



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
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CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

CHARLES A. RICHMAN  
*Commissioner*

**INTERIM ORDER**

**April 26, 2016 Government Records Council Meeting**

Glenn Katon (on behalf of Muslim Advocates)  
Complainant

Complaint No. 2012-267

v.

NJ Department of Law and Public Safety,  
Office of the Attorney General  
Custodian of Record

At the April 26, 2016 public meeting, the Government Records Council (“Council”) considered the March 22, 2016 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 GRC is “unable to make a determination as to the accessibility of [the records] based upon . . . the custodian’s response thereto . . .” N.J.A.C. 5:105-2.7. As such, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian unlawfully denied access to the requested records, and if so to: (a) order disclosure of the records, (b) determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances and is therefore subject to a civil penalty pursuant to N.J.S.A. 47:1A-11, and (c) make a determination as to whether the Complainant is a prevailing party, and if so, award prevailing party attorney fees pursuant to N.J.S.A. 47:1A-6.

Interim Order Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of April, 2016

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: April 28, 2016**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
April 26, 2016 Council Meeting**

**Glenn Katon (on behalf of Muslim Advocates)<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-267**

**v.**

**New Jersey Department of Law and Public Safety, Office of the Attorney General  
Custodial Agency<sup>2</sup>**

**Records Relevant to Complaint:** Electronically formatted copies via e-mail of:

1. All records collected and/or created as part of the “fact-finding review” of intelligence-gathering conducted by the New York Police Department (“NYPD”) in New Jersey, including but not limited to all records reflecting communications with the NYPD, such as e-mails, audio recordings, notes of telephone and other communications, and memos.
2. All records upon which the Office of the Attorney General relied for its determination that the NYPD’s activities in the state did not violate New Jersey’s civil or criminal laws.
3. All records reflecting the Office of the Attorney General’s determination that the NYPD’s activities in the state did not violate New Jersey’s civil or criminal laws.
4. The agreement with the NYPD referenced in the Attorney General’s News Release dated May 24, 2012, and any new protocols or procedures promulgated pursuant to the agreement.
5. The “formalized notification protocols” referenced in the Attorney General’s News Release dated May 24, 2012.
6. All records reflecting the selection criteria for the “Muslim outreach committee” referenced in the Attorney General’s News Release dated May 24, 2012, and communications inside and outside the Attorney General’s Office regarding that committee.

**Custodian of Records:** Deputy Attorney General Bruce J. Solomon

**Request Received by Custodian:** July 16, 2012

**GRC Complaint Received:** September 17, 2012

**Response Made by Custodian:** October 4, 2012

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<sup>1</sup> Represented by Steven Beckelman, Esq., of McCarter & English, LLP (Newark, NJ).

<sup>2</sup> Represented by DAG Valentina M. DiPippo.

Glenn Katon (on behalf of Muslim Advocates) v. New Jersey Department of Law and Public Safety, Office of the Attorney General, 2012-267 – Supplemental Findings and Recommendations of the Executive Director

## Background

At its July 23, 2013 public meeting, the Government Records Council (“Council”) considered the July 16, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian did not unlawfully deny access to the records responsive to request items numbered 1 and 4 because the Custodian certified that no responsive records exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. The records responsive to requested items numbered 2 and 3 are exempt from disclosure as inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1. *See also* In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75 (2000) and Education Law Center v. NJ Department of Education, 198 N.J. 274 (2009). Thus, the Custodian did not unlawfully deny access to the responsive records. N.J.S.A. 47:1A-6.
4. Notwithstanding the Custodian’s “deemed denial,” the Custodian did not unlawfully deny access to the records responsive to requested items numbered 5 and 6 because he disclosed the records to the Complainant on October 4, 2012. N.J.S.A. 47:1A-6.
5. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian provided the Complainant with all records responsive to the request not otherwise exempt. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

### Procedural History:

On July 26, 2013, the Council distributed its July 23, 2013 Final Decision to all parties. On September 3, 2013, the Complainant appealed this complaint to the Superior Court of New Jersey, Appellate Division.

On February 12, 2015, the Superior Court of New Jersey, Appellate Division, rendered its decision in Katon v. NJ Dep't of Law & Pub. Safety, 2015 N.J. Super. Unpub. LEXIS 256 (App. Div. Feb. 12, 2015). The court affirmed in part, vacated in part, and remanded the matter to the GRC, with direction that the “Custodian shall provide the GRC with a revised Statement and index that responds in full to requests (1) and (3), lists all responsive documents which are not being produced, and particularizes the claim of privilege for each document.” Id. at \*13. The court further stated that “the Custodian shall produce the revised Statement and index promptly in a reasonable time to be set by the GRC within ten (10) days of the date of this opinion.” Id. at \*15.

Pursuant to the court’s directive, the GRC by letter dated February 20, 2015, asked the Custodian to submit a revised Statement of Information and document index responding in full to request items number 1 and 3. In response to the GRC’s letter, the Custodian submitted a revised SOI on March 23, 2015.<sup>3</sup>

The Custodian certifies that he received the Complainant’s OPRA request on July 16, 2012. The Custodian further certifies that he met with members of the Attorney General’s Executive Staff, particularly DAG Christopher Iu and Special Assistant to the Attorney General Paul Salvatoriello, and reviewed their files in order to respond to the Complainant’s request. The Custodian certifies that he responded to the request on October 4, 2012, and disclosed 8 pages of records responsive to same. The Custodian states that in the Statement of Information (“SOI”), dated April 19, 2013, he certified that there were 579 pages of records in Special Assistant Salvatoriello’s file and 31 pages of records in DAG Iu’s file; however, when the Custodian’s Counsel reviewed the files to prepare the document index for the revised SOI, she determined that there were actually 548 pages of records in Special Assistant Salvatoriello’s file and 33 pages of records in DAG Iu’s file, which were withheld from disclosure, in addition to the 8 pages of records previously disclosed. The Custodian certifies that he is disclosing 12 pages of records from DAG Iu’s file as an attachment to the revised SOI. The Custodian states that there are a total of 589 pages of records, which includes 569 pages listed on the document index, 8 pages disclosed to the Complainant in October 2012, and 12 pages disclosed to the Complainant on March 23, 2015. The Custodian certifies that the discrepancy in the count is attributable to a clerical error.

The Custodian’s Counsel states that in the SOI dated April 19, 2013, the Custodian interpreted request item number 1 as seeking documents from the New York Police Department (“NYPD”) in the possession of the Office of the Attorney General (“OAG”). As such, Counsel states that the Custodian certified that there were no records responsive to request item number 1. Counsel states that the Appellate Division interpreted request item number 1 more broadly to include all documents held by the OAG which are related to the fact-finding review described in the Attorney General’s May 24, 2012 press release. Counsel states that, in view of the Appellate Division’s interpretation, the Custodian is revising his response to assert that any documents responsive to request item number 1 are protected by the attorney-client, attorney work product, and deliberative process privileges.

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<sup>3</sup> The parties agreed to an extension of time for the Custodian to submit the revised SOI. The revised SOI includes a document index for the records determined to be responsive to request item numbers 1 and 3, Counsel’s letter brief, Custodian’s certification, and document production.

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The Custodian's Counsel first argues that the records responsive to request item numbers 1 and 3 that were withheld from disclosure are exempt as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1., as well as attorney work product.

Counsel states that the Executive Staff members involved in this matter were attorneys who gathered and created documents to advise the Attorney General so that he could determine whether the NYPD's activities in New Jersey violated state laws. Counsel argues that such documents reflect legal advice and policy recommendations made by Executive Staff members to the Attorney General. Counsel further argues that these records are also subject to the attorney work product privilege because they express the mental impressions, conclusions, opinions, or legal theories of an attorney. Counsel cites Paff v. Division of Law, 412 N.J. Super. 140 (App. Div. 2010) and O'Boyle v. Borough of Longport, 218 N.J. 168 (2014) as legal authority for said exemptions.

The Custodian's Counsel next argues that the records responsive to request item numbers 1 and 3 that were withheld from disclosure are exempt from disclosure as inter-agency or intra-agency advisory, consultative, or deliberative ("ACD") material pursuant to N.J.S.A. 47:1A-1.1.

The Custodian's Counsel states that the withheld records are those that the OAG collected and created as part of its fact finding review, the purpose of which was to make a legal determination regarding whether the NYPD's activities violated any of New Jersey's criminal or civil laws. Counsel states that the OAG also used the information to make policy determinations regarding how to proceed in view of the NYPD's activity in New Jersey.

The Custodian's Counsel argues that the documents "collected" by the OAG include documents from litigation related to NYPD activity in New Jersey, internet research, including news clips and website printouts, and legal research. Counsel states that although the documents may be publicly available, disclosure of said documents would reveal the OAG's process of conducting research and identifying issues during the decision-making process.

The Custodian's Counsel states that the documents "created" by the OAG, which include internal memoranda, outlines, checklists, task lists, internal meeting agendas, drafts of the Attorney General's Law Enforcement Directive, draft correspondence, draft memoranda of understanding, draft press releases and e-mail correspondence, reflect the analysis and deliberations that occur during the decision-making process. Counsel states that the drafts are works in progress, which if revealed would disclose unofficial policy determinations or present inaccurate information to the public. Counsel contends that the deliberative process privilege protects both decisions to act and not to act. With respect to draft documents, Counsel cites Ciesla v. N.J. Dep't of Health and Senior Servs., 429 N.J. Super. 127, 138 (App. Div. 2012), to argue that protection of same "avoids the confusion that could result from the release of information concerning matters that do not bear on an agency's chosen course."

Counsel states that any documents responsive to request item number 3, other than the May 24, 2012 press release and Attorney General Law Enforcement Directive No. 2012-1, are protected by the deliberative process privilege.

The Custodian's Counsel concludes by arguing that disclosure of any of the documents the Custodian withheld as ACD material would chill open and frank discussion within the agency in the development of its policies. Counsel contends that the Custodian, therefore, properly asserted the deliberative process privilege and the records are exempt from disclosure under OPRA.

The Custodian attached to the SOI a document index listing the denied records by Bates Stamp number. With the exception of Bates #0031 – 0058, the Custodian gave the same reason for denial of all of the records: "Attorney-Client/Attorney Work Product; Deliberative Process"<sup>4</sup>

On April 7, 2015, the Complainant's Counsel submitted a response to the Custodian's revised SOI and document index for request items numbered 1 and 3.

The Complainant's Counsel states that the Custodian has failed to provide a document index as required by the Appellate Division's decree. Specifically, Counsel argues that the Custodian failed to describe sufficiently the basis for each asserted privilege. Counsel argues that the Custodian's assertion of the attorney-client privilege, work product privilege, and deliberative process privilege for every record that is being withheld from disclosure is overbroad, fails to make a sufficiently particularized showing of privilege, contradicts numerous legal principles, and violates the Appellate Division's instructions. Counsel states that an accurate index is necessary for substantive review by the requestor as well as the reviewing court. Counsel cites Paff v. NJ Dep't of Labor, 392 N.J. Super. 334, 341 (App. Div. 2007) in support of his argument.

The Complainant's Counsel states that the Custodian failed to relate each privilege to particular records, as was required per the Appellate Division's directive. The Complainant's Counsel states that, while the Custodian purported to remedy the deficiency, he did not do so. Counsel contends that the Custodian: (1) failed to sufficiently particularize the privileges because he continued to assert three privileges for each record without attempting to explain how any of the privileges attached to the particular record; (2) failed to indicate any basis for the application of a privilege, who prepared the record, to whom it was communicated, and the purpose thereof; (3) used the term "handwritten" to try to indicate some presumption that a privilege applies to handwritten material; and (4) asserted the attorney-client privilege, work product privilege, and deliberative process privilege for publicly available news articles, court filings, and similar documents.

Counsel argues that the Custodian's blanket assertion of the attorney-client privilege to all records listed in the document index should not be sustained. Rather, Counsel argues that a specific basis for the Custodian's inability to comply with a record request describing the nature of the documents is required. Counsel cites Burke v. Brandes, 429 N.J. Super. 169, 178 (App. Div. 2012). The Complainant's Counsel also questions the existence of an attorney-client relationship in the instant case. Counsel states that the Custodian claims that the Attorney General is the client of his deputies. Counsel states that while the courts have found that a unit of State government may be a "client" of the Attorney General for purposes of the attorney-client

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<sup>4</sup> The Custodian stated that Bates #0031 – 0058 are identical to the records already produced in October 2012. Glenn Katon (on behalf of Muslim Advocates) v. New Jersey Department of Law and Public Safety, Office of the Attorney General, 2012-267 – Supplemental Findings and Recommendations of the Executive Director

privilege, where the attorney is not providing legal advice, but is merely performing non-legal duties such as conducting an investigation, the attorney-client privilege otherwise available to a state agency is inapplicable. Counsel cites to Paff v. Div. of Law, 412 N.J. Super. 140, 151-52 (App. Div. 2010).

The Complainant's Counsel contends that the Appellate Division required the Custodian to identify the client if he continued to assert an attorney-client privilege in the revised SOI. Counsel states that the Appellate Division also stated that a "[f]urther explanation may be needed" if the Custodian identifies the client as the Attorney General, given that the Attorney General is the sole legal adviser for all state agencies. Counsel questions the attorney-client relationship that exists between attorneys practicing law in the Attorney General's office that are providing legal advice to the Attorney General, because in such case, he argues, any communications between a subordinate attorney delegated a task by his or her superior would have to be afforded the protections of the attorney-client privilege. Counsel further argues that the NYPD and the New York Attorney General's office are not clients of the OAG; therefore any facts received by them are not subject to the attorney-client privilege. As such, Counsel argues, the Custodian's blanket assertion of the attorney-client privilege for all of the records listed in the document index should not be sustained.

With respect to the work product privilege, the Complainant's Counsel contends that such a privilege applies to records prepared in anticipation of litigation. Counsel argues that the Custodian did not cite to any anticipated litigation that would allow assertion of the work product privilege to deny access to every record listed in the document index. Counsel argues that the requested records in this matter are part of an investigatory file prepared in response to an incident; therefore, the records are not materials prepared in anticipation of litigation and are not protected by the work product privilege. Counsel cites Payton v. NJ Turnpike Auth., 148 N.J. 524, 554. (1997).

The Complainant's Counsel further states that factual information contained in the requested records is not subject to the work product privilege; however the Custodian has not produced any factual documents, in whole or in part. Counsel argues that the Custodian's blanket assertion of the work product privilege for all of the records listed in the document index should not be sustained.

The Complainant's Counsel states that the Custodian also attempted to use the deliberative process privilege to deny the Complainant access to all of the records listed in the document index. Counsel states that to assert the privilege the document must be pre-decisional and it must be deliberative in nature, *i.e.*, containing opinions, recommendations, or advice about agency policies. Counsel cites to In re the Liquidation of Integrity Ins. Co., 165 N.J. 75 (2000). Counsel states that because factual material is not protected, if the requested record contains a mix of deliberative and factual material, the deliberative material may be redacted but the factual material must be disclosed. Counsel argues that the Custodian's blanket assertion of the deliberative process privilege should not be sustained without (1) the Custodian's production of an amended document index that is sufficiently detailed, explaining with particularity the basis of the privilege; and (2) an *in camera* inspection of the privileged records, including a hearing to explain the documents and claim of privilege.

The Complainant's Counsel further argues that the Custodian's search for records responsive to the Complainant's request is inadequate because the Custodian stated that he engaged in a narrower search for records requested by the Complainant than he had for similar prior requests. Counsel argues that the Custodian failed to search adequately for documents responsive to the Complainant's request items. Counsel further states that the Custodian claims that numerous records cannot be disclosed because they are in draft form and therefore exempt from disclosure as ACD material. Counsel questions why numerous draft documents listed in the document index were never put into final form and disclosed or lawfully denied. Counsel further argues that even if in draft form, the facts contained in those draft documents are subject to disclosure. Counsel states that the Custodian must either disclose the draft documents in whole or in part, or explain why they are privileged.

The Complainant's Counsel concludes by stating that the Custodian's blanket claims of privilege to deny access should not be countenanced. The Complainant's Counsel demands that the Council receive, hear, review and adjudicate the Custodian's denial of access pursuant to N.J.S.A. 47:1A-7. Specifically, Counsel demands that the Council require the Custodian to (1) conduct a more thorough search for records responsive to the Complainant's request, (2) provide a more detailed and descriptive privilege log supporting each claim of privilege, (3) disclose all records that are not privileged, either in whole or in part, by making lawful redactions, and (4) pay the Complainant his attorney's fees and costs.

The Complainant's Counsel attached a chart listing the Bates Stamp number for each of the records the Custodian listed in the document index. For each record, Counsel set forth the corresponding privilege asserted by the Custodian and the Complainant's response in opposition to the Custodian's asserted privilege.

On May 8, 2015, the Custodian's Counsel submitted a response to the Complainant's April 7, 2015 response to the Custodian's revised SOI and document index. The Custodian's Counsel asserts that the challenge to the adequacy of the Custodian's search for records responsive to the request is outside the scope of the remand because the Complainant raised the adequacy argument for the first time in the April 7, 2015 response to the Custodian's revised SOI. However, Counsel asserts that the Custodian conducted an appropriately thorough search and has detailed all records responsive to the Complainant's request in its revised SOI.

The Custodian's Counsel states that, contrary to the Complainant's assertion, the Custodian did not deny access to records solely because they contained handwritten annotations. Counsel states that the annotations reflect the mental impressions of the attorneys involved in the matter and demonstrates that the documents were actively used by the OAG in the course of its fact finding review.

Counsel contends that the Custodian appropriately applied the attorney-client, attorney work product, and deliberative process privileges to the documents collected and created by the OAG, and that these documents reflect legal advice and policy recommendations made by Executive Staff members to the Attorney General. Counsel contends that the document index adequately describes the documents at issue and that an *in camera* review is not necessary.



### **Analysis**

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

Following an appeal by the Complainant, the Appellate Division directed the Custodian to provide the GRC with a revised Statement of Information and a document index that responded in full to request item numbers 1 and 3, listed all responsive documents which are not being produced, and particularized the claim of privilege for each document.

The Custodian responded in a timely manner, as extended by agreement of the parties, with the revised SOI.<sup>5</sup> The document index attached to the revised SOI was purported by the Custodian to contain all records responsive to request item numbers 1 and 3, identified by Bates Stamp numbers. The claim of privilege, however, was not particularized as required by the Appellate Division’s decree. Rather the Custodian’s reason for denial was given for each and every withheld record (except for those identified in footnote 4, *supra*) as “Attorney-Client/Attorney Work Product; Deliberative Process.” As such, the second SOI submitted by the Custodian did little to facilitate the GRC in its adjudication of this complaint. Moreover, if the GRC were to decide that an *in camera* examination of the requested records was necessary, it would be hard pressed to determine whether the records were lawfully denied based upon the Custodian’s very broad reason for denial.

Therefore, the GRC is “unable to make a determination as to the accessibility of [the records] based upon . . . the custodian’s response thereto . . .” N.J.A.C. 5:105-2.7. As such, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian unlawfully denied access to the requested records, and if so to: (a) order disclosure of the records, (b) determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances and is therefore subject to a civil penalty pursuant to N.J.S.A. 47:1A-11, and (c) make a determination as to whether the Complainant is a prevailing party, and if so, award prevailing party attorney fees pursuant to N.J.S.A. 47:1A-11.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the GRC is “unable to make a determination as to the accessibility of [the records] based upon . . . the custodian’s response thereto . . .” N.J.A.C. 5:105-2.7. As such, this complaint should be referred to the Office of Administrative Law for a determination of whether the Custodian unlawfully denied access to the requested records, and if so to: (a) order disclosure of the records, (b) determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances and is therefore

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<sup>5</sup> The GRC granted a further extension from Friday, March 20, 2015, to Monday, March 23, 2015, due to early closing of the New Jersey State offices on March 20, 2015.  
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subject to a civil penalty pursuant to N.J.S.A. 47:1A-11, and (c) make a determination as to whether the Complainant is a prevailing party, and if so, award prevailing party attorney fees pursuant to N.J.S.A. 47:1A-6.

Prepared By: John E. Stewart

March 22, 2016<sup>6</sup>

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<sup>6</sup> This complaint was prepared for adjudication at the Council's March 29, 2016 meeting; however, the complaint could not be adjudicated due to lack of a quorum.

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State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

FINAL DECISION

July 23, 2013 Government Records Council Meeting

Glenn Katon  
(on behalf of Muslim Advocates)  
Complainant

Complaint No. 2012-267

v.  
NJ Department of Law and Public Safety  
Office of the Attorney General  
Custodian of Record

At the July 23, 2013 public meeting, the Government Records Council (“Council”) considered the July 16, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian did not unlawfully deny access to the records responsive to request items numbered 1 and 4 because the Custodian certified that no responsive records exist and the Complainant failed to submit any competent, credible evidence to refute the Custodian’s certification. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. The records responsive to request items numbered 2 and 3 are exempt from disclosure as inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1. See also In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75 (2000) and Education Law Center v. NJ Department of Education, 198 N.J. 274 (2009). Thus, the Custodian did not unlawfully deny access to the responsive records. N.J.S.A. 47:1A-6.
4. Notwithstanding the Custodian’s “deemed denial,” the Custodian did not unlawfully deny access to the records responsive to request items numbered 5 and 6 because he disclosed the records to the Complainant on October 4, 2012. N.J.S.A. 47:1A-6.



5. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian provided the Complainant with all records responsive to the request not otherwise exempt. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

Final Decision Rendered by the  
Government Records Council  
On The 23rd Day of July 2013

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

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

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
July 23, 2013 Council Meeting**

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Complainant**

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**Records Relevant to Complaint:** Electronically formatted copies via e-mail of:

1. All records collected and/or created as part of the “fact-finding review” of intelligence-gathering conducted by the New York Police Department (“NYPD”) in New Jersey, including but not limited to all records reflecting communications with the NYPD, such as e-mails, audio recordings, notes of telephone and other communications, and memos.
2. All records upon which the Office of the Attorney General relied for its determination that the NYPD’s activities in the state did not violate New Jersey’s civil or criminal laws.
3. All records reflecting the Office of the Attorney General’s determination that the NYPD’s activities in the state did not violate New Jersey’s civil or criminal laws.
4. The agreement with the NYPD referenced in the Attorney General’s News Release dated May 24, 2012, and any new protocols or procedures promulgated pursuant to the agreement.
5. The “formalized notification protocols” referenced in the Attorney General’s News Release dated May 24, 2012.
6. All records reflecting the selection criteria for the “Muslim outreach committee” referenced in the Attorney General’s News Release dated May 24, 2012, and communications inside and outside the Attorney General’s Office regarding that committee.

**Custodian of Records:** Deputy Attorney General Bruce J. Solomon

**Request Received by Custodian:** July 16, 2012

**GRC Complaint Received:** September 17, 2012

**Response Made by Custodian:** October 4, 2012

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

## **Background**<sup>2</sup>

### **Request:**

On July 16, 2012, the Complainant's Open Public Records Act ("OPRA") request seeking the above-listed records was received by the Custodian.

### **Denial of Access Complaint:**

On September 17, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserts that he submitted his OPRA request to the Custodian on July 6, 2012. The Complainant further asserts that he did not receive a response to his request from the Custodian and resubmitted his request on August 22, 2012. The Complainant states that as of September 13, 2012, he had not received a response from the Custodian.

### **Response:**

On October 4, 2012, the fifty-seventh (57<sup>th</sup>) business day following receipt of said request, the Custodian responded in writing forwarding seven (7) documents to the Complainant.

### **Statement of Information:**

On April 19, 2013, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that he received the Complainant's OPRA request on July 16, 2012, and that he responded to the request on October 4, 2012, by forwarding to the Complainant via e-mail a receipt for the Complainant's OPRA request, along with eight (8) pages of records responsive to the Complainant's request. The Custodian certifies that there were a number of telephone and e-mail exchanges between the Complainant and the Custodian in which it was agreed that extensions of time were granted to permit the Custodian to respond to the Complainant's request on October 4, 2012.

The Custodian certifies that the Office of the Attorney General does not have records responsive to the Complainant's request items numbered 1 and 4. The Custodian further certifies that request items 2 and 3 are exempt from disclosure as inter-agency or intra-agency advisory, consultative, or deliberative ("ACD") material pursuant to N.J.S.A. 47:1A-1.1. The Custodian cites Education Law Center v. NJ Department of Education, 198 N.J. 274 (2009) in support of his denial. The Custodian also certifies that the records consist of legal research, legal memoranda and internal e-mails, and are also exempt from disclosure as attorney work product and attorney-client privileged material. The Custodian cites Paff v. Division of Law, 412 N.J. Super. 140 (App. Div. 2010) as legal authority for said exemption.

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<sup>2</sup>The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Glenn Katon (on behalf of Muslim Advocates) v. New Jersey Department of Law and Public Safety, Office of the Attorney General, 2012-267 – Findings and Recommendations of the Executive Director

The Custodian certifies that Attorney General Law Enforcement Directive No. 2012-1, consisting of three (3) pages, is the record responsive to request item number 5. The Custodian certifies that he disclosed the record to the Complainant on October 4, 2012.

The Custodian certifies that the following records, each consisting of one (1) page, were determined to be responsive to request item number 6, and he disclosed the records to the Complainant on October 4, 2012:

1. E-mail from DAG Christopher Iu regarding the Muslim Outreach Committee dated June 11, 2012;
2. E-mail from Special Assistant to the Attorney General Paul Salvatoriello to members of the Attorney General's Muslim Outreach Committee regarding a September 5, 2012 meeting dated August 24, 2012;
3. Agenda for the September 5, 2012 Attorney General's Muslim Outreach Committee meeting;
4. E-mail from Imam Shareef to Special Assistant to the Attorney General Paul Salvatoriello regarding an Outreach Committee meeting dated August 27, 2012;
5. List of members of the Attorney General's Muslim Outreach Committee and Law and Public Safety personnel who attended the September 5, 2012 Attorney General's Muslim Outreach Committee meeting.

#### Additional Information:

The Complainant forwarded an e-mail to the GRC dated October 18, 2012, wherein he requested an extension of time until October 26, 2012, to allow the parties to resolve all remaining issues.

### Analysis<sup>3</sup>

#### Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. *Id.* Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).<sup>4</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

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<sup>3</sup> There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

<sup>4</sup> It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

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The Custodian certified that he received the Complainant's OPRA request on July 16, 2012. The Custodian further certified that he responded in writing to the OPRA request on October 4, 2012, which was the fifty-seventh (57<sup>th</sup>) business day following receipt of said request.<sup>5</sup> Although the Custodian certified that there were a number of telephone and e-mail exchanges between the Complainant and the Custodian in which it was agreed that extensions of time were granted to permit the Custodian to respond to the Complainant's request on October 4, 2012, there is nothing in the evidence of record to support the Custodian's assertion. Moreover, the Complainant stated in the complaint that the Custodian failed to respond to his OPRA request dated July 6, 2012, and therefore he resubmitted the request on August 22, 2012, but again did not receive a response from the Custodian. The Complainant indicated that he still had not received a response to his July 6, 2012 request as of September 13, 2012, when he filed his complaint.

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

### **Unlawful Denial of Access**

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

### **Request items number 1 and 4**

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the custodian certified that no records responsive to the complainant's request for billing records existed and the complainant submitted no evidence to refute the custodian's certification regarding said records. The GRC determined that, because the custodian certified that no records responsive to the request existed and no evidence existed in the record to refute the custodian's certification, there was no unlawful denial of access to the requested records.

Here, the Custodian certified in the SOI that the Office of the Attorney General does not have records responsive to the Complainant's request items numbered 1 and 4. For this reason, the Custodian certified that he denied access to said records.

Therefore, the Custodian did not unlawfully deny access to the records responsive to request items numbered 1 and 4 because the Custodian certified that no responsive records exist

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<sup>5</sup> The Custodian informed the GRC that during a portion of this time he was also assigned to emergency operations associated with Hurricane Sandy.

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and the Complainant failed to submit any competent, credible evidence to refute the Custodian's certification. See Pusterhofer, *supra*.

Request items number 2 and 3

OPRA defines a "government record" as:

Any paper ... data processed or image processed document, information stored or maintained electronically ... or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State ... 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.

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

The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975). Specifically, the New Jersey Supreme Court has ruled that a record that contains or involves factual components is entitled to deliberative-process protection under the exemption in OPRA when it was used in decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Education Law Center v. NJ Department of Education, 198 N.J. 274, 966 A.2d 1054, 1069 (2009). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. The earliest federal case adopting the privilege is Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958). The privilege and its rationale were subsequently adopted by the federal district courts and circuit courts of appeal. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir.1993).

The deliberative process privilege was discussed at length in Integrity, *supra*. There, the Court addressed the question of whether the Commissioner of Insurance, acting in the capacity of Liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. *Id.* at 81. The

Court adopted a qualified deliberative process privilege based upon the holding of McClain v. College Hospital, 99 N.J. 346 (1985), Integrity, *supra*, at 88. In doing so, the Court noted that:

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

*Id.* at 84-85.

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

The initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.”

Integrity, *supra*, at 88, *citing McClain*, *supra*, at 361-62.

Here, the Complainant requested:

2. All records upon which the Office of the Attorney General ***relied for its determination*** that the NYPD’s activities in the state did not violate New Jersey’s civil or criminal laws.
3. All records ***reflecting the*** Office of the Attorney General’s ***determination*** that the NYPD’s activities in the state did not violate New Jersey’s civil or criminal laws. (Emphasis added.)

The Custodian denied access to request items numbered 2 and 3 because he certified the records are exempt from disclosure as ACD material. The Custodian also certified the records are exempt as attorney-client privileged material.

The Complainant, by the very wording of his request, is seeking ACD material. The Complainant’s request seeks records that were relied upon by the agency in making a determination, as well as records reflecting that determination.

With respect to request item number 2, it is axiomatic that records relied upon to make a determination would necessarily contain opinions, recommendations, and/or advice because such input is essential to the decision-making process. Such pre-decisional records containing deliberative information are clearly exempt from disclosure as ACD material. Request item number 3 seeks records reflecting the agency determination. Although such records would have been made either contemporaneously with, or after the determination, they would represent *pre-decisional* deliberative material exempt from disclosure. Request items numbered 2 and 3, therefore, meet the two-prong test set forth in Integrity, *supra*, for ACD material; to wit: (1) the records are pre-decisional; and (2) the records are deliberative in nature, containing opinions, recommendations, or advice.

Therefore, the records responsive to request items numbered 2 and 3 are exempt from disclosure as ACD material. N.J.S.A. 47:1A-1.1. See also Integrity, *supra*, and Education Law Center, *supra*. Thus, the Custodian did not unlawfully deny access to the responsive records. N.J.S.A. 47:1A-6.

Since the records responsive to request items numbered 2 and 3 are exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1, it is unnecessary for the Council to determine whether the requested records are also exempt from disclosure as attorney-client privileged material.

#### Request items number 5 and 6

The Custodian certified that Attorney General Law Enforcement Directive No. 2012-1, consisting of three (3) pages, is the record responsive to request item number 5, and that he disclosed the record to the Complainant on October 4, 2012. The Custodian also certified that the following records, each consisting of one (1) page, were determined to be responsive to request item number 6, and that he disclosed the records to the Complainant on October 4, 2012:

1. E-mail from DAG Christopher Iu regarding the Muslim Outreach Committee dated June 11, 2012;
2. E-mail from Special Assistant to the Attorney General Paul Salvatoriello to members of the Attorney General's Muslim Outreach Committee regarding a September 5, 2012 meeting dated August 24, 2012;
3. Agenda for the September 5, 2012 Attorney General's Muslim Outreach Committee meeting;
4. E-mail from Imam Shareef to Special Assistant to the Attorney General Paul Salvatoriello regarding an Outreach Committee meeting dated August 27, 2012;
5. List of members of the Attorney General's Muslim Outreach Committee and Law and Public Safety personnel who attended the September 5, 2012 Attorney General's Muslim Outreach Committee meeting.

Therefore, notwithstanding the Custodian's "deemed denial," the Custodian did not unlawfully deny access to the records responsive to request items numbered 5 and 6 because he disclosed the records to the Complainant on October 4, 2012. N.J.S.A. 47:1A-6.

## **Knowing & Willful**

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

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

Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian provided the Complainant with all records responsive to the request not otherwise exempt. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

## **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The Custodian did not unlawfully deny access to the records responsive to request items numbered 1 and 4 because the Custodian certified that no responsive records exist and the Complainant failed to submit any competent, credible evidence to refute

- the Custodian's certification. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).
3. The records responsive to request items numbered 2 and 3 are exempt from disclosure as inter-agency or intra-agency advisory, consultative, or deliberative material. N.J.S.A. 47:1A-1.1. *See also In Re the Liquidation of Integrity Insurance Company*, 165 N.J. 75 (2000) and *Education Law Center v. NJ Department of Education*, 198 N.J. 274 (2009). Thus, the Custodian did not unlawfully deny access to the responsive records. N.J.S.A. 47:1A-6.
  4. Notwithstanding the Custodian's "deemed denial," the Custodian did not unlawfully deny access to the records responsive to request items numbered 5 and 6 because he disclosed the records to the Complainant on October 4, 2012. N.J.S.A. 47:1A-6.
  5. Although the Custodian violated N.J.S.A. 47:1A-5(g) and N.J.S.A. 47:1A-5(i), the Custodian provided the Complainant with all records responsive to the request not otherwise exempt. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.

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

July 16, 2013