestions, and other subjective information which reflect the personal opinions of the speaker, rather than the policy of the agency. While the Custodian asserts that the requested records contain information generated on behalf of a public employer relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1), this exemption does not apply to this portion of the requested minutes.

Therefore, although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to **Page 5** of the requested minutes (with the exception of the identity of the speaker and sentence 1), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

Page 6: **Page 6** is not exempt from disclosure because the statement made is not relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1.) as claimed by the Custodian. There is no other apparent exemption in OPRA that applies to this information. Therefore, the Custodian unlawfully denied access to **Page 6** and this portion of the record must be disclosed.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council find that regarding the closed session minutes of the Mayor and Council of the Borough of Fairview held on December 3, 2002 (authorizing #03-318):

117. **Page 1:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers contained in Page 1 and the Custodian must provide access to this portion of the requested records.
118. **Page 1, paragraph 1:** This portion of the requested minutes is not exempt from disclosure. The Custodian has not provided a lawful basis for denial of access to this portion of the requested records as it does not constitute attorney-client privileged material (N.J.S.A. 47:1A-1.1.) as claimed by the Custodian. Therefore, the Custodian unlawfully denied access to Page 1, paragraph 1 and the Custodian must provide access to this portion of the requested record.
119. **Page 1, paragraphs 2-6:** The Custodian's claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1.) does not apply to this portion of the requested minutes. While the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 1, paragraphs 2-6 of the requested minutes (with the exception of the identity of the speakers), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
120. **Page 1, paragraphs 8-13:** The Custodian's claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1.) does not apply to this

portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 1, paragraphs 8-13 of the requested minutes (with the exception of the identity of the speakers), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

121. **Page 1, paragraph 14:** The Custodian lawfully denied access to Page 1, paragraph 14 of the requested minutes (with the exception of the identity of the speaker) as attorney-client privileged material, which is exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1 as ACD material.
122. **Page 2:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 2 and the Custodian must provide access to this portion of the requested records.
123. **Page 2, paragraphs 1-5:** The Custodian lawfully denied access to **Page 2, paragraphs 1-5** of the requested minutes (with the exception of the identity of the speakers) as attorney-client privileged material, which is exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1 as ACD material.
124. **Page 2, paragraph 6:** This portion of the requested minutes is not exempt from disclosure. The Custodian has not provided a lawful basis for denial of access to this portion of the requested records as it does not constitute attorney-client privileged material (N.J.S.A. 47:1A-1.1) as claimed by the Custodian. Therefore, the Custodian unlawfully denied access to Page 2, paragraph 6 and the Custodian must provide access to this portion of the requested record.
125. **Page 2, paragraph 7:** The Custodian's claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 1, paragraphs 8-13 of the requested minutes (with the exception of the identity of the speakers), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
126. **Page 2, paragraph 8:** This portion of the requested minutes is not exempt from disclosure. The Custodian has not provided a lawful basis for denial of access to this portion of the requested records, as they do not constitute attorney-client privileged material (N.J.S.A. 47:1A-1.1) as claimed by the Custodian. Therefore, the Custodian unlawfully denied access to Page 2, paragraph 8, and the Custodian must provide access to this portion of the requested record.
127. **Page 2, paragraphs 9-14:** The Custodian's claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 1, paragraphs 8-13 of the requested minutes (with the exception

of the identity of the speakers), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

128. **Page 3:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 3 and the Custodian must provide access to this portion of the requested records.
129. **Page 3:** The Custodian's claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 3 of the requested minutes (with the exception of the title of the document, the identities of the speakers and the page numbers), because it is ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
130. **Page 4:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 4 and the Custodian must provide access to this portion of the requested records.
131. **Page 4, paragraph 1, line 1:** The Custodian has not provided a lawful basis for denial of access to **Page 4, paragraph 1, line 1**. This portion of the requested records does not contain attorney-client privileged material (N.J.S.A. 47:1A-1.1) as claimed by the Custodian. Therefore, the Custodian unlawfully denied access to Page 4, paragraph 1, line 1 and the Custodian must provide access to this portion of the requested records.
132. **Page 4:** The Custodian's claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 4 of the requested minutes (with the exception of Page 4, paragraph 1, line 1, the title of the document, the identities of the speakers and the page numbers), because it is ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
133. **Page 5:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 5 and the Custodian must provide access to this portion of the requested records.
134. **Page 5, paragraphs 1-6:** The Custodian's claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 5, paragraphs 1-6 of the requested minutes (with the exception

of the identity of the speakers), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

135. **Page 5, paragraphs 7-10:** The Custodian lawfully denied access to Page 5, paragraphs 7-10 of the requested minutes (with the exception of the identity of the speakers) as attorney-client privileged material, which is exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1 as ACD material.
136. **Page 6:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 6, and the Custodian must provide access to this portion of the requested records.
137. **Page 6 paragraphs 1-6:** The Custodian lawfully denied access to Page 6, paragraphs 1-6 of the requested minutes (with the exception of the identity of the speakers) as attorney-client privileged material, which is exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1 as ACD material.
138. **Page 6, paragraphs 7-10:** The Custodian's claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1.) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 6, paragraphs 7-10 of the requested minutes (with the exception of the identity of the speakers), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
139. **Page 6 paragraphs 11-15:** The Custodian lawfully denied access to Page 6 paragraphs 11-15 of the requested minutes (with the exception of the identity of the speakers) as attorney-client privileged material, which is exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1 as ACD material.
140. **Page 7:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 7 and the Custodian must provide access to this portion of the requested records.
141. **Page 7:** The Custodian lawfully denied access to Page 7 of the requested minutes (with the exception of the title of the document, the identities of the speakers and the page numbers) as attorney-client privileged material, which is exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1 as ACD material.
142. **Page 8:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in

Page 8, and the Custodian must provide access to this portion of the requested records.

143. **Page 8:** The Custodian lawfully denied access to Page 8 of the requested minutes (with the exception of the title of the document, the identities of the speakers and the page numbers) as attorney-client privileged material, which is exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1. as ACD material.
144. **Page 9:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers, and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 9 and the Custodian must provide access to this portion of the requested records.
145. **Page 9, paragraphs 1-7:** The Custodian lawfully denied access to **Page 9, paragraphs 1-7** of the requested minutes (with the exception of the identity of the speakers) as attorney-client privileged material, which is exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1. as ACD material.
146. **Page 9, paragraph 8:** The Custodian's claimed exemption for attorney-client privileged material (N.J.S.A. 47:1A-1.1.) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to **Page 9, paragraph 8** of the requested minutes (with the exception of the identity of the speaker), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
147. **Page 9, paragraphs 9-19:** The Custodian lawfully denied access to Page 9, paragraphs 9-19 of the requested minutes (with the exception of the identity of the speaker) as attorney-client privileged material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is also exempt from access pursuant to N.J.S.A. 47:1A-1.1. as information generated by a public employer containing statements of strategy and negotiating position and ACD material.
148. **Page 10:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 10 and the Custodian must provide access to this portion of the requested records.
149. **Page 10, paragraphs 1-14:** The Custodian lawfully denied access to Page 10, paragraphs 1-14 of the requested minutes (with the exception of the identity of the speaker) as attorney-client privileged material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is also exempt from access pursuant to N.J.S.A. 47:1A-1.1. as information generated by a public employer containing statements of strategy and negotiating position and ACD material.

150. **Page 10:** The Custodian has not provided a lawful basis for denial of access to the balance of Page 10. Therefore, the Custodian unlawfully denied access to Page 10 (with the exception of with the exception of **Page 10, paragraphs 1-14**, the title of the document, the identities of the speakers and the page numbers) and the Custodian must provide access to this portion of the requested records.
151. **Page 11:** The Custodian has not provided a lawful basis for denial of access to Page 11 of the requested record. Therefore, the Custodian unlawfully denied access to Page 11 and the Custodian must provide access to this portion of the requested records.

Regarding the closed session minutes of the Mayor and Council of the Borough of Fairview held on Decision 3, 2002 (authorizing #02-319):

152. **Page 1:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers contained in Page 1 and the Custodian must provide access to this portion of the requested records.
153. **Page 1:** The Custodian lawfully denied access to **Page 1** of the requested minutes (with the exception of the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers) as information generated by a public employer containing statements of strategy and negotiating position, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1, as ACD material.
154. **Page 2:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 2 and the Custodian must provide access to this portion of the requested records.
155. **Page 2, paragraphs 1-7:** The Custodian lawfully denied access to Page 2, paragraphs 1-7 of the requested minutes (with the exception of the title of the document, the identities of those in attendance at the meeting, the identities of the speakers and the page numbers) as information generated by a public employer containing statements of strategy and negotiating position, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1, as ACD material.
156. **Page 2, paragraphs 8-15:** The Custodian's claimed exemption for information generated on behalf of a public employer relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not

provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 2, paragraphs 8-15 of the requested minutes (with the exception of the identity of the speakers), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

157. **Page 2, paragraph 16:** The Custodian has not provided a lawful basis for denial of access to this portion the requested records. Therefore, the Custodian unlawfully denied access to Page 2, paragraph 16 and the Custodian must provide access to this portion of the requested records.
158. **Page 2, paragraph 17:** The Custodian's claimed exemption for information generated on behalf of a public employer relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 2, paragraph 17 of the requested minutes (with the exception of the identity of the speaker), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
159. **Page 2, paragraph 18:** The Custodian has not provided a lawful basis for denial of access to this portion the requested records. Therefore, the Custodian unlawfully denied access to Page 2, paragraph 18 and the Custodian must provide access to this portion of the requested records.
160. **Page 3:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers, and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 3 and the Custodian must provide access to this portion of the requested records.
161. **Page 3, paragraphs 1-4:** The Custodian's claimed exemption for information generated on behalf of a public employer relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 3, paragraphs 1-4 of the requested minutes (with the exception of the identity of the speaker), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
162. **Page 3, paragraph 5:** The Custodian has not provided a lawful basis for denial of access to this portion the requested records. Therefore, the Custodian unlawfully denied access to Page 3, paragraph 5, and the Custodian must provide access to this portion of the requested records.
163. **Page 3, paragraphs 6-16:** The Custodian's claimed exemption for information generated on behalf of a public employer relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 3, paragraphs 6-16 of the requested minutes (with the exception of the identity of the speaker), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

164. **Page 3, paragraph 17:** The Custodian lawfully denied access to Page 3, paragraph 17 of the requested minutes (with the exception of the identity of the speaker) as information generated by a public employer containing statements of strategy and negotiating position, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is also exempt from access pursuant to N.J.S.A. 47:1A-1.1 as attorney-client privileged material and ACD material.
165. **Page 4:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers, and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 4 and the Custodian must provide access to this portion of the requested records.
166. **Page 4, paragraph 1:** The Custodian lawfully denied access to Page 4, paragraph 1 of the requested minutes (with the exception of the identity of the speaker) as information generated by a public employer containing statements of strategy and negotiating position, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is also exempt from access pursuant to N.J.S.A. 47:1A-1.1 as attorney-client privileged material and ACD material.
167. **Page 4, paragraph 2:** The Custodian lawfully denied access to **Page 4, paragraph 2** of the requested minutes (with the exception of the identity of the speaker) as information generated by a public employer containing statements of strategy and negotiating position, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is exempt from access pursuant to N.J.S.A. 47:1A-1.1 as ACD material.
168. **Page 4, paragraphs 3-8:** The Custodian lawfully denied access to **Page 4, paragraphs 3-8** of the requested minutes (with the exception of the identity of the speaker) as information generated by a public employer containing statements of strategy and negotiating position, which are exempt from access pursuant to N.J.S.A. 47:1A-1.1. Additionally, this information is also exempt from access pursuant to N.J.S.A. 47:1A-1.1 as attorney-client privileged material and ACD material.
169. **Page 4, paragraph 9:** The Custodian has not provided a lawful basis for denial of access to this portion the requested records. Therefore, the Custodian unlawfully denied access to Page 4, paragraph 9 and the Custodian must provide access to this portion of the requested records.
170. **Page 4, paragraphs 10-14:** The Custodian's claimed exemption for information generated on behalf of a public employer relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to Page 4, paragraphs 10-14 of the requested minutes (with the exception of the identity of the speaker), because they are ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

171. **Page 5:** The Custodian has not provided a lawful basis for denial of access to the title of the document, the identities of the speakers, and the page numbers. Therefore, the Custodian unlawfully denied access to the title of the document, the identities of the speakers and the page numbers contained in Page 5 and the Custodian must provide access to this portion of the requested records.
172. **Page 5:** The Custodian's claimed exemption for information generated on behalf of a public employer relating to collective negotiation strategy and negotiating position (N.J.S.A. 47:1A-1.1) does not apply to this portion of the requested minutes. Although the Custodian did not provide the Complainant with the proper basis for denying access, access was lawfully denied to **Page 5** of the requested minutes (with the exception of the identity of the speaker), because it is ACD material, which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
173. **Page 6:** The Custodian has not provided a lawful basis for denial of access to Page 6 of the requested record. Therefore, the Custodian unlawfully denied access to Page 6 and the Custodian must provide access to this portion of the requested records.
- 174. The Custodian shall comply with "1. - 57." within five (5) business days from receipt of this decision on the basis of the Council's above determination and provide certified confirmation to the Executive Director that the Custodian has complied with the Council's decision.**

Prepared By:

Colleen C. McGann
Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director
Government Records Council

November 8, 2006

Interim Order
July 13, 2005 Government Records Council Meeting

Thomas Allegretta
Complainant

Complaint No. 2005-132

v.

Borough of Fairview
Custodian of Record

At the July 13, 2006 public meeting, the Government Records Council ("Council") considered the July 6, 2006 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:

9. With regard to 10/16/2001 R01-264, pursuant to N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. the Custodian's failure to properly notify the Complainant of a lawful basis for denial of access and the delay in access to these records constitutes a deemed unlawful denial of access.
10. The potential reasons for denying access to 12/3/2002 R-02-318 and 12/3/2002 R-02-319 claimed by the Custodian are compelling but, it cannot be determined whether the facts of this complaint support the denial of access to the redacted portions of the requested records. Therefore, an *in camera* review of these unredacted requested records is necessary to determine what information, if any, is exempt from disclosure.
11. The document 05/17/2005 R-05131 was not made, maintained or kept on file at the time of the Complainant's May 17, 2005 OPRA request therefore, there is no denial of access to this document.
12. With regard to 12/17/2002 R-02-335, pursuant to N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. the Custodian's failure to properly notify the Complainant of a lawful basis for denial of access and the delay in access to these records constitutes a deemed unlawful denial of access.
13. With regard to the closed session minutes indicated in the Custodian's index as 12/30/97 pursuant to N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g., the Custodian's failure to properly notify the Complainant of a lawful basis for denial of access or delay in access to these records constitutes a deemed unlawful denial of access.
14. The Custodian has acted improperly in not redacting the requested documents according to GRC guidelines.
15. Based on N.J.S.A. 47:1A-7.b., the GRC does not have authority adjudicate whether a Custodian has complied with OPMA or any statute other than OPRA.
16. In light of the legal standards set forth above and the fact that the Custodian has ultimately released those documents for which no specific exemption might exist, the Custodian's actions do not meet the legal standard for a knowing and willful

violation pursuant to OPRA or unreasonable denial of access under the totality of the circumstances in this case. However, the Custodian's actions do appear to be at least negligent regarding his knowledge of OPRA.

Interim Order Rendered by the
Government Records Council
On The 19th Day of July, 2006

Vincent P. Maltese, Chairman
Government Records Council

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

Robin Berg Tabakin, Secretary
Government Records Council

Decision Distribution Date: July 19, 2006

**Findings and Recommendations of the Executive Director
July 13, 2006 Council Meeting**

Thomas Allegretta

GRC Complaint No. 2005-132

Complainant

v.

Borough of Fairview

Custodian of Records

Records Relevant to Complaint:

All closed session minutes for all Council meetings for the months of December 1997, November 1999, October 2001, March 2002, December 2002, and January 2003.

Request Made: May 17, 2005

Response Made: May 25, 2005

Custodian: Diane Testa

GRC Complaint filed: June 30, 2005

Background

May 17, 2005

Complainant's Open Public Records Act ("OPRA") Request. The Complainant is seeking copies of certain closed session Township Council meeting minutes.

May 25, 2005

Custodian's response to the Complainant's OPRA Request. The Custodian states that the fee for copies is \$12.00 and copies will be ready for pick up on June 1, 2005.

June 1, 2005

Custodian's second response to the Complainant's OPRA Request. The Custodian indicates that the requested documents are attached and that the cost for the requested records included in the package is \$17.00.

June 6, 2005

Custodian's third response to the Complainant's OPRA Request. The Custodian indicates that the information requested is enclosed and states that, as the Custodian has

already advised the Complainant that certain items were removed from the minutes due to the fact that they concern information regarding ongoing litigation and/or negotiations.

June 30, 2005

Complainant’s Denial of Access Complaint with the following attachments:

- May 17, 2005 Complainant’s OPRA Request
- June 1, 2005 Custodian’s second response to the Complainant’s OPRA Request
- June 6, 2005 Custodian’s third response to the Complainant’s OPRA Request.

The Complainant states that he is disputing the redactions to the closed session minutes he received from the Borough on June 1, 2005. The Complainant states he was not originally informed of any denial of his request and only after examining the records was he aware that he had not received all of the requested documents. The Complainant alleges that when he asked he was verbally told by the Custodian that the missing parts were about matters that did not concern him. He states he was given no specific reason for the denial until he received a letter, at his request, providing a reason. Specifically, the Complainant lists the redactions and Custodian’s response in the following way:

Description of Record Denied	Response to Request
Redacted portions of pages five and eight of the Closed Session Minutes of the Fairview Council Meetings of December 3, 2002 – Authorizing resolution #02-318	Certain items have been removed from the minutes due to the fact that it concerns information regarding ongoing litigation and/or negotiations.
Redacted portions of pages four and five of the Closed Session Minutes of the Fairview Council Meeting of December 2, 2002 – Authorizing Resolution #02-319	Certain items have been removed from the minutes due to the fact that it concerns information regarding ongoing litigation and/or negotiations.
Redacted portion of page three of the Council of the Closed Session Minutes of the Fairview Council Meeting of October 16, 2001 -- Authorizing Resolution #01-264	Certain items have been removed from the minutes due to the fact that it concerns information regarding ongoing litigation and/or negotiations.
Redacted portions of Closed Session Minutes of the Fairview Council Meeting of December 30, 1997	Certain items have been removed from the minutes due to the fact that it concerns information regarding ongoing litigation and/or negotiations.
Redacted portions of Closed Session Minutes of the Fairview Council Meeting of December 17, 2002	Certain items have been removed from the minutes due to the fact that it concerns information regarding ongoing litigation and/or negotiations.
Any and all portions of the requested record that the Complainant is unaware of that were redacted from any document requested on May 17, 2005	Certain items have been removed from the minutes due to the fact that it concerns information regarding ongoing litigation and/or negotiations.

The Complainant asserts that while he does have litigation against the Mayor and Council, as well as the Custodian, the requested minutes preceded the civil rights suit against them. Therefore, the Complainant asserts that the litigation cannot be the subject of the closed session minutes requested. The Complainant asserts that the Borough Attorney's attendance at these meetings does not mean that the Borough can invoke the attorney-client privilege. The Complainant further asserts that this is especially true since the Borough Attorney attends at each of these meetings regardless of topic to act in an advisory capacity.

The Complainant states that the second response to his OPRA request now contains an oblique reference to the Complainant leaving the Complainant with no doubt whatsoever that the redacted portion is about him.

July 11, 2005

Agreement to Mediate sent to both parties.

July 25, 2005

Custodian's signed Agreement to Mediate. The Complainant did not agree to mediate this complaint.

July 26, 2005

Custodian's Statement of Information with the following attachments:

- May 17, 2005 Complainant's OPRA Request
- May 25, 2005 Custodian's response to the Complainant's OPRA Request
- June 6, 2005 Custodian's third response to the Complainant's OPRA Request.

The Custodian states that the documents provided to the Complainant on June 1, 2005 were redacted because it contained information regarding personnel matters. That Custodian states that upon further review it was determined it was found that the information could be released. This Custodian states that she released this information on June 6, 2005. The Custodian states that all information that could be released to the Complainant was released as of June 6, 2005. The Custodian states that any portions of the requested records which were redacted involve pending litigation and/or anticipated litigation or personnel matters.

Undated letter

Complainant's letter to the Government Records Council ("GRC") with the following attachments:

- Copy of the GRC's Records Notes - "Redacting Government Records"
- Copy of "Main Points of N.J.S.A. 10:4-6."⁵

⁵ Printed from www.njsp.org/member/sunshine.html

The Complainant responds to the July 26, 2005 Statement of Information by stating that, while the Custodian contends that the requested information could not be released due to pending litigation, the litigation in question is that of the Complainant and “should not provide refuge.” The Complainant asserts that this is especially true because he did not receive a “Rice Notice” as mandated by the Open Public Meetings Act, N.J.S.A. 10:4-6 which would have allowed the Complainant to request a public hearing. The Complainant also states that the documents were not redacted per GRC website instruction, which states that redactions should be made by using a visually obvious method that shows the requestor the specific location of redacted material in the record.

August 2, 2005

Letter from the Custodian to the GRC. The Custodian states that the Complainant was not given notice that he was going to be discussed due to pending litigation filed by the Complainant (Docket No. BER-L-0037340-04). The Custodian states that because of this pending litigation the Complainant did not have the right to be present during the discussion of the merits of the litigation and the strategy on the case. Additionally the Custodian asserts that it was clear from the documents released which of the portions of the documents had been redacted.

Undated letter

Complainant’s letter to the GRC. The Complainant states that he is unable to find any exemption to the “Rice Notice” and states that the Custodian should not be allowed to redact the information based on the fact that he was not given proper notice that he was being discussed at the meetings in question. The Complainant states that redactions were made by leaving big empty spaces and reiterates that the redactions do not conform to the GRC instructions as the missing portions have not been blacked out which would clearly show the location and length of missing material.

December 14, 2005

Letter to the Custodian from the GRC. The GRC requests an index of all redactions made to the requested closed session minutes to include a general nature description of the document and redactions indicating the claimed statutory exemption for each and an explanation of how each exemption applies to the document.

December 23, 2005

Custodian’s response to the GRC December 14, 2005 letter.⁶ The Custodian provided an index of the requested documents. The index indicated the following:

Title and Date	Pages	General Nature Description	General Nature Description of	Claimed Statutory Exemption
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⁶ Not in the form of a legal certification as requested.

			Redactions	
10/16/2001 R01-264	7	Closed session minutes of Mayor and Council of the Borough of Fairview	Negotiations with an employee regarding salary adjustment, matter is resolved and information has been released	
12/3/2002 R-02-318	11	Closed session minutes of Mayor and Council of the Borough of Fairview	Information regarding police department	Information on page 8 was redacted because it was involving police promotion and pending or anticipated litigation
12/3/2002 R-02-319	6	Closed session minutes of Mayor and Council of the Borough of Fairview	Information in connection with collective negotiations	Information is protected as it involves pending collective bargaining
05/17/2005 R-05131	2	Unapproved closed session minutes of Mayor and Council of the Borough of Fairview	Payment to a former employee that has been resolved and released	
12/17/2002 R-02-335	1	Closed session minutes of Mayor and Council of the Borough of Fairview	All information was previously provided to the Complainant	
12/30/1997	10	Unsigned copy of closed session minutes of Mayor and Council of the Borough of Fairview	Information is no longer protected and the Custodian's notes reflect that it was released to the Complainant	

December 29, 2005

Letter to the Custodian from the GRC. The GRC requests that the Custodian submit a legally certified index of the documents responsive to the request and an explanation of the following points:

- Regarding the 10/16/2001 closed session minutes of Mayor and Council of the Borough of Fairview
 1. when the matter was resolved,
 2. whether or not the documents were released in response to OPRA request made on May 17, 2005, and

3. what date the documents were released to the Complainant.
- Regarding the 05/17/2005 unapproved closed session minutes of Mayor and Council of the Borough of Fairview
 1. when the matter was resolved,
 2. whether or not the documents were released in response to OPRA request made on May 17, 2005, and
 3. what date the documents were released to the Complainant.
 - Regarding the 02/17/2002 closed session minutes of Mayor and Council of the Borough of Fairview
 1. whether or not the documents were released in response to OPRA request made on May 17, 2005, and
 2. what date the documents were released to the Complainant.
 - Regarding the 02/30/1997 unsigned copy of closed session minutes of Mayor and Council of the Borough of Fairview
 1. when the information became no longer protected,
 2. whether or not the documents were released in response to OPRA request made on May 17, 2005, and
 3. what date the documents were released to the Complainant.

January 4, 2005

Custodian's certified index. The Custodian provided index "Exhibit A: January 4, 2005 Custodian's Certified Index" in response to the December 23, 2005 letter to the Custodian from the GRC.

January 23, 2006

Letter to the Custodian from the GRC. The GRC requests that the Custodian submit a legally certified index stating the reasons for the delay in access to the 10/16/01 R01-264.

January 27, 2006

Custodian's certification. The Custodian states that there was a delay in access to the document 10/16/01 R01-264 because the sentences redacted concerned negotiations for a pay increase for a public employee and alluded to negotiations for a police contract. The Custodian asserts that she felt that it referred to strategy. The Custodian states that after further review it was determined that the contract issue had been resolved and the Custodian then released the document to the Complainant.

Analysis

Whether the Custodian unlawfully denied access to the redacted portions of the requested closed session minutes pursuant to OPRA?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions...”
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...” N.J.S.A. 47:1A-1.1.

OPRA requires that:

“...[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor... If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA] as amended and supplemented, the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.” (Emphasis added.) N.J.S.A. 47:1A-5.g .

OPRA requires that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request, provided that the record is currently available and not in storage or archived. In the event a custodian fails to respond within seven business days after receiving a request, the failure to respond shall be deemed a denial of the request...” N.J.S.A. 47:1A-5.i.

OPRA delineates the powers and duties of the GRC. Specifically, OPRA indicates the GRC may do the following:

“...receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian ...; issue advisory opinions ...; *prepare guidelines* and an informational pamphlet ...; prepare lists for use by records custodians ...; make training opportunities available for records custodians ..., and

operate an informational website and a toll-free helpline ...”(Emphasis added.) N.J.S.A. 47:1A-7.b.

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

“...[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.

The Complainant states that he is disputing the redactions to the closed session minutes he received from the Borough. The Custodian indicates that any portions of the requested records which have not been released are public-employee related and exempt under N.J.S.A.47:1A-1.1 or are attorney-client privilege exempt under N.J.S.A.47:1A-1.1.

10/16/2001 R01-264

The Complainant takes issue with the redacted 10/16/2001 R01-264. The Custodian certifies that the redactions made to this document are public employee related and therefore exempt pursuant to N.J.S.A. 47:1A-1.1. The Custodian states that the redactions to this document concern negotiations for a pay increase for the tax collector and the Custodian asserts the information contained therein refers to strategy. This document was released to the Complainant on December 23, 2005 after it had been determined that the contract being negotiated had been resolved and the document could be released. Although access was ultimately granted, the Complainant was not given a written reason for a delay or basis for lawful denial of access to the requested record pursuant to N.J.S.A. 47:1A-5.g and these documents were not provided to the Complainant within the statutorily required seven business day time period for response as required under N.J.S.A. 47:1A-5.i. Therefore, pursuant to N.J.S.A. 47:1A-5.g. and 5.i., the Custodian’s actions are deemed an unlawful denial of this record.

With regard to 10/16/2001 R01-264, pursuant to N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. the Custodian’s failure to properly notify the Complainant of a lawful basis for denial of access and the delay in access to these records constitutes a deemed unlawful denial of access.

12/3/2002 R-02-318 and 12/3/2002 R-02-319

The Complainant disputes the redaction made to the closed session minutes entitled 12/3/2002 R-02-318. The Custodian certified in the document index provided to the GRC January 4, 2006 that the redacted information has to do with information on the police department. The Custodian asserts that the redacted information is exempt from access pursuant to N.J.S.A. 47:1A-1.1 as attorney-client privilege relating to Allegretta litigation which had not been settled at the time of the OPRA request.

The Complainant asserts that he was informed by the Custodian that he was denied access to portions of 12/3/2002 R-02-319 because they involve information regarding ongoing litigation and/or negotiations. The Custodian has certified that this

information is relating to collective negotiations contract strategy and is exempt from access under N.J.S.A. 47:1A-1.1 as a public employee related record.

The potential reasons for denying access to 12/3/2002 R-02-318 and 12/3/2002 R-02-319 claimed by the Custodian are compelling but, it cannot be determined whether the facts of this complaint support the denial of access to the redacted portions of the requested records. Therefore, an *in camera* review of these unredacted requested records is necessary to determine what information, if any, is exempt from disclosure.

05/17/2005 R-05131

The Custodian certifies that 05/17/2005 R-05131 did not exist at the time of the request and so could not be released in response to the Complainant's May 17, 2005 OPRA request. This record was not made, maintained or kept on file at the time of the OPRA request therefore, there is no denial of access to this document.

05/17/2005 R-05131 was not made, maintained or kept on file at the time of the Complainant's May 17, 2005 OPRA request therefore, there is no denial of access to this document.

12/17/2002 R-02-335

The Custodian indicates that the Complainant was notified in writing on May 25, 2005 that 12/17/2002 R-02-335 would be available for pick-up by the Complainant on June 1, 2005. The Custodian also certifies that all information in this document was provided to the Complainant on June 1, 2005. Although the Complainant was given a written response to the request and access was ultimately granted, the Complainant was not given a written reason for a delay or basis for lawful denial of access to the requested record pursuant to N.J.S.A. 47:1A-5.g and these documents were not provided to the Complainant within the statutorily required seven business day time period for response as required under N.J.S.A. 47:1A-5.i. Therefore, pursuant to N.J.S.A. 47:1A-5.g and 5.i., the Custodian's actions are deemed an unlawful denial of this record.

With regard to 12/17/2002 R-02-335, pursuant to N.J.S.A. 47:1A-5.i and N.J.S.A. 47:1A-5.g the Custodian's failure to properly notify the Complainant of a lawful basis for denial of access and the delay in access to these records constitutes a deemed unlawful denial of access.

Closed Session Minutes Indicated in the Custodian's Index as 12/30/97

In response to the Complainant's concern about redacted portions of the closed session minutes indicated in the Custodian's index as 12/30/97, the Custodian certifies that the requested documents were released in their entirety to the Complainant on June 6, 2005 in response to this OPRA request. The Custodian states to the GRC that the records were not provided within the statutory time period because they were thought to be exempt from access as a personnel record. The Custodian asserts that upon further review the records were released to the Complainant. Although access was ultimately granted the Complainant was not given a written reason for a delay or basis for lawful denial of access to the requested record pursuant to N.J.S.A. 47:1A-5.g and these

documents were not provided to the Complainant within the statutorily required seven business day time period for response as required under N.J.S.A. 47:1A-5.i. Therefore, pursuant to N.J.S.A. 47:1A-5.g. and 5.i., the Custodian's actions are deemed an unlawful denial of this record.

With regard to the closed session minutes indicated in the Custodian's index as 12/30/97 pursuant to N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g., the Custodian's failure to properly notify the Complainant of a lawful basis for denial of access or delay in access to these records constitutes a deemed unlawful denial of access.

Method of Redaction

OPRA states:

“...[t]he Government Records Council shall... prepare guidelines and an informational pamphlet for use by records custodians in complying with the law governing access to public records... operate an informational website...” N.J.S.A. 47:1A-7.b.

Additionally, the Complainant raises the issue that the Custodian's redactions do not conform to the GRC instructions for redaction available on the GRC website. The Complainant states that the Custodian did not mark the redacted portions using a visually obvious method. The Custodian asserts that it is clear from the documents released which of the portions of the documents had been redacted.

While OPRA itself does not specify the method of redaction that must be used when denying access to a portion of a requested record the GRC is responsible for providing guidance to records Custodian's to respond to OPRA requests pursuant to N.J.S.A. 47:1A-7.b. The GRC website indicates that, “redaction may be accomplished by using a visually obvious method that shows the requester the specific location of any redacted material in the record... [i]f ‘white-out’ correction fluid is used to redact material, some visual symbol should be placed in the space formerly occupied by the redacted material to show the location of redacted material.”⁷ From the copies of the documents provided as part of the Denial of Access Complaint and subsequent submissions by the Complainant, it is apparent that the Custodian has white out the redacted materials and not provided a visual symbol showing the location of the redacted materials. Therefore, the Custodian has acted improperly in not redacting the requested documents according to GRC guidelines.

Whether the Complainant was provided a “Rice Notice” pursuant to N.J.S.A. 10:4-6?

⁷ http://www.state.nj.us/grc/records_notes/rngovrecords.html, Copyright 2003 by the New Jersey Government Records Council.

The Complainant questions the Custodian's compliance with the Open Public Meetings Act ("OPMA") concerning a "Rice Notice," pursuant to N.J.S.A. 10:4-6.

The duties and responsibilities of the GRC are provided for in OPRA under N.J.S.A. 47:1A-7.b. Specifically the GRC is statutorily mandated to:

- establish an informal mediation program to facilitate the resolution of disputes regarding access to government records;
- receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian;
- issue advisory opinions, on its own initiative, as to whether a particular type of record is a government record which is accessible to the public;
- prepare guidelines and an informational pamphlet for use by records custodians in complying with the law governing access to public records;
- prepare an informational pamphlet explaining the public's right of access to government records and the methods for resolving disputes regarding access, which records custodians shall make available to persons requesting access to a government record;
- prepare lists for use by records custodians of the types of records in the possession of public agencies which are government records;
- make training opportunities available for records custodians and other public officers and employees which explain the law governing access to public records; and
- operate an informational website and a toll-free helpline staffed by knowledgeable employees of the council during regular business hours which shall enable any person, including records custodians, to call for information regarding the law governing access to public records and allow any person to request mediation or to file a complaint with the council when access has been denied..."

Thus, OPRA does not authorize the GRC to adjudicate whether a Custodian has complied with OPMA.

OPMA specifically provides that "[a]ny person including a member of the public, may apply to the Superior Court for injunctive orders or other remedies to insure compliance with the provisions of [OPMA] and the Court shall issue such orders and remedies as shall be necessary to insure compliance with [OPMA]." N.J.S.A. 10:4-16 Therefore, the GRC does not have the authority to determine a Custodian's compliance with OPMA or any law other than OPRA.

Based on N.J.S.A. 47:1A-7.b., the GRC does not have authority adjudicate whether a Custodian has complied with OPMA or any statute other than OPRA.

Whether the denial of access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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 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.

Based on the deemed unlawful denial of access to the requested records and the fact that the Custodian’s May 25, 2005 written response to the request was insufficient, the Council must consider whether or not 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.

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 at 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 (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 (App. Div. 1996) at 107).

In light of the legal standards set forth above and the fact that the Custodian has ultimately released those documents for which no specific exemption might exist, the Custodian’s actions do not meet the legal standard for a knowing and willful violation pursuant to OPRA or unreasonable denial of access under the totality of the circumstances in this case. However, the Custodian’s actions do appear to be at least negligent regarding his knowledge of OPRA.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council find that:

17. With regard to 10/16/2001 R01-264, pursuant to N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. the Custodian's failure to properly notify the Complainant of a lawful basis for denial of access and the delay in access to these records constitutes a deemed unlawful denial of access.
18. The potential reasons for denying access to 12/3/2002 R-02-318 and 12/3/2002 R-02-319 claimed by the Custodian are compelling but, it cannot be determined whether the facts of this complaint support the denial of access to the redacted portions of the requested records. Therefore, an *in camera* review of these unredacted requested records is necessary to determine what information, if any, is exempt from disclosure.
19. The document 05/17/2005 R-05131 was not made, maintained or kept on file at the time of the Complainant's May 17, 2005 OPRA request therefore, there is no denial of access to this document.
20. With regard to 12/17/2002 R-02-335, pursuant to N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. the Custodian's failure to properly notify the Complainant of a lawful basis for denial of access and the delay in access to these records constitutes a deemed unlawful denial of access.
21. With regard to the closed session minutes indicated in the Custodian's index as 12/30/97 pursuant to N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g., the Custodian's failure to properly notify the Complainant of a lawful basis for denial of access or delay in access to these records constitutes a deemed unlawful denial of access.
22. The Custodian has acted improperly in not redacting the requested documents according to GRC guidelines.
23. Based on N.J.S.A. 47:1A-7.b., the GRC does not have authority adjudicate whether a Custodian has complied with OPMA or any statute other than OPRA.
24. In light of the legal standards set forth above and the fact that the Custodian has ultimately released those documents for which no specific exemption might exist, the Custodian's actions do not meet the legal standard for a knowing and willful violation pursuant to OPRA or unreasonable denial of access under the totality of the circumstances in this case. However, the Custodian's actions do appear to be at least negligent regarding his knowledge of OPRA.

Prepared By:

Colleen C. McGann

Case Manager

Approved By:

Catherine Starghill
Executive Director

July 6, 2006

