

**FINAL DECISION**  
**November 15, 2006 Government Records Council Meeting**

Jane Cowley  
Complainant

Complaint No. 2006-45

v.

Township of Kingwood  
Custodian of Record

At the November 15, 2006 public meeting, the Government Records Council (“Council”) considered the November 8, 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 complied with the Council’s September 21, 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 15<sup>th</sup> 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**

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

**Jane Cowley<sup>1</sup>**  
**Complainant**

*GRC Complaint No. 2006-45*

v.

**Township of Kingwood<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:**

1. Township Committee meeting minutes from October 2003 through October 2004 in any form including audio tape or handwritten notes.
2. All Department of Environmental Protection (DEP) Notices of Violation and Letters of Interpretation from January 2002 to the present on all township properties.<sup>3</sup>

**Request Made:** October 7, 2004 and October 20, 2004

**Response Made:** October 14, 2004 and October 28, 2004

**Custodian:** Mary MacConnell

**GRC Complaint Filed:** February 20, 2006

**Background**

September 21, 2006

Government Records Council's ("Council") Interim Order. At its September 21, 2006 public meeting, the Council considered the September 7, 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, found that:

1. The unapproved draft meeting minutes and the Custodian's handwritten notes of the Township Committee meetings constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, as well as O'Shea v. West Milford Board of Education, GRC Case No. 2004-93 (April, 2006). As such, the Custodian has borne her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 as she certifies that the requested minutes which have not already been provided have not yet been approved by the governing body.

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

<sup>2</sup> Represented by Joseph Novak, Esq. (Clinton, NJ).

<sup>3</sup> The Complainant requested additional documents; however, they are not the subject of this complaint.

2. However, the Custodian has unlawfully denied access to the audio tapes of the Township Committee meetings because these tapes do not constitute inter-agency or intra-agency advisory, consultative, or deliberative material. The audio tapes are not pre-decisional as they are the recording of the actual statements made by the attendees of the meetings. These tapes may require redaction of information discussed which is otherwise exempt from disclosure to the public under OPRA, but in general the inter-agency or intra-agency advisory, consultative, or deliberative material exemption does not apply. As such, the audio tapes (if any exist) should be released to the Complainant with any redactions which may be lawfully justified pursuant to N.J.S.A. 47:1A-6.
3. Since the Custodian certifies granting the Complainant access to the requested records within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i. by allowing the Complainant to view the records during regular business hours pursuant to N.J.S.A. 47:1A-5.a. and the Complainant's request to inspect the requested records, the Custodian has properly responded to the Complainant's request and has not unlawfully denied access to the requested records.
4. **The Custodian shall comply with "2." above within five (5) business days from receipt of this Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.**

**October 4, 2006**

Council's Interim Order distributed to the parties.

October 6, 2006

E-mail from the GRC to the Custodian. The Executive Director acknowledges the Custodian's verbal request (via a telephone conversation of the same day) for information regarding the criteria the GRC established to evaluate whether a custodian may assess a special service charge in accordance with N.J.S.A. 47:1A-5.c. and whether such charge assessed is reasonable. The Custodian asserts that a special service charge may be necessary in order to comply with the GRC's Interim Order. The Executive Director requires the Custodian to provide information regarding the proposed special service charge to the Complainant and the GRC within the five (5) business days as ordered in the September 21, 2006 Interim Order.

**October 12, 2006**

Custodian's E-mail to the GRC. The Custodian states that following a review of the criteria the GRC established to evaluate whether a special service charge is warranted and whether such charge assessed is reasonable, she is not requesting a special service charge to provide the records the GRC ordered disclosed to the Complainant in the September 21, 2006 Interim Order.

**October 12, 2006**

Custodian's response to the Council's Interim Order. The Custodian provided the Complainant a list of all the audio tapes available to be duplicated at a cost of \$1.98 per audio tape. The Custodian requested the Complainant determine the audio tapes desired, submit the appropriate payment to the Custodian, and the tapes would be provided within one day or so.

**Analysis**

**Whether the Custodian complied with the Council's September 21, 2006 Interim Order?**

The Custodian made the requested audio tapes available to the Complainant for the actual cost of the audio tapes of \$1.98 per tape on October 12, 2006 as ordered by the GRC in its September 21, 2006 Interim Order. Thus, the Custodian complied with the Council's September 21, 2006 Interim Order.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Custodian has complied with the Council's September 21, 2006 Interim Order.

Prepared and  
Approved By:

Catherine Starghill, Esq.  
Executive Director

November 8, 2006

**INTERIM ORDER****September 21, 2006 Government Records Council Meeting**

Jane Cowley  
Complainant

Complaint No. 2006-45

v.

Township of Kingwood  
Custodian of Record

At the September 21, 2006 public meeting, the Government Records Council (“Council”) considered the September 7, 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 with an amendment regarding the public access to the requested audio tapes of a public meeting. The Council, therefore, finds that:

5. The unapproved draft meeting minutes and the Custodian’s handwritten notes of the Township Committee meetings constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, as well as O’Shea v. West Milford Board of Education, GRC Case No. 2004-93 (April, 2006). As such, the Custodian has born her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 as she certifies that the requested minutes which have not already been provided have not yet been approved by the governing body.
6. However, the Custodian has unlawfully denied access to the audio tapes of the Township Committee meetings because these tapes do not constitute inter-agency or intra-agency advisory, consultative, or deliberative material. The audio tapes are not pre-decisional as they are the recording of the actual statements made by the attendees of the meetings. These tapes may require redaction of information discussed which is otherwise exempt from disclosure to the public under OPRA, but in general the inter-agency or intra-agency advisory, consultative, or deliberative material exemption does not apply. As such, the audio tapes (if any exist) should be released to the Complainant with any redactions which may be lawfully justified pursuant to N.J.S.A. 47:1A-6.
7. Since the Custodian certifies granting the Complainant access to the requested records within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i. by allowing the Complainant to view the records during regular business hours pursuant to N.J.S.A. 47:1A-5.a. and the Complainant’s request to inspect the requested records, the Custodian has properly responded to the Complainant’s request and has not unlawfully denied access to the requested records.

8. **The Custodian shall comply with "2." above within five (5) business days from receipt of this Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.**

Interim Order Rendered by the  
Government Records Council  
On The 21<sup>st</sup> Day of September, 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: October 4, 2006**

**Findings and Recommendations of the Executive Director  
September 21, 2006 Council Meeting**

Jane Cowley<sup>4</sup>

GRC Complaint No. 2006-45

**Complainant**

v.

**Township of Kingwood<sup>5</sup>  
Custodian of Records**

**Records Relevant to Complaint:**

3. Township Committee meeting minutes from October 2003 through October 2004 in any form including audio tape or handwritten notes.
4. All Department of Environmental Protection (DEP) Notices of Violation and Letters of Interpretation from January 2002 to the present on all township properties.<sup>6</sup>

**Request Made:** October 7, 2004 and October 20, 2004

**Response Made:** October 14, 2004 and October 28, 2004

**Custodian:** Mary MacConnell

**GRC Complaint filed:** February 20, 2006

**Background**

October 7, 2004

Complainant's Open Public Records Act ("OPRA") request. The Complainant is seeking Township Committee meeting minutes from October 2003 through October 2004 in any form including audio tape or handwritten notes.

October 14, 2004

Custodian's response to the Complainant's October 7, 2004 OPRA request. The Custodian asserts that the Township is not legally required to tape meetings and therefore there are some meetings for which no tapes exist. She claims that any tapes or handwritten notes that do exist are not available as public information and are considered a tool the Custodian uses to prepare the minutes. The Custodian also claims that the minutes do not become public information until they are adopted by the governing body.

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<sup>4</sup> No legal representation of record listed.

<sup>5</sup> Represented by Joseph Novak, Esq. (Clinton, NJ).

<sup>6</sup> The Complainant requested additional documents; however, they are not the subject of this complaint.



She states that if the Complainant would like copies of approved minutes in the future, she would be happy to advise the Complainant as to when they would become available.

**October 20, 2004**

Complainant's second OPRA request. The Complainant is seeking all Department of Environmental Protection (DEP) notices of Violation and Letters of Interpretation from January 2002 to the present on all Township properties.

**October 28, 2004**

Custodian's response to the Complainant's October 20, 2004 OPRA request. The Custodian states that the requested Notices of Violation, Applications and Letters of Interpretation for properties in the Township are available at the Municipal Building, Monday through Friday from 9:00am – 3:00pm. She also states that it would be helpful for the Complainant to contact her a day before she plans to come in as some of the responsive documents have to be retrieved from another location.

Additionally, the Custodian indicates that the requested information can also be accessed from the NJ DEP's website at [www.state.nj.us/dep](http://www.state.nj.us/dep). She includes step by step instructions on how to access the requested information through the website.

February 20, 2006

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

- Letter from the Custodian to the Complainant dated September 7, 2004
- Complainant's October 7, 2004 OPRA request
- Letter from Custodian to the Complainant dated October 14, 2004
- Complainant's October 20, 2004 OPRA request
- Letter from Custodian to Complainant dated October 28, 2004

The Complainant asserts that she submitted an OPRA request for copies of the Township Committee meeting minutes from October 2003 through October 2004. She claims that the Custodian denied her request by stating that the minutes are not completed because the Township is too busy and she cannot access the minutes in any other format. Additionally, the Complainant asserts that she submitted another OPRA request for DEP Letters of Interpretation and Notices of Violation. She claims that the Custodian advised her that the requested records are only available at the Township Building, but then advised that the Complainant could access the same records on the DEP's website.

February 22, 2006

**Offer of Mediation sent to both parties.**

**February 28, 2006**

Custodian's faxed Agreement to Mediate. The Complainant did not agree to mediate this case.

**April 4, 2006**

Request for Statement of Information sent to the Custodian.

**April 4, 2006**

Letter from Custodian to GRC staff. The Custodian states that on February 28, 2006 she faxed her Agreement to Mediate to GRC staff and inquires as to why a mediation meeting has not been scheduled. She also states that the Township offices will be closed from April 6, 2006 to April 10, 2006 due to renovation of the building and requests an extension of time to prepare the Statement of Information.

**April 17, 2006**

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated August 23, 2004
- Complainant's OPRA request dated August 24, 2004
- Complainant's OPRA request dated October 20, 2004
- Letter from Custodian to Complainant dated September 7, 2004
- Letter from Custodian to Complainant dated October 14, 2004
- Letter from Custodian to Complainant dated October 28, 2004

The Custodian certifies that she received the Complainant's various OPRA requests on August 23, 2004, August 24, 2004, and October 20, 2004. She certifies that she provided the Complainant with written responses to said requests on September 7, 2004, October 14, 2004, and October 28, 2004. The Custodian additionally certifies that the following requested documents were provided to the Complainant:

- Construction Permit File for Block 26 Lot 6
- Planning Board Minutes:
  - January 14, 2003
  - February 11, 2003
  - March 11, 2003
  - April 8, 2003
  - May 13, 2003
  - June 10, 2003
  - July 8, 2003
  - August 12, 2003
  - September 9, 2003
  - October 14, 2003
  - November 10, 2003
  - December 9, 2003
  - January 13, 2004
  - February 10, 2004
  - March 9, 2004
  - April 13, 2004
  - May 11, 2004
  - June 8, 2004
  - July 13, 2004

- August 10, 2004
- September 14, 2004
- October 12, 2004
- November 12, 2004
- December 14, 2004
- Township Committee Minutes:
  - January 1, 2003
  - January 7, 2003
  - February 4, 2003
  - March 3, 2003
  - March 4, 2003
  - April 1, 2003
  - April 28, 2003
  - May 6, 2003
  - May 13, 2003
  - May 27, 2003
  - June 3, 2003
  - June 11, 2003
  - June 23, 2003
  - July 1, 2003
  - July 18, 2003
  - August 5, 2003
  - September 2, 2003
  - September 22, 2003
- Township Ordinances:
  - No. 12-10-2003
  - No. 12-11-2003
  - No. 12-13-2003
  - No. 12-1-2004
  - No. 12-2-2004
  - No. 12-3-2004
  - No. 12-4-2004
  - No. 12-5-2004
  - No. 12-6-2004
  - No. 12-7-2004
  - No. 12-8-2004
  - No. 12-9-2004
  - No. 12-10-2004
  - No. 12-11-2004
  - No. 12-12-2004
  - No. 12-13-2004
  - No. 12-14-2004
  - No. 12-15-2004
  - No. 12-16-2004

The Custodian certifies that all of the documents that were requested by the Complainant which were maintained on file by the Township on August 23, 2004, September 7, 2004, and October 14, 2004 were provided to the Complainant. She additionally certifies that she cannot provide official minutes if they have not been prepared yet. The Custodian also asserts that in the Complainant's October 20, 2004 request, she requested to view DEP documents, rather than have them copied. The Custodian certifies that she notified the Complainant of when she could come in to view the requested records as well as advised her of an alternate way to view the same records online. The Custodian contends that anything the Township would have on file regarding these requests would be a copy of another agency's original document.

## Analysis

### **Whether the Custodian unlawfully denied access to the requested Township Committee meeting minutes, the DEP's Letters of Interpretation, and the DEP's Notices of Violation?**

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 ...* 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 also states that:

“[t]he custodian of a government record shall permit the record to be inspected, examined, and copied by any person *during regular business hours...*” (Emphasis added.) N.J.S.A. 47:1A-5.a.

Additionally, OPRA mandates that:

“[a] custodian shall permit access to a government record and provide a copy thereof *in the medium requested* if the public agency maintains the record in that medium...” (Emphasis added.) N.J.S.A. 47:1A-5.d.

OPRA also provides 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...*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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

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

The Open Public Meetings Act provides that:

“[e]ach public body shall keep reasonable comprehensible minutes of all its meetings showing the time and place, the members present, the subjects considered, the actions taken, the vote of each member, and any other information required to be shown in the minutes by law, which shall be promptly available to the public to the extent that making such matters public shall not be inconsistent with section 7 of this act.” N.J.S.A. 10:4-14.

#### Township Committee Meeting Minutes

The Complainant asserts submitting an OPRA request on October 7, 2004 for the Township Committee meeting minutes from October 2003 through October 2004 in any form including audio tape or handwritten notes. She claims to have received a response from the Custodian dated October 14, 2004 in which the Custodian asserted that any tapes or handwritten notes of Township meetings are not public information as they are just a tool she uses to prepare the minutes and that minutes cannot be released until approved by the governing body. The Custodian certifies that she cannot provide official minutes if they have not been prepared yet.

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

The draft minutes in question are prepared as part of the process of producing minutes of a meeting of a public body that was held pursuant to the Open Public Meetings Act (OPMA). Specifically, OPMA provides:

Each public body shall keep reasonable comprehensible minutes of all its meetings showing the time and place, the members present, the subjects considered, the actions taken, the vote of each member, and any other

information required to be shown in the minutes by law, which shall be promptly available to the public to the extent that making such matters public shall not be inconsistent with section 7 of this act. N.J.S.A. 10:4-14.

The question of whether such draft minutes are exempt from disclosure requires consideration of the general question of the status of draft documents under OPRA. As a general matter, draft documents are advisory, consultative and deliberative communications. Although OPRA broadly defines a “government record” as information either “made, maintained or kept on file in the course of [an agency’s] official business,” or “received” by an agency in the course of its official business, N.J.S.A. 47:1A-1.1, the statute also excludes from this definition a variety of documents and information. Ibid. See Bergen County Improvement Auth. v. North Jersey Media, 370 N.J. Super. 504, 516 (App. Div. 2004). The statute expressly provides that “inter-agency or intra-agency advisory, consultative, or deliberative material” is not included within the definition of a government record. N.J.S.A. 47: 1A-1 .1.

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

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

The New Jersey Appellate Division also has reached this conclusion with regard to draft documents. In the unreported section of In re Readoption, *supra*, the court reviewed an OPRA request to the Department of Corrections (DOC) for draft regulations and draft statutory revisions. The court stated that these drafts were “all clearly pre-decisional and reflective of the deliberative process.” *Id.* at 18. It further held:

The trial judge ruled that while appellant had not overcome the presumption of non-disclosure as to the entire draft, it was nevertheless entitled to those portions which were eventually adopted. Appellant appeals from the portions withheld and DOC appeals from the portions required to be disclosed. We think it plain that all these drafts, in their

entirety, are reflective of the deliberative process. On the other hand, appellant certainly has full access to all regulations and statutory revisions ultimately adopted. We see, therefore, no basis justifying a conclusion that the presumption of nondisclosure has been overcome. Ibid. (Emphasis added.)

The court similarly held that memos containing draft procedures and protocols were entirely protected from disclosure. *Id.* at 19. See also Edwards v. City of Jersey City, GRC No. 2002-71 (February 27, 2004) (noting that in general, drafts are deliberative materials).

Although draft minutes always fall under OPRA's exemption for deliberative material, the Appellate Division has suggested that the confidentiality accorded to deliberative records may be overcome if the requestor asserts and is able to demonstrate an overriding need for the record in question. See In re Readoption, *supra*, 367 N.J.Super. at 73. Resolution of such a claim, if raised by the requestor, will depend upon the particular circumstances of the case in question.

Additionally, in O'Shea v. West Milford Board of Education, GRC Case No. 2004-93 (April, 2006), the Council held that "the Board Secretary's handwritten notes taken during the June 22, 2004 executive session were exempt from disclosure under the 'inter-agency, intra-agency advisory, consultative, or deliberative' privilege pursuant to N.J.S.A. 47:1A-1.1."

Thus, in accordance with the foregoing case law, all draft documents including handwritten notes, including the draft minutes of a meeting held by a public body, are entitled to the protection of the deliberative process privilege. Draft minutes are pre-decisional. In addition, they reflect the deliberative process in that they are prepared as part of the public body's decision making concerning the specific language and information that should be contained in the minutes to be adopted by that public body, pursuant to its obligation, under the Open Public Meetings Act, to "keep reasonably comprehensible minutes." N.J.S.A. 10:4-14.

Therefore, the unapproved, draft meeting minutes and the Custodian's handwritten notes of the Township Committee meetings constitutes inter-agency or intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and O'Shea v. West Milford Board of Education, GRC Case No. 2004-93 (April, 2006). As such, the Custodian has borne her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 as she certifies that the requested minutes which have not already been provided to the Complainant have not been approved by the governing body. These minutes should be released when they have been approved by the governing body.

This conclusion is a departure from prior GRC decisions and is based on the legal advice received from the Office of the Attorney General.

However, the Custodian has unlawfully denied access to the audio tapes of the Township Committee meetings because these tapes do not constitute inter-agency or intra-agency advisory, consultative, or deliberative material. The audio tapes are not pre-decisional as they are the recording of the actual statements made by the attendees of the meetings. These tapes may require redaction of information discussed which is otherwise exempt from disclosure to the public under OPRA, but

in general the inter-agency or intra-agency advisory, consultative, or deliberative material exemption does not apply. As such, the audio tapes (if any exist) should be released to the Complainant with any redactions which may be lawfully justified pursuant to N.J.S.A. 47:1A-6.

### DEP's Letters of Interpretation and DEP's Notices of Violations

The Complainant states that she submitted a second OPRA request on October 20, 2004 for all DEP Notices of Violation and Letters of Interpretation from January 2002 to the present on all Township properties.

The Custodian certifies providing a written response on October 28, 2004 in which she indicated that the requested documents were available for viewing in the Municipal Building, Monday through Friday from 9:00am– 3:00pm. The Custodian also certifies that she provided the Complainant with an alternate means of accessing these records by giving her instructions on how to find these documents on the DEP's website.

The language of OPRA is clear that a custodian is to provide requested records in the medium in which they are requested pursuant to N.J.S.A. 47:1A-5.d. Additionally, N.J.S.A. 47:1A-5.i states that a custodian must either grant or deny access to a requested record within seven (7) business days of receiving said request. N.J.S.A. 47:1A-5.a provides that records may be inspected during an agency's regular business hours.

Since the Custodian certifies granting the Complainant access to the requested records within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i by allowing the Complainant to view the records during regular business hours pursuant to N.J.S.A. 47:1A-5.a and the Complainant's request to inspect the requested records, the Custodian has properly responded to the Complainant's request and has not unlawfully denied access to the requested records.

### Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

9. The unapproved draft meeting minutes and the Custodian's handwritten notes of the Township Committee meetings constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, as well as O'Shea v. West Milford Board of Education, GRC Case No. 2004-93 (April, 2006). As such, the Custodian has born her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 as she certifies that the requested minutes which have not already been provided have not yet been approved by the governing body.
10. However, the Custodian has unlawfully denied access to the audio tapes of the Township Committee meetings because these tapes do not constitute inter-agency or intra-agency advisory, consultative, or deliberative material. The audio tapes are not pre-decisional as they are the recording of the actual statements made by the attendees of the meetings. These



tapes may require redaction of information discussed which is otherwise exempt from disclosure to the public under OPRA, but in general the inter-agency or intra-agency advisory, consultative, or deliberative material exemption does not apply. As such, the audio tapes (if any exist) should be released to the Complainant with any redactions which may be lawfully justified pursuant to N.J.S.A. 47:1A-6.

11. Since the Custodian certifies granting the Complainant access to the requested records within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i. by allowing the Complainant to view the records during regular business hours pursuant to N.J.S.A. 47:1A-5.a. and the Complainant's request to inspect the requested records, the Custodian has properly responded to the Complainant's request and has not unlawfully denied access to the requested records.
12. **The Custodian shall comply with "2." above within five (5) business days from receipt of this Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.**

Prepared By:

Dara Lownie  
Case Manager

Approved By:

Catherine Starghill, Esq.  
Executive Director

September 7, 2006