



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
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CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

October 29, 2008 Government Records Council Meeting

Irma Sandoval
Complainant

Complaint No. 2006-167

v.

NJ State Parole Board
Custodian of Record

At the October 29, 2008 public meeting, the Government Records Council ("Council") considered the October 22, 2008 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Council's March 26, 2008 Interim Order is hereby amended to reflect that the Custodian's submission on April 16, 2007 was the result of an extension granted by the GRC. However, the Custodian's submission of the unredacted Status of Interview form twenty one (21) business days after receiving the Council's Order is not compliant with such Order.
2. Because the Council's March 28, 2007 Interim Order clearly stated that the Council should conduct an *in camera* review of the completed Status of Interview form, the Custodian's Counsel's assertion that the Council's March 28, 2007 Interim Order did not contain a request for an *in camera* review of the Status of Interview form is, therefore, mistaken.
3. Because the Council's March 26, 2008 Interim Order does not explicitly state that of the 372 e-mails identified as responsive to the Complainant's request, only one e-mail required redaction for a social security number, and that it was determined that the Custodian's Counsel should so advise the GRC but was not required to submit six (6) copies of the 372 e-mails, the Council's March 26, 2008 Interim Order is hereby amended to reflect these facts.
4. Because the Council's March 26, 2008 Interim Order was clear with regard to the action required of the Custodian, the Council declines to amend its March 26, 2008 Interim Order.



5. Although the Custodian failed to comply with the Council's March 28, 2007 Interim Order with regard to the timely submission of the unredacted Status of Interview forms, the Custodian released the remainder of the requested records with minimal redactions. It is therefore concluded that 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. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law. Therefore, referral of this matter to the Office of Administrative Law as determined in the Council's March 28, 2007 Interim Order is not warranted.

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 29th Day of October, 2008

Robin Berg Tabakin, Chair
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: October 30, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
October 29, 2008 Council Meeting**

**Irma Sandoval¹
Complainant**

GRC Complaint No. 2006-167

v.

**NJ State Parole Board²
Custodian of Records**

Records Relevant to Complaint:

The following information pertaining to the position of Administrative Analyst I with the New Jersey State Parole Board (“SPB”), Unit Scope 1203-Administration.

1. Completed Status of Interview forms for interviews conducted by Candie Brown (“Brown”), Human Resources Unit, and Donald Weinbaum (“Weinbaum”), Fiscal Unit, during April 2006 for the above-named promotional title;
2. Copy of all promotional postings, including Department of Personnel and SPB postings, Notice of Vacancy, etc., related to the above-named title;
3. E-mail or written communications between Brown and Weinbaum from April 1, 2005 through June 23, 2006 with the following key words: 1) PS64591, 2) Administrative Analyst 1, 3) Mary Barbato, 4) Diane Angelucci, 5) PS060055, 6) provisional appointment (“PA”), 7) regular appointment (“RA”), 8) interview, 9) candidates, 10) organizational chart, 11) interview questions, 12) question, 13) failed, 14) displacement, 15) hiring freeze, 16) promotional freeze, 17) freeze;
4. Completed questions, candidate answers and notes of interview taken by Brown and Weinbaum for all candidates interviewed;
5. Information related to the evaluation criteria used by Weinbaum and/or Brown in the final selection of the candidates;
6. Completed Disposition of Certification form returned to the Department of Personnel;
7. Personnel Action Memorandums (“PAM”) noting the PA, subsequent RA and displacement of provisional employees Mary Barbato and Diane Angelucci;
8. Letters sent to all candidates regarding the scheduling of the interviews;
9. Letters sent to all candidates regarding the outcome of the interview process; and
10. E-mail or written communications and/or PMIS/TLRS screen shots related to State hiring/promotional freeze.

¹No legal representation listed on record.

²Previously represented by DAG Lisa A. Puglisi, on behalf of the New Jersey Attorney General.

Request Made: June 23, 2006
Response Made: June 23, 2006³
Custodian: Thomas Renahan, Records Coordinator⁴
GRC Complaint Filed: September 7, 2006

Background

March 26, 2008

Interim Order of the Government Records Council (“Council”). At its March 26, 2008 public meeting, the Council considered the March 19, 2008 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 has not timely complied with the Council’s March 28, 2007 Interim Order by providing the Council with all records set forth in Paragraph 4 of the Order within five (5) business days of receiving the Council’s Order; to wit, the Custodian sent one (1) copy of the redaction index by facsimile nine (9) business days after receiving the Council’s Order and one (1) copy of the unredacted Status of Interview form by facsimile twenty-one (21) business days after receiving the Council’s Order, contrary to the provisions of said Order.

2. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and provide certified confirmation of compliance pursuant to N.J. Court Rules, R. 1:4-4 to the Executive Director.**

The results of the in camera inspection were set forth in the following table:

Record Number	Record Name/Date	Description of Document and/or Redaction	Custodian’s Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination
1	Two (2) page Status of Interview form dated April 27, 2006 and approved by the Executive Director May	Redaction of the “reason for selection – non selection” and redaction of the “interview rank”	Exempt as Advisory, Consultative, Deliberative materials – shows the panel’s ranking of the candidate	Redactions are appropriate pursuant to <u>N.J.S.A. 47:1A-1.1</u> as Advisory, Consultative, or Deliberative material because

³ In her Denial of Access Complaint, the Complainant indicates August 7, 2006 as the date the Custodian denied her OPRA request.

⁴ Lisa Puglisi is now the Custodian for the NJ State Parole Board.

	12, 2006		and reasons for their ranking and selection; exempt under <u>N.J.S.A.</u> 47:1A-1.1	the redacted material reflects the opinions and recommendations of interviewers in support of their subsequent decision.
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March 26, 2008

Council’s Interim Order distributed to the parties.

March 27, 2008

Custodian Counsel’s response to the GRC’s Interim Order. Counsel requests reconsideration of the GRC’s March 26, 2008 Interim Order. Counsel asserts that the GRC’s findings were based on a misunderstanding of the procedure and the record in this matter.

Counsel claims that the GRC’s finding that the Custodian did not timely comply with the GRC’s March 28, 2007 Interim Order was inaccurate because Counsel requested and obtained an extension of time to respond to the Order. Counsel submits her own Certification in support of this assertion.

Counsel certifies that on April 2, 2007, she received the GRC’s March 28, 2007 Interim Order, which required the Custodian to respond within five (5) business days of receipt of the Order. Counsel further certifies that on April 9, 2007 (the 5th business day after receipt of the Council’s March 28, 2007 Interim Order) she e-mailed the Executive Director of the GRC to request an extension of time to respond until April 16, 2007 because the Custodian was on vacation and unable to certify to the records. Counsel certifies that the extension was granted by e-mail dated April 9, 2007.⁵

Counsel asserts that the GRC’s March 28, 2007 Interim Order did not require the Custodian to provide an unredacted Status of Interview form to the GRC and that the Interim Order does not contain any request for an *in camera* review of this document. Counsel states that she was contacted on April 30, 2007, by GRC staff who advised Counsel that the GRC wanted to review an unredacted copy of the Status of Interview forms. Counsel contends that she provided the GRC with the requested document on May 2, 2007.

Counsel also asserts that it was determined that there were 372 e-mails responsive to the request noted in paragraph 4 of the GRC’s March 28, 2007 Interim Order. Counsel further asserts that of these 372 e-mails, only one item on one page was redacted, a social security number. Counsel asserts that upon discussion with the GRC’s In House Attorney, it was determined that Custodian’s Counsel should advise the GRC of the one

⁵ This comports with the GRC’s records.

redaction, but that providing six copies of the 372 e-mails was not necessary at that point. Counsel asserts that this agreement was reflected in her April 16, 2007 letter to the GRC.

Finally, Custodian's Counsel argues that the GRC's March 26, 2008 Interim Order requiring the Custodian to comply with the Council's findings of the in camera examination set forth therein within five (5) business days from receipt of the Order is unclear as to what the Custodian must do. Counsel asserts that according to the table contained in the Council's March 26, 2008 Interim Order, the redactions of the two-page Status of Interview form were appropriate as advisory, consultative and deliberative material. Counsel maintains that this record, in redacted form, was already made available to the Complainant, as certified in the Custodian's April 16, 2007 certification. Counsel contends that there is nothing further for the Custodian to provide.

Custodian's Counsel therefore requests that the GRC reconsider its March 26, 2008 Interim Order finding the Custodian in violation of the Council's March 28, 2007 Interim Order.

Analysis

Whether the Custodian timely complied with the Council's March 28, 2007 Interim Order?

Custodian's Counsel claims that the GRC's finding that the Custodian did not timely comply with the GRC's March 28, 2007 Interim Order was inaccurate because Counsel requested and obtained an extension of time to respond to the Order.

The evidence of record indicates that Counsel further certifies that on April 9, 2007 (the 5th business day after receipt of the Council's March 28, 2007 Interim Order) Custodian's Counsel e-mailed the Executive Director of the GRC to request an extension of time to respond until April 16, 2007 because the Custodian was on vacation and unable to certify to the records. Counsel certifies that the extension was granted by e-mail dated April 9, 2007.⁶

Although the Council's March 26, 2008 Interim Order reflects that the Custodian responded to the Council's March 28, 2007 Interim Order on April 16, 2007 by providing a copy of the redaction index by facsimile, the Interim Order does not reflect that this submission was the result of an extension granted by the GRC. However, the Custodian did not provide the copy of the unredacted Status of Interview form until twenty one (21) business days after receiving the Council's Order, which was beyond the extended submission date of April 16, 2007.

Therefore, the Council's March 26, 2008 Interim Order is hereby amended to reflect that the Custodian's submission on April 16, 2007 was the result of an extension granted by the GRC. However, the Custodian's submission of the unredacted Status of Interview form twenty one (21) business days after receiving the Council's Order is not compliant with such Order.

⁶ This comports with the GRC's records.

Custodian's Counsel also asserts that the GRC's March 28, 2007 Interim Order did not require the Custodian to provide an unredacted Status of Interview form to the GRC and that the Interim Order did not contain any request for an *in camera* review of this document. Counsel states that she was contacted on April 30, 2007, by GRC staff who advised Counsel that the GRC wanted to review an unredacted copy of the Status of Interview form. Counsel contends that she provided the GRC with the requested document on May 2, 2007. As noted in the Council's March 26, 2008 Interim Order, the Custodian provided to the GRC one (1) copy of a two-page unredacted Status of Interview form. This Status of Interview form was the subject of an *in camera* review conducted by the Council at its March 26, 2008 meeting.

The Council's March 28, 2007 Interim Order required the following in pertinent part:

- "4. Because the Custodian certifies that he has not printed out or reviewed these e-mails, the Custodian cannot know whether any of these e-mails contain the kind of material protected by EO 26. The GRC should, therefore, conduct an *in camera* review of these records to determine if EO 26 applies. Because there is insufficient evidence in the record to determine if N.J.S.A. 47:1A-10 or any other exemption applies to the completed *Statement of Interview forms* requested by Complainant, the GRC should conduct an *in camera* review of these records. **The Custodian must deliver⁷ to the Council in a sealed envelope six copies of the requested unredacted documents, a document or redaction index detailing the document and/or each redaction asserted and the lawful basis for the denial, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the document requested by the Council for the *in camera* inspection within five (5) business days from receipt of the Council's Interim Order.** (Emphasis added)...
10. **The Custodian shall comply with items #2, 3, 4, and 7 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.**" (Emphasis in original)."

It appears from the record that the "Status of Interview forms" sought by the Complainant were inaccurately referred to by the GRC as "Statement of Interview forms" in paragraph 4 of the Council's March 28, 2007 Interim Order. However, the forms are referred to correctly in the Analysis portion of the Order. Moreover, the Council noted this error in footnote 5 on page 4 of its March 26, 2008 Interim Order. If the Custodian was truly confused as to the records required for submission, he should have asked the GRC for clarification.

⁷The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

With regard to the Status of Interview form, the Council specifically stated on page 14 of the March 28, 2007 Interim Order that:

Because there is insufficient evidence in the record to ascertain to what extent the completed Status of Interview forms requested by the Complainant contain privileged and confidential information, the GRC should conduct an *in camera* review of the completed Status of Interview forms to determine to what extent N.J.S.A. 47:1A-10 or any other exemption applies to these documents.

Because the Council's March 28, 2007 Interim Order clearly stated that the Council should conduct an *in camera* review of the completed Status of Interview form, the Custodian's Counsel's assertion that the Council's March 28, 2007 Interim Order did not contain a request for an *in camera* review of the Status of Interview form is, therefore, mistaken.

The Custodian's Counsel also asserts that it was determined that there were 372 e-mails responsive to the request noted in paragraph 4 of the GRC's March 28, 2007 Interim Order. Counsel further asserts that of these 372 e-mails, only one item on one page was redacted, a social security number. Counsel asserts that upon discussion with the GRC's In House Attorney, it was determined that Custodian's Counsel should advise the GRC of the one redaction, but that providing six copies of the 372 e-mails was not necessary at that point. Counsel asserts that this agreement was reflected in her April 16, 2007 letter to the GRC.

Because the Council's March 26, 2008 Interim Order does not explicitly state that of the 372 e-mails identified as responsive to the Complainant's request, only one e-mail required redaction for a social security number, and that it was determined that the Custodian's Counsel should so advise the GRC but was not required to submit six (6) copies of the 372 e-mails, the Council's March 26, 2008 Interim Order is hereby amended to reflect these facts.

Finally, Custodian's Counsel argues that the GRC's March 26, 2008 Interim Order requiring the Custodian to comply with the Council's findings of the *in camera* examination set forth therein within five (5) business days from receipt of the Order is unclear as to what the Custodian must do. Counsel asserts that according to the table contained in the Council's March 26, 2008 Interim Order, the redactions of the two-page Status of Interview form were appropriate as advisory, consultative and deliberative material. Counsel maintains that this record, in redacted form, was already made available to the Complainant, as certified in the Custodian's April 16, 2007 certification. Counsel contends that there is nothing further for the Custodian to provide.

Paragraph 2 of the Conclusions and Recommendations in the Council's March 26, 2008 Interim Order required the Custodian to disclose the Status of Interview form to the Complainant and to provide certified confirmation of compliance to the Executive Director of the GRC. Inasmuch as the Custodian certified on April 16, 2007 that the redacted Status of Interview form was provided to the Complainant, the Custodian need

only to have provided certified confirmation of compliance to the Executive Director of the GRC in order to comply with the Council's March 26, 2008 Interim Order.

Therefore, because the Council's March 26, 2008 Interim Order was clear with regard to the action required of the Custodian, the Council declines to amend its March 26, 2008 Interim Order.

Whether the Custodian's delay in 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 and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

"... If 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 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, 107 (App. Div. 1996).

In this complaint, the Custodian's response to the Complainant on June 23, 2006 resulted in a deemed denial and violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i because the Custodian failed to indicate a specific reason why he could not immediately comply with Complainant's request for access. Moreover, the evidence of record indicates that the Custodian failed to comply with the Council's March 28, 2007 Interim Order with regard to the timely submission of the unredacted Status of Interview forms.

However, the Custodian disclosed the requested e-mails and Personnel Action Memoranda with minimal redactions for social security numbers contained therein. Further, the Custodian properly redacted the Status of Interview forms for advisory, consultative and deliberative material contained therein.

Therefore, although the Custodian failed to comply with the Council's March 28, 2007 Interim Order with regard to the timely submission of the unredacted Status of Interview forms, the Custodian released the remainder of the requested records with minimal redactions. It is therefore concluded that 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. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law. Therefore, referral of this matter to the Office of Administrative Law as determined in the Council's March 28, 2007 Interim Order is not warranted.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council find that:

1. The Council's March 26, 2008 Interim Order is hereby amended to reflect that the Custodian's submission on April 16, 2007 was the result of an extension granted by the GRC. However, the Custodian's submission of the unredacted Status of Interview form twenty one (21) business days after receiving the Council's Order is not compliant with such Order.
2. Because the Council's March 28, 2007 Interim Order clearly stated that the Council should conduct an *in camera* review of the completed Status of Interview form, the Custodian's Counsel's assertion that the Council's March 28, 2007 Interim Order did not contain a request for an *in camera* review of the Status of Interview form is, therefore, mistaken.
3. Because the Council's March 26, 2008 Interim Order does not explicitly state that of the 372 e-mails identified as responsive to the Complainant's request, only one e-mail required redaction for a social security number, and that it was determined that the Custodian's Counsel should so advise the GRC but was not required to submit six (6) copies of the 372 e-mails, the Council's March 26, 2008 Interim Order is hereby amended to reflect these facts.
4. Because the Council's March 26, 2008 Interim Order was clear with regard to the action required of the Custodian, the Council declines to amend its March 26, 2008 Interim Order.
5. Although the Custodian failed to comply with the Council's March 28, 2007 Interim Order with regard to the timely submission of the unredacted Status of Interview forms, the Custodian released the remainder of the requested records with minimal redactions. It is therefore concluded that 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. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law. Therefore, referral of this matter to the Office of Administrative Law as determined in the Council's March 28, 2007 Interim Order is not warranted.

Prepared By: Karyn Gordon, Esquire
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

October 22, 2008



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

March 26, 2008 Government Records Council Meeting

Irma Sandoval
Complainant

Complaint No. 2006-167

v.

NJ State Parole Board
Custodian of Record

At the March 26, 2008 public meeting, the Government Records Council ("Council") considered the March 19, 2008 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:

1. The Custodian has not timely complied with the Council's March 28, 2007 Interim Order by providing the Council with all records set forth in Paragraph 4 of the Order within five (5) business days of receiving the Council's Order; to wit, the Custodian sent one (1) copy of the redaction index by facsimile nine (9) business days after receiving the Council's Order and one (1) copy of the unredacted Status of Interview form by facsimile twenty-one (21) business days after receiving the Council's Order, contrary to the provisions of said Order.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and provide certified confirmation of compliance pursuant to N.J. Court Rules, R. 1:4-4 to the Executive Director.**

Interim Order Rendered by the
Government Records Council
On The 26th Day of March, 2008

Robin Berg Tabakin, Vice Chairman
Government Records Council



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

Janice Kovach
Government Records Council

Decision Distribution Date: March 27, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
March 26, 2008 Council Meeting**

**Irma Sandoval¹
Complainant**

GRC Complaint No. 2006-167

v.

**NJ State Parole Board²
Custodian of Records**

Records Relevant to Complaint:

The following information pertaining to the position of Administrative Analyst I with the New Jersey State Parole Board (“SPB”), Unit Scope 1203-Administration.

1. Completed Status of Interview forms for interviews conducted by Candie Brown (“Brown”), Human Resources Unit, and Donald Weinbaum (“Weinbaum”), Fiscal Unit, during April 2006 for the above-named promotional title;
2. Copy of all promotional postings, including Department of Personnel and SPB postings, Notice of Vacancy, etc., related to the above-named title;
3. E-mail or written communications between Brown and Weinbaum from April 1, 2005 through June 23, 2006 with the following key words: 1) PS64591, 2) Administrative Analyst 1, 3) Mary Barbato, 4) Diane Angelucci, 5) PS060055, 6) provisional appointment (“PA”), 7) regular appointment (“RA”), 8) interview, 9) candidates, 10) organizational chart, 11) interview questions, 12) question, 13) failed, 14) displacement, 15) hiring freeze, 16) promotional freeze, 17) freeze;
4. Completed questions, candidate answers and notes of interview taken by Brown and Weinbaum for all candidates interviewed;
5. Information related to the evaluation criteria used by Weinbaum and/or Brown in the final selection of the candidates;
6. Completed Disposition of Certification form returned to the Department of Personnel;
7. Personnel Action Memorandums (“PAM”) noting the PA, subsequent RA and displacement of provisional employees Mary Barbato and Diane Angelucci;
8. Letters sent to all candidates regarding the scheduling of the interviews;
9. Letters sent to all candidates regarding the outcome of the interview process; and
10. E-mail or written communications and/or PMIS/TLRS screen shots related to State hiring/promotional freeze.

Request Made: June 23, 2006

Response Made: June 23, 2006³

Custodian: Thomas Renahan, Records Coordinator

GRC Complaint Filed: September 7, 2006

¹ No legal representation listed on record.

² Represented by DAG Lisa A. Puglisi, on behalf of the New Jersey Attorney General.

³ In her Denial of Access Complaint, the Complainant indicates August 7, 2006 as the date the Custodian denied her OPRA request.

Background

March, 28, 2007

Interim Order of the Government Records Council. At the March 28, 2007 public meeting, the Government Records Council (“Council”) considered the March 21, 2007 Executive Director’s Findings and Recommendations and all related documents submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. Therefore, the Council found that:

1. Based on the GRC decision in Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006), the Custodian has violated N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. by failing to respond to the Complainant’s request in writing by granting access, denying access, requesting an extension of the statutory response time, or asking for clarification of the request within the statutorily mandated seven (7) business days, resulting in a deemed denial of access.
2. Because the completed Status of Interview forms for interviews conducted by Brown and Weinbaum in April 2006 may contain data “disclos[ing] conformity with specific experiential, educational or medical qualifications required for” the position of Administrative Analyst I with the SPB, the Custodian should have granted access to such records. The Custodian, therefore, has failed to bear his burden of proof that the denial of access to Complainant was authorized by law pursuant to N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-10. **The Custodian shall disclose this record with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and 47:1A-5.g.**
3. To the extent that the e-mails and written memoranda contain government records pursuant to N.J.S.A. 47:1A-10 and are not otherwise exempt from disclosure, the Custodian should have granted access to such records, redacting confidential or privileged information as necessary. The Custodian, therefore, has failed to bear his burden of proof that the denial of access to Complainant regarding the e-mails and other written communications between Brown and Weinbaum from April 1, 2005 through June 23, 2006 with certain key words was authorized by law. N.J.S.A. 47:1A-1. **The Custodian shall disclose this record with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and 47:1A-5.g.**
4. Because the Custodian certifies that he has not printed out or reviewed these e-mails, the Custodian cannot know whether any of these e-mails contain the kind of material protected by EO 26. The GRC should, therefore, conduct an *in camera* review of these records to determine if EO 26 applies. Because there is insufficient evidence in the record to determine if N.J.S.A. 47:1A-10 or any other exemption applies to the completed Statement of Interview forms requested by Complainant, the GRC should conduct an *in camera* review of these records.

The Custodian must deliver⁴ to the Council in a sealed envelope six copies of the requested unredacted documents, a document or redaction index detailing the document and/or each redaction asserted and the lawful basis for the denial, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the document requested by the Council for the *in camera* inspection within five (5) business days from receipt of the Council's Interim Order.

5. Because the questions, answers and interview notes of Brown and Weinbaum are pre-decisional and deliberative, the requested notes, questions and candidate answers are advisory, consultative or deliberative material and do not fall within the definition of a government record pursuant to N.J.S.A. 47:1A-1.1. See, In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000), Therefore, the Custodian has borne the burden of proof that he lawfully denied access to the questions, candidate answers and interview notes of Brown and Weinbaum. N.J.S.A. 47:1A-1.
6. Because the Custodian would have been required to identify, analyze, collate, and compile documents responsive to the Complainant's request for information related to the evaluation criteria used by Brown and Weinbaum in the final selection of candidates, this request is not a request for a specific government record under OPRA and is therefore invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005). Therefore, the Custodian lawfully denied access to Complainant regarding this request. N.J.S.A. 47:1A-1.
7. To the extent that the Personnel Action Memoranda for Barbato and Angelucci requested by Complainant contain government records, i.e., a person's name, title, position, salary, payroll record, length of service, date of separation, type and amount of pension, the Custodian should have redacted confidential or privileged information and granted access to the document pursuant to N.J.S.A. 47:1A-10. Custodian has, therefore, failed to bear his burden of proof that the denial of access of the PAMs was authorized by law pursuant to N.J.S.A. 47:1A-1. **The Custodian shall disclose this record with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and 47:1A-5.g.**
8. Because the letters to candidates other than Complainant regarding the scheduling of interviews and the outcome of the interview process are part of the job application process and are therefore exempt from disclosure pursuant to Executive Order #26, the Custodian has borne his burden of proof that the denial of access to Complainant was authorized by law. N.J.S.A. 47:1A-1.
9. Based on the Custodian's denial of access to government records, misstatements regarding the existence of documents relating to this request and other contested

⁴ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

facts in this case, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the complaint should be referred to the Office of Administrative Law for determination of a knowing and willful violation of the Act under the totality of the circumstances. N.J.S.A. 47:1A-7.e.

10. **The Custodian shall comply with items #2, 3, 4, and 7 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.**

April 2, 2007

Interim Decision sent to both parties.

April 16, 2007

Certification of the Custodian with the following attachments:

- Three (3) page redaction index prepared by the Custodian
- Letter from Custodian's Counsel to the GRC dated April 16, 2007
- Certification of mailing from Custodian's Counsel dated April 16, 2007

The Custodian certifies that he reviewed the e-mails responsive to the Complainant's request which were required to be delivered to the GRC for *in camera* review pursuant to the Council's March, 28, 2007 Interim Order. The Custodian further certifies that the e-mails, totaling three hundred seventy-two (372) pages, can be disclosed with one redaction of a social security number that is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.

The Custodian also certifies that he reviewed a two (2) page Status of Interview form responsive to the Complainant's request which was required to be delivered to the GRC for *in camera* review pursuant to the Council's March, 28, 2007 Interim Order.⁵ The Custodian certifies that this document can be disclosed with the "interview rank" and the "reason for selection – non selection" redacted because the redacted sections constitute advisory, consultative or deliberative material which is exempt pursuant to N.J.S.A. 47:1A-1.1. The Custodian contends in his certification that the former must be redacted because it contains the interviewers' opinions as to the candidates, and the latter must be redacted because it contains the interviewers' recommendations as to the selection of the candidate for the position sought.

The Custodian further certifies the only information redacted from the four (4) pages of Personal Action Memoranda were social security numbers pursuant to N.J.S.A. 47:1A-1.1. The Custodian certifies that the redacted documents can be provided to the Complainant upon payment of the copying charges.

May 2, 2007

Certification of the Custodian with the following attachments:

⁵ In the Council's March 28, 2007 Interim Order, the Status of Interview forms were referred to as Statement of Interview forms.

- A two (2) page unredacted Status of Interview form responsive to the Complainant’s request
- Letter from Custodian’s Counsel to the GRC dated May 2, 2007
- Certification of mailing from Custodian’s Counsel dated May 2, 2007

The Custodian certifies that he has enclosed a true and accurate copy of the unredacted Status of Interview form.

Analysis

An *in camera* inspection was performed on the submitted record.⁶ The results of the *in camera* inspection are set forth in the following table:

Record Number	Record Name/Date	Description of Document and/or Redaction	Custodian’s Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination
1	Two (2) page Status of Interview form dated April 27, 2006 and approved by the Executive Director May 12, 2006	Redaction of the “reason for selection – non selection” and redaction of the “interview rank”	Exempt as Advisory, Consultative, Deliberative materials – shows the panel’s ranking of the candidate and reasons for their ranking and selection; exempt under <u>N.J.S.A. 47:1A-1.1</u>	Redactions are appropriate pursuant to <u>N.J.S.A. 47:1A-1.1</u> as Advisory, Consultative, or Deliberative material because the redacted material reflects the opinions and recommendations of interviewers in support of their subsequent decision.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council find that:

1. The Custodian has not timely complied with the Council’s March 28, 2007 Interim Order by providing the Council with all records set forth in Paragraph 4 of the Order within five (5) business days of receiving the Council’s Order; to wit, the Custodian sent one (1) copy of the redaction index by facsimile nine (9) business days after

⁶ The Custodian in his April 16, 2007 certification avers that a social security number was redacted on one (1) of the 372 pages of e-mails. The Custodian further certifies that only the individual social security numbers were redacted on the four (4) pages of Personnel Action Memoranda. These redactions are appropriate pursuant to N.J.S.A. 47:1A-1.1, which exempts from disclosure, *inter alia*, social security numbers.

receiving the Council's Order and one (1) copy of the unredacted Status of Interview form by facsimile twenty-one (21) business days after receiving the Council's Order, contrary to the provisions of said Order.

2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and provide certified confirmation of compliance pursuant to N.J. Court Rules, R. 1:4-4 to the Executive Director.**

Prepared By:

John E. Stewart
Case Manager/*In Camera* Attorney

Approved By:

Catherine Starghill
Executive Director

March 19, 2008



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ACTING COMMISSIONER LUCILLE DAVY
ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

March 28, 2007 Government Records Council Meeting

Irma Sandoval
Complainant

Complaint No. 2006-167

v.

NJ State Parole Board
Custodian of Record

At the March 28, 2007 public meeting, the Government Records Council (“Council”) considered the March 21, 2007 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. Based on the GRC decision in Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006), the Custodian has violated N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. by failing to respond to the Complainant’s request in writing by granting access, denying access, requesting an extension of the statutory response time, or asking for clarification of the request within the statutorily mandated seven (7) business days, resulting in a deemed denial of access.
2. Because the completed Status of Interview forms for interviews conducted by Brown and Weinbaum in April 2006 may contain data “disclos[ing] conformity with specific experiential, educational or medical qualifications required for” the position of Administrative Analyst I with the SPB, the Custodian should have granted access to such records. The Custodian, therefore, has failed to bear his burden of proof that the denial of access to Complainant was authorized by law pursuant to N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-10. **The Custodian shall disclose this record with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and 47:1A-5.g.**
3. To the extent that the e-mails and written memoranda contain government records pursuant to N.J.S.A. 47:1A-10 and are not otherwise exempt from



disclosure, the Custodian should have granted access to such records, redacting confidential or privileged information as necessary. The Custodian, therefore, has failed to bear his burden of proof that the denial of access to Complainant regarding the e-mails and other written communications between Brown and Weinbaum from April 1, 2005 through June 23, 2006 with certain key words was authorized by law. N.J.S.A. 47:1A-1. **The Custodian shall disclose this record with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and 47:1A-5.g.**

4. Because the Custodian certifies that he has not printed out or reviewed these e-mails, the Custodian cannot know whether any of these e-mails contain the kind of material protected by EO 26. The GRC should, therefore, conduct an *in camera* review of these records to determine if EO 26 applies. Because there is insufficient evidence in the record to determine if N.J.S.A. 47:1A-10 or any other exemption applies to the completed Statement of Interview forms requested by Complainant, the GRC should conduct an *in camera* review of these records.

The Custodian must deliver¹ to the Council in a sealed envelope six copies of the requested unredacted documents, a document or redaction index detailing the document and/or each redaction asserted and the lawful basis for the denial, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the document requested by the Council for the *in camera* inspection within five (5) business days from receipt of the Council's Interim Order.

5. Because the questions, answers and interview notes of Brown and Weinbaum are pre-decisional and deliberative, the requested notes, questions and candidate answers are advisory, consultative or deliberative material and do not fall within the definition of a government record pursuant to N.J.S.A. 47:1A-1.1. See, In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000), Therefore, the Custodian has borne the burden of proof that he lawfully denied access to the questions, candidate answers and interview notes of Brown and Weinbaum. N.J.S.A. 47:1A-1.
6. Because the Custodian would have been required to identify, analyze, collate, and compile documents responsive to the Complainant's request for information related to the evaluation criteria used by Brown and Weinbaum in the final selection of candidates, this request is not a request for a specific government record under OPRA and is therefore invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.

¹ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

Super. 534, 549 (App. Div. 2005). Therefore, the Custodian lawfully denied access to Complainant regarding this request. N.J.S.A. 47:1A-1.

7. To the extent that the Personnel Action Memoranda for Barbato and Angelucci requested by Complainant contain government records, i.e., a person's name, title, position, salary, payroll record, length of service, date of separation, type and amount of pension, the Custodian should have redacted confidential or privileged information and granted access to the document pursuant to N.J.S.A. 47:1A-10. Custodian has, therefore, failed to bear his burden of proof that the denial of access of the PAMs was authorized by law pursuant to N.J.S.A. 47:1A-1. **The Custodian shall disclose this record with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and 47:1A-5.g.**
8. Because the letters to candidates other than Complainant regarding the scheduling of interviews and the outcome of the interview process are part of the job application process and are therefore exempt from disclosure pursuant to Executive Order #26, the Custodian has borne his burden of proof that the denial of access to Complainant was authorized by law. N.J.S.A. 47:1A-1.
9. Based on the Custodian's denial of access to government records, misstatements regarding the existence of documents relating to this request and other contested facts in this case, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the complaint should be referred to the Office of Administrative Law for determination of a knowing and willful violation of the Act under the totality of the circumstances. N.J.S.A. 47:1A-7.e.
10. **The Custodian shall comply with items #2, 3, 4, and 7 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.**

Interim Order Rendered by the
Government Records Council
On The 28th Day of March, 2007

Vincent P. Maltese, Chairman
Government Records Council

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

Government Records Council

Decision Distribution Date: April 2, 2007

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL
Findings and Recommendations of the Executive Director
March 28, 2007 Council Meeting**

**Irma Sandoval¹
Complainant**

GRC Complaint No. 2006-167

v.

**New Jersey State Parole Board
Custodian of Records²**

Records Relevant to Complaint:

The following information pertaining to the position of Administrative Analyst I with the New Jersey State Parole Board (“SPB”), Unit Scope 1203-Administration.

1. Completed Status of Interview forms for interviews conducted by Candie Brown (“Brown”), Human Resources Unit, and Donald Weinbaum (“Weinbaum”), Fiscal Unit, during April 2006 for the above-named promotional title;
2. Copy of all promotional postings, including Department of Personnel and SPB postings, Notice of Vacancy, etc., related to the above-named title;
3. E-mail or written communications between Brown and Weinbaum from April 1, 2005 through June 23, 2006 with the following key words: 1) PS64591, 2) Administrative Analyst 1, 3) Mary Barbato, 4) Diane Angelucci, 5) PS060055, 6) provisional appointment (“PA”), 7) regular appointment (“RA”), 8) interview, 9) candidates, 10) organizational chart, 11) interview questions, 12) question, 13) failed, 14) displacement, 15) hiring freeze, 16) promotional freeze, 17) freeze;
4. Completed questions, candidate answers and notes of interview taken by Brown and Weinbaum for all candidates interviewed;
5. Information related to the evaluation criteria used by Weinbaum and/or Brown in the final selection of the candidates;
6. Completed Disposition of Certification form returned to the Department of Personnel;
7. Personnel Action Memorandums (“PAM”) noting the PA, subsequent RA and displacement of provisional employees Mary Barbato and Diane Angelucci;
8. Letters sent to all candidates regarding the scheduling of the interviews;
9. Letters sent to all candidates regarding the outcome of the interview process; and
10. E-mail or written communications and/or PMIS/TLRS screen shots related to State hiring/promotional freeze.

¹ No legal representation listed in the Denial of Access Complaint.

² Legal representation by Lisa A. Puglisi, Deputy Attorney General, Department of Law and Public Safety, Division of Law (Trenton, NJ).

Request Made: June 23, 2006
Response Made: June 23, 2006³
Custodian: Thomas Renahan, Records Coordinator
GRC Complaint Filed: September 7, 2006

Background

June 23, 2006

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests copies of the documents listed above.

June 23, 2006

Custodian's response to the OPRA request made the same day the request was made. The Custodian acknowledges receipt of the Complainant's OPRA request and states that he will attempt to obtain the requested records as soon as possible. Custodian further states that he will notify the Complainant in writing if he requires an extension of time under OPRA.

July 17, 2006

Custodian's letter to the Complainant. The Custodian advises the Complainant that the Custodian has located some of the requested records and requests an extension of time of approximately one week to fully respond to the OPRA request.

July 17, 2006

Complainant's e-mail to the Custodian. The Complainant agrees to the Custodian's request for an extension of time.

July 24, 2006

Custodian's letter to the Complainant. The Custodian requests a further extension of time to obtain advice from the New Jersey Department of Personnel because of possible confidentiality issues regarding some of the personnel records referenced in the Complainant's OPRA request.

July 26, 2006

Custodian's letter to the Complainant. The Custodian notifies the Complainant that the following records are available:

- Copy of all promotional postings, including Department of Personnel and SPB postings, Notice of Vacancy, etc., related to the above-named title,
- Letters sent to all candidates regarding the scheduling of the interviews,
- Letters sent to all candidates regarding the outcome of the interview process, and
- E-mail or written communications and/or PMIS/TLRS screen shots related to State Hiring/Promotional Freeze.

³ In her Denial of Access Complaint, the Complainant indicates August 7, 2006 as the date Custodian denied her OPRA request.

The Custodian also alleges that certain requested records are exempt from access as confidential personnel records. The Custodian informs the Complainant that the Complainant will receive a written explanation for the denial of access to the requested records upon release of the records listed above. The Custodian requests payment of a \$9.00 copying charge prior to the release of the requested documents.

August 7, 2006

Custodian's letter to the Complainant. The Custodian acknowledges receipt of the \$9.00 copying fee. The Custodian further states that the following records will not be made available:

- Completed Status of Interview forms for interviews conducted by Brown and Weinbaum during April 2006,
- E-mail or written communications between Brown and Weinbaum from April 1, 2005 through June 23, 2006 with the following key words 1) PS64591, 2) Administrative Analyst 1, 3) Mary Barbato, 4) Diane Angelucci, 5) PS060055, 6) PA, 7) RA, 8) interview, 9) candidates, 10) organizational chart, 11) interview questions, 12) question, 13) failed, 14) displacement, 15) hiring freeze, 16) promotional freeze, 17) freeze,
- Completed questions, candidate answers and interview notes taken by Brown and Weinbaum for all candidates interviewed,
- Information related to the evaluation criteria used by Weinbaum and/or Brown in the final selection of the candidates,
- Letters sent to all candidates regarding the scheduling of the interviews, and
- Letters sent to all candidates regarding the outcome of the interview process.

The Custodian asserts that the requested records are confidential personnel records pursuant to OPRA and Department of Personnel confidentiality requirements. The Custodian states that as to letters sent to all candidates regarding the scheduling and outcome of the interviews, the Complainant is only entitled to receive those letters addressed to the Complainant. The Custodian states that letters addressed to other candidates are personnel records and cannot be disclosed.

September 7, 2006

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

- Complainant's OPRA request dated June 23, 2006,
- Custodian's response to the OPRA request dated June 23, 2006,
- Custodian's letter to the Complainant dated July 17, 2006,
- Complainant's e-mail to the Custodian dated July 17, 2006,
- Custodian's letter to the Complainant dated July 26, 2006, and
- Custodian's letter to the Complainant dated August 7, 2006.

The Complainant asserts that the Custodian wrongfully denied access to all of the requested records. The Complainant contends that the agency's failure to release the records represents a faulty application of OPRA and an overly broad assertion of the executive privilege meant to protect the privileged deliberations of the Governor and those closely involved in the management of his administration.

Furthermore, the Complainant states that the requested Status of Interview Form is a document made by the SPB to document the interview portion of the employment screening process. The Complainant states that the form contains a list of candidates' names, interview questions, the responses sought to the questions and the responses given by each candidate. The Complainant states that she was a promotional candidate for the title of Administrative Analyst I and after review of the Complainant's own personnel file, the Complainant found that these records are not in her file. Additionally, the Complainant asserts that the interview questions, interview notes and evaluation criteria from her promotional interviews are not contained in her personnel file nor are the reports and documents that detail the evaluation criteria for candidates during the promotional process. Based on this, the Complainant asserts that the Custodian's contention that these documents are personnel records is inaccurate.

The Complainant contends that the privilege asserted by the Custodian arises from Executive Order 26 (McGreevey, Aug. 13, 2002) ("EO 26") and is limited to records generated by and under control of the Governor's Office. The Complainant contends that e-mails or written communications between Brown and Weinbaum are not covered by the privilege because neither Brown nor Weinbaum are attached to the Office of the Governor and no evidence has been presented to indicate that they were involved in any consultative or deliberative process involving the Governor or his staff.

September 19, 2006

Offer of Mediation sent to both parties.

September 22, 2006

Custodian declines mediation.

September 26, 2006

Request for Statement of Information ("SOI") sent to the Custodian.

September 27, 2006

Complainant's signed Agreement to Mediate.

October 3, 2006

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated June 23, 2006,
- Custodian's response to the OPRA request dated June 23, 2006,
- Custodian's letter to the Complainant dated July 17, 2006,
- Complainant's e-mail to the Custodian dated July 17, 2006,
- Custodian's letter to the Complainant dated July 24, 2006,
- Custodian's letter to the Complainant dated July 26, 2006, and
- Custodian's letter to the Complainant dated August 7, 2006.

The Custodian provides the following Document Index indicating that the following documents were not provided in response to the OPRA request:⁴

⁴ The Custodian failed to include notations for the completed Status of Interview forms for interviews conducted by Brown and Weinbaum during April 2006, requested by Complainant. The Custodian's Irma Sandoval v. NJ State Parole Board, 2006-167 – Findings and Recommendations of the Executive Director

List of all Documents Responsive to Complainant's June 23, 2006 OPRA Request	Documents Provided to Complainant, in Whole or in Part and the Date(s) Provided	Documents Not Provided to Complainant, in Whole or in part	Legal Explanation and Citation for Non-disclosure or redactions
E-mail or written communications between Brown and Weinbaum from April 1, 2005 through June 23, 2006 with key words PS64591; Administrative Analyst 1; Mary Barbato; Diane Angelucci; PS060055; provisional appointment; RA Appointment; interview; candidates; organizational chart; interview questions; question; failed; displacement; hiring freeze; promotional freeze; freeze	None	Cannot be provided – E-mails are only retained for 90 days; in addition, any e-mail sent from April to June 2006 with this information are personnel records	EO 26; personnel records exempt under <u>N.J.S.A.</u> 47:1A-10
Completed questions, candidate answers and interview notes taken by Brown and Weinbaum for all candidates interviewed	None	Completed questions and answers and interview notes from both Brown and Weinbaum for all candidates interviewed	EO 26, personnel records exempt under <u>N.J.S.A.</u> 47:1A-10, advisory, consultative and deliberative (“ACD”) exempt under <u>N.J.S.A.</u> 47:1A-1.1.
Information related to the evaluation criteria used by Weinbaum and/or Brown in the final determination or selection of the candidate(s)	None	Cannot be determined – request is for information and not records	Not a valid request for records; EO 26; personnel records exempt under <u>N.J.S.A.</u> 47:1A-10, ACD exempt under <u>N.J.S.A.</u> 47:1A-1.1.
PAMS noting the provisional appointments and subsequent regular	None	PAMS noting the provisional appointments and subsequent regular	EO 26, personnel records exempt under <u>N.J.S.A.</u> 47:1A-10

August 7, 2006 letter states that this document will not be disclosed because it is considered a personnel record.

appointment and displacement of provisional employees Mary Barbato and Diane Angelucci.		appointment and displacement of provisional employees Mary Barbato and Diane Angelucci.	
Letters sent to all candidates regarding the scheduling of the interviews, and letters sent to all candidates regarding the outcome of the interview process.	None	Letters sent to candidates other than the Complainant regarding the scheduling and outcome of interviews.	EO 26, personnel records exempt under <u>N.J.S.A. 47:1A-10</u>

The Custodian certifies that the Complainant’s request was received on June 23, 2006 and was acknowledged in writing, in a timely manner, on June 23, 2006. The Custodian further certifies that the Custodian advised the Complainant that he would attempt to fulfill her request and would notify the Complainant if an extension of time was necessary. The Custodian certifies that he asked for an extension of time on July 17, 2006 to prepare a comprehensive response to the Complainant’s request, which extension the Complainant granted. The Custodian certifies that on July 24, 2006 he requested an additional extension because he needed to consult with the Department of Personnel on Complainant’s OPRA request. The Custodian certifies that on July 26, 2006 he informed the Complainant that the following records were available for her upon payment of a \$9.00 copying fee:

- Copy of all promotional postings, including Department of Personnel and SPB postings, Notice of Vacancy, etc., related to the Administrative Analyst I – SPB title;
- Letters sent to all candidates regarding the scheduling of interviews (only as to Sandoval);
- Letters sent to all candidates regarding the outcome of the interview process (only as to Sandoval);
- E-mail or written communications and PMIS/TLRS screen shots, related to State Hiring/Promotional Freeze.

The Custodian certifies that he further advised the Complainant that the following records were deemed personnel records exempt from OPRA:

- Completed Status of Interview forms for interviews conducted by Brown and Weinbaum during April 2006;
- E-mail or written communications between Brown and Weinbaum from April 1, 2005 through June 23, 2006 with the following key words: 1) PS64591, 2) Administrative Analyst 1, 3) Mary Barbato, 4) Diane Angelucci, 5) PS060055, 6) provisional appointment (“PA”), 7) regular appointment (“RA”), 8) interview, 9) candidates, 10) organizational chart, 11) interview questions, 12) question, 13) failed, 14) displacement, 15) hiring freeze, 16) promotional freeze, 17) freeze;

- Completed questions, candidate answers and interview notes taken by Brown and Weinbaum for all candidates interviewed;
- Information related to the evaluation criteria used by Weinbaum and/or Brown in the final selection of the candidate(s);
- Completed Disposition of Certification form returned to the Department of Personnel;
- Personnel Action Memorandums (“PAM”) noting the PA and subsequent RA and displacement of provisional employees Mary Barbato and Diane Angelucci;
- Letters sent to all candidates other than Complainant regarding the scheduling of the interviews;
- Letters sent to all candidates other than Complainant regarding the outcome of the interview process.

The Custodian certifies that on August 9, 2006 the Complainant paid the \$9.00 copying fee and received the documents specifically granted access on July 26, 2006, thirty two (32) business days after Complainant’s June 23, 2006 OPRA request. The Custodian states that the Complainant was advised that certain records which had not been provided were exempt from OPRA because they are considered personnel records. The Custodian further certifies that the decision to deny Complainant access to the above-referenced records was made pursuant to EO 26.

Custodian’s counsel submits a letter brief in support of the SOI. Custodian argues that the Denial of Access complaint should be dismissed because the requested records which were withheld are not public records under OPRA. Custodian asserts that the interview forms, interview notes, evaluation criteria, disposition of certification form, PAMs, communications regarding the position, letters scheduling interviews and letters regarding the outcome of the interview process are all personnel records exempt from OPRA. Moreover, Custodian alleges that only an employee’s name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of pension are public records under OPRA.

Custodian argues that pursuant to EO 26, only resumes of candidates may be disclosed after the successful candidate has been hired and the unsuccessful candidate has consented to the disclosure. Custodian contends that the Executive Order does not extend to notes or interview materials. Custodian asserts that by the clear language of the Executive Order, these limitations apply to all state agencies.

Custodian also asserts that the interview questions, answers and scoring, and the evaluation criteria were withheld because they are advisory, consultative and deliberative materials not subject to disclosure under OPRA or EO 26. Custodian further contends that the request for information related to evaluation criteria used in the hiring process is not a valid OPRA request because it asks for information rather than a specific public record.

Custodian also argues that the Complainant’s request for e-mails could not be fulfilled, in part, because the SPB retains e-mails for only ninety (90) days. Custodian

asserts that such e-mails are also unavailable, notwithstanding the fact that the e-mails necessarily contain confidential personnel information not subject to OPRA.

Finally, Custodian contends that a record need not be maintained in an individual's personnel file in order to be considered a personnel record. Custodian asserts that personnel records contain information regarding hiring, promotional or other employee concerns and may not necessarily be specific to an individual employee.

October 25, 2006

The Complainant's response to the Custodian's SOI attaching the Job Specification for Administrative Analyst I with the SPB-SPA.

The Complainant argues that the requested Status of Interview form should have been released because it documents the fact that an interview took place, the results of that interview, and is therefore not a personnel record. The Complainant further argues that the requested interview questions should have been released because they are not advisory, consultative or deliberative but are instead a record that an interview took place. The Complainant asserts that the requested evaluation criteria should also have been released because it is an agency report. The Complainant further asserts that the SPB purges e-mails from its system after seventy-five (75) days, not ninety (90) days, and that, in any event, e-mails are not purged from the sent items folders of personal e-mail accounts and therefore these records should have been released. The Complainant argues that the completed Disposition of Certification form should also have been released because it is a public record providing an employee's name and title. Finally, the Complainant contends that copies of the scheduling and disposition letters sent to promotional candidates should have been provided to her because these letters are public records under OPRA and document that a fair and open process took place.

The Complainant asserts that the requested records should have been released with lawful and appropriate redactions to allow the release of that information which is accessible to the public. The Complainant asserts that the GRC should not allow EO 26 to be so broadly interpreted because such an interpretation would allow any report or document to be shielded from public access contrary to the legislative intent of OPRA.

November 13, 2006

Letter from the GRC to the Custodian. The GRC requests a certification of the Custodian indicating; (1) whether or not the requested e-mails and/or written communications between Brown and Weinbaum from April 1, 2005 through June 23, 2006 were made, maintained or kept on file by the SPB at the time of the Complainant's June 23, 2006 OPRA request, and (2) whether or not the Completed Disposition of Certification Form referenced in the October 3, 2006 Statement of Information contains any information specifically identified as releasable pursuant to N.J.S.A. 47:1A-10, and to provide a specific lawful basis for denial to any of this information.

November 17, 2006

Custodian's legal certification. The Custodian states that he will need additional time to determine whether or not the requested records were made, maintained or kept on file at the time of the Complainant's OPRA request because the Custodian is awaiting a response from the Office of Information Technology. The Custodian states that the Office of Information Technology will need an additional two (2) weeks to provide that information.

Additionally, the Custodian states that there was an error in the October 3, 2006 Statement of Information regarding the completed Certification of Eligibles for Appointment form, which the Complainant identifies as the completed Disposition of Certification. The Custodian certifies that he did not provide this document to Complainant because the Custodian believed that the Department of Personnel was providing that information to the Complainant. The Custodian states that he will forward to the Complainant a copy of the completed Certification of Eligibles for Appointment form with social security numbers and home addresses redacted.

November 17, 2006

Letter from the Custodian to the Complainant enclosing a copy of the completed Certification of Eligibles for Appointment form with personal information redacted.

December 27, 2006

Certifications from the Custodian and the Chief of the SPB's Information Technology Unit ("ITU") to GRC in response to the GRC's inquiry dated November 13, 2006. Pursuant to the certification from the Chief of the Board's ITU, the Custodian certifies that the ITU does not have the capability to search for e-mails between two users between two dates by content search criteria. The Custodian also certifies that the ITU ran a search for e-mails between Weinbaum and Brown from April 1, 2005 to June 23, 2006. The Custodian further certifies that because the ITU could not run the search as it was requested by the Complainant, the Custodian took additional time to consult with the ITU to determine how a search could be run to accommodate the Complainant's request.

The Custodian certifies that the search revealed that there were no e-mails from Brown to Weinbaum from April 1, 2005 to June 23, 2006 and that there were 146 e-mails from Weinbaum to Brown during that time period. However, the Custodian certifies that the ITU cannot determine whether the e-mails contain the key words identified by the Complainant in her request.

The Custodian asserts that OPRA does not require an agency to conduct research or collate data. The Custodian cites MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005), for the proposition that public agencies are required to disclose only "identifiable" governmental records not otherwise exempt, and that wholesale requests for general information to be analyzed, collated, and compiled by the responding government entity are not encompassed therein. The Custodian asserts that the SPB is not required to analyze each document to determine whether it contains one of the keywords identified by the Complainant in her request. Furthermore, the Custodian states that any e-mails that may be identified as relevant to

the Complainant's request would need to be printed out and reviewed in order to determine whether a privilege would prohibit their disclosure.

The Custodian certifies that, regarding the Complainant's request for written communications other than e-mails, Brown possessed one memorandum dated February 24, 2006 regarding applicant resumes. The Custodian asserts that this memorandum is confidential because it is a personnel record and contains advisory, consultative, and deliberative information regarding applicants.

The Custodian further certifies that Weinbaum had in his possession:

- 1) 36-page PAM dated April 27, 2006 regarding Mary Barbato and containing:
 - a) Status of Interview form for the Administrative Analyst I position,
 - b) Certification of Eligibles for Appointment,
 - c) Applicant Resumes Memorandum,
 - d) Letters to Brown from Applicants,
 - e) Interview Questions for the Administrative Analyst I title for four applicants, including Complainant,
 - f) Letter to Weinbaum from an applicant with resume,
 - g) Complainant's resume,
 - h) Organizational Chart for Fiscal Unit,
 - i) Fiscal Unit Overview of Functions and Responsibilities, and
- 2) 38-page PAM dated November 3, 2005 regarding Lewis Lawitz and containing:
 - a) PAM form,
 - b) Notice of Job Vacancy,
 - c) Status of Interview form,
 - d) Letter from L. Lawitz with resume,
 - e) Interview questions for four applicants, and
 - f) Letters and resumes from applicants.

The Custodian asserts that the PAMs and the information contained within them are personnel records and contain advisory, consultative, and deliberative documents that are exempt from OPRA. The Custodian contends that the exceptions to these are the Certification of Eligibles for Appointment, the organizational chart, overview of functions, and notice of job vacancy. The Custodian states that the Certification of Eligibles for Appointment has already been provided to the Complainant, and the organizational chart, overview of functions, and notice of job vacancy will be made available to the Complainant upon payment of the appropriate copying fee, which is not specified in this Certification.

As part of his December 27, 2006 submission to the GRC, the Custodian enclosed a Certification from Christopher Cermele, Chief of the SPB's ITU. Cermele certifies that he is fully familiar with the e-mail search requested by the Complainant. Cermele further certifies that the ITU does not have the capability to search for e-mails between two users and between two dates by content search criteria. Cermele certifies that on December 18, 2006 he ordered a search for e-mails between Weinbaum and Brown from April 1, 2005 to June 23, 2006.

Analysis

Whether the Custodian responded to the Complainant's June 23, 2006 OPRA request within the statutorily required seven (7) business days?

OPRA provides that:

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

OPRA 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 ... or deny a request for access ... as soon as possible, but not later than seven business days after receiving the request ...* 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 ...*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

Additionally, OPRA provides that:

“...[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

The Complainant made her OPRA request on June 23, 2006. Pursuant to N.J.S.A. 47:1A-5.i, the Custodian should have granted or denied access to the requested records no later than July 5, 2006. In his June 23, 2006 letter to Complainant, the Custodian fails to specifically grant or deny access to the Complainant and fails to indicate a specific reason why he could not immediately comply with the Complainant's request for access.

If the Custodian required additional time beyond the seven (7) business day time period required by OPRA in order to satisfy the Complainant's request, he should have obtained a written agreement from the Complainant in order to do so. In Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), the Custodian knew he needed additional time in order to respond to the Complainant's request, but failed to obtain a written agreement from the Complainant extending the seven (7) business day time frame required under OPRA to respond. The Council held that the Custodian's failure to obtain a written agreement extending the seven (7) business day time period resulted in a “deemed” denial of the request.

The Custodian's response to Complainant on June 23, 2006 that he would attempt to obtain the requested documents “as soon as possible” does not satisfy the access requirements of N.J.S.A. 47:1A-5.i. Because the Custodian failed to specifically grant or

deny access to the requested records, failed to indicate a specific reason why he could not immediately comply with Complainant's request for access, and failed to obtain a written agreement to an extension of the seven (7) business day statutory time period within which to respond to Complainant's request, the request is deemed denied and the Custodian has violated N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i.

Whether the Custodian unlawfully denied access to the requested records pursuant to N.J.S.A. 47:1A-10 and EO 26?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

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...*" (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

"[t]he provisions of OPRA shall not abrogate any exemption of a public record or a government record from public access heretofore made pursuant to OPRA; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order." N.J.S.A. 47:1A-9.a.

OPRA further provides in pertinent part that:

"Notwithstanding the provisions of [OPRA] or any other law to the contrary, the personnel ... records of any individual in the possession of a public agency, ... shall not be considered a government record and shall not be made available for public access, except that ... data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment ... shall be a government record." N.J.S.A. 47:1A-10.

In addition, EO 26 states that:

"No public agency shall disclose the resumes, applications for employment or other information concerning job applicants while a

recruitment search is ongoing. The resumes of successful candidates shall be disclosed once the successful candidate is hired. The resumes of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure.” N.J. Exec. Order No. 26 (McGreevey, Aug. 13, 2002).

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 Complainant asserts that the Custodian unlawfully denied access to the following documents:

- Completed Status of Interview forms for interviews conducted by Brown and Weinbaum during April, 2006,
- E-mail or written communications between Brown and Weinbaum from April 1, 2005 through June 23, 2006 with certain key words,
- Completed questions, candidate answers and interview notes taken by Brown and Weinbaum,
- Information related to the evaluation criteria used by Brown and Weinbaum in the final selection of candidates;
- PAMs, and
- Letters sent to candidates other than the Complainant regarding scheduling interviews and the outcome of the interview process.

The Custodian alleges that these documents are exempt from disclosure under EO 26 and are also exempt from the definition of government records under OPRA because they are personnel records pursuant to N.J.S.A. 47:1A-10.

EO 26 clearly exempts from disclosure resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing. Although Complainant argues in her Denial of Access Complaint that EO 26 applies only to documents generated by and under the control of the Governor’s Office, it is clear by the explicit language of the Executive Order itself that EO 26 applies to public agencies generally. EO 26 permits the public disclosure of successful candidates’ resumes after the search has been concluded. The resumes of unsuccessful candidates may be disclosed after the search is concluded, but only with the permission of the unsuccessful candidate. At least one court has held that the express provision in EO 26 permitting the disclosure of resumes and the silence regarding whether applications for employment may be disclosed indicates that the Governor intended to maintain the confidentiality of information concerning job applicants generally. See North Jersey Media Group Inc. v. State of New Jersey Department of Personnel, 389 N.J. Super. 527, 535 (Law Div. 2006).

OPRA explicitly states that personnel records of an individual in the possession of a public agency are not government records and shall not be made available for public access. N.J.S.A. 47:1A-10. However, the statute also clearly states that a person's name,

title, position, salary, payroll record, length of service, date of separation, and type and amount of pension is considered a government record and is, therefore, subject to disclosure. *Id.* Moreover, data contained in information which discloses conformity with a specific experiential, educational or medical qualification for government employment is also considered a government record subject to disclosure. *Id.*

Completed Status of Interview forms for interviews conducted by Brown and Weinbaum in April 2006 for the position of Administrative Analyst I.

The Custodian asserts that the completed Status of Interview forms are exempt from disclosure as personnel records under OPRA. Although N.J.S.A. 47:1A-10 exempts personnel records from public access, N.J.S.A. 47:1A-10 also states that “data contained in information which disclose conformity with specific experiential [or] educational ... qualifications required for government employment” shall be considered a government record. N.J.S.A. 47:1A-10.

To the extent that the completed Status of Interview forms for interviews conducted by Brown and Weinbaum in April 2006 contain data “disclos[ing] conformity with specific experiential, educational or medical qualifications required for” the position of Administrative Analyst I with the SPB, the Custodian should have granted access to such records, redacting confidential or privileged information as necessary. The Custodian has failed to bear his burden of proof that the denial of access to Complainant regarding the Status of Interview forms was authorized by law. N.J.S.A. 47:1A-6.

Because there is insufficient evidence in the record to ascertain to what extent the completed Status of Interview forms requested by the Complainant contain privileged and confidential information, the GRC should conduct an *in camera* review of the completed Status of Interview forms to determine to what extent N.J.S.A. 47:1A-10 or any other exemption applies to these documents.

E-mail or written communications between Brown and Weinbaum from April 1, 2005 through June 23, 2006 with certain key words.

The Custodian asserts that the Complainant’s request for e-mail or written communications could not be fulfilled because the requested documents were both exempt from access pursuant to EO 26 and because they were unavailable, since e-mails are purged from the SPB system after ninety (90) days.

Conflicting evidence exists regarding the availability of the requested e-mails. Complainant contends that although e-mails are purged from the system after seventy-five (75), not ninety (90), days, they are not purged from an individual’s “sent items” folder and are therefore available. Also, in his December 27, 2006 Certification, the Custodian certifies that a December 18, 2006 search of e-mails between Brown and Weinbaum from April 1, 2005 through June 23, 2006 disclosed 146 e-mails from Weinbaum to Brown. The Custodian certifies that it cannot be determined whether any of the e-mails contain the keywords requested by the Complainant. However, the Custodian was apparently able to identify and locate specific e-mails related to the State promotional and hiring freeze, because in his letter to Complainant dated July 26, 2006,

the Custodian states that these documents were part of a package of documents available to Complainant upon payment of a \$9.00 copying fee.

The Custodian also certifies that Brown had a memorandum regarding resumes in her possession and that Weinbaum had numerous documents in his possession which were responsive to the Complainant's OPRA request. The Custodian alleges that these documents are non-public personnel records.

Based on the Custodian's December 27, 2006 Certification, it is clear that 146 e-mails exist that may be responsive to the Complainant's request, as well as certain written communications that may also be responsive to Complainant's request.

The Custodian argues that, pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005), Complainant's request is not sufficiently specific to enable the Custodian to identify which records Complainant requests. Under MAG Entertainment, public agencies are required to disclose only "identifiable" governmental records not otherwise exempt from OPRA, and wholesale requests for general information to be analyzed, collated, and compiled by the responding government entity are not encompassed therein. The Custodian asserts that the SPB is not required to analyze each of the 146 e-mails between Weinbaum and Brown to determine whether it contains one of the keywords identified by the Complainant in her request. Furthermore, the Custodian states that any e-mails that may be identified as relevant to the Complainant's request would need to be printed out and reviewed in order to determine whether a privilege would prohibit their disclosure.

In MAG Entertainment, the plaintiff filed an OPRA request for "all documents or records evidencing that the ABC sought, obtained or ordered revocation of a liquor license for the charge of selling alcoholic beverages to an intoxicated person in which such person, after leaving the licensed premises, was involved in a fatal auto accident," and "all documents or records evidencing that the ABC sought, obtained or ordered suspension of a liquor license exceeding 45 days for charges of lewd or immoral activity." MAG Entertainment, 375 N.J. Super. 534, 539-40 (App. Div. 2005). MAG's request did not identify any specific case by name, date, docket number or any other citation. *Id.* The request was not limited to a particular time frame, thus necessitating a search of both open and closed Division files. Moreover, because the agency's case tracking system did not have a search engine that could readily extract a list of cases that fit MAG's request, the custodian would have to manually review the contents of every Division case file to determine the factual basis for the charges brought and their disposition. *Id.* In other words, MAG's request required the custodian to collect, evaluate, and compile information from each file and amounted, in effect, to an improper demand for research. *Id.* See also, New Jersey Builder's Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 171-2 (App. Div. 2007)(holding that no award of attorneys fees will be made for late response to an OPRA request consisting of a five-page document listing thirty-eight separate requests for "any and all documents and data").

The Appellate Division found that MAG's OPRA request was invalid because MAG failed to identify with any specificity or particularity the government records it sought. *Id.* at 549. The court noted that:

“[s]uch an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted[.]” *Id.*

The Complainant in the complaint now before the GRC requested specific e-mails by recipient, by date range and by content. Based on that information, the Custodian has identified 146 e-mails which fit the specific recipient and date range criteria Complainant requested. The Complainant's request is not overly broad or invalid merely because the Custodian must review these particular e-mails for content or, more specifically, for privileged material. See, Courier Post v. Lenape Regional High School District, 360 N.J.Super. 191, 206 (Law Div. 2002)(“Redaction of privileged or confidential data cannot cause the release of otherwise public information to be placed in a straight jacket.”).

The Custodian also contends that these records are exempt from public access because they are exempt from disclosure pursuant to EO 26. EO 26 prohibits the disclosure of “resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing.” EO 26 permits the disclosure of the successful candidate's resume after the recruitment search is concluded, and permits the disclosure of unsuccessful candidates' resumes with their permission after the recruitment search is concluded.

The written memoranda dated February 24, 2006 in Brown's possession contains applicant resumes and is therefore exempt from disclosure under EO 26. The applications and letters with attached resumes in Weinbaum's possession are similarly exempt from disclosure under EO 26.

There is insufficient evidence in the record to conclude that all 146 e-mails located by the Custodian contain the kind of material protected by EO 26. Because the Custodian's December 27, 2006 certification states that he has not printed out or reviewed these e-mails, the Custodian cannot know whether any of these e-mails contain the kind of material protected by EO 26. The GRC should conduct an *in camera* review of these records to determine if EO 26 applies.

Finally, the Custodian asserts that the requested e-mails and memoranda are personnel records pursuant to N.J.S.A. 47:1A-10 and therefore shall not be made available for public access. N.J.S.A. 47:1A-10 clearly states that a person's name, title, position, salary, payroll record, length of service, date of separation, and type and amount of pension **is** considered a government record and is therefore subject to disclosure. *Id.* Moreover, data contained in information which discloses conformity with a specific

experiential, educational or medical qualification for government employment shall also be considered a government record subject to disclosure. *Id.*

To the extent that the requested e-mails and written memoranda contain government records pursuant to N.J.S.A. 47:1A-10 and are not otherwise exempt from disclosure, the Custodian should have granted access to such records, redacting confidential or privileged information as necessary. The Custodian has failed to bear his burden of proof that the denial of access to Complainant regarding the e-mails and other written communications between Brown and Weinbaum from April 1, 2005 through June 23, 2006 with certain key words was authorized by law. N.J.S.A. 47:1A-6.

Completed questions, candidate answers and interview notes taken by Brown and Weinbaum

The Custodian asserts that the completed questions, candidate answers and interview notes taken by Brown and Weinbaum are prohibited from disclosure by EO 26 and N.J.S.A. 47:1A-10, and also that these materials contain advisory, deliberative or consultative material (“ACD”) exempt from OPRA under N.J.S.A. 47:1A-1.1.

OPRA excludes inter- or intra-agency advisory, consultative or deliberative materials from the definition of a government record. 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 those documents that are the subject of the “deliberative process privilege.”

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 “intra-agency” or “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. Strictly factual segments of an otherwise deliberative document are not exempted from disclosure. In Re the Liquidation of Integrity Insurance Company, 165 N.J. 75, 88 (2000); In re Readoption With Amendments of Death Penalty Regulations, supra at 73 (App. Div. 2004).

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). 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 In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000). 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), Liquidation of Integrity, *supra*, 165 N.J. 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:

“[t]he 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.” In Re Liquidation of Integrity, *supra*, 165 N.J. at 88, citing McClain, *supra*, 99 N.J. at 361-62, 492 A.2d 991.

OPRA places the burden on the Custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6. The Custodian contends that the requested notes, questions and answers are exempt from disclosure as ACD pursuant to N.J.S.A. 47:1.1 and EO 26.

In Sooy v. New Jersey Department of Corrections, GRC Complaint No. 2006-128 (October 19, 2006), the Complainant claimed he was unlawfully denied access to the requested notes, transcripts, and score forms of interviews held for the position of captain at Southern State Correctional Facility on May 31, 2006. The GRC found that the requested notes and score sheets were both pre-decisional and deliberative. Based on the

decision in In re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000), the requested notes and score sheets were ACD and did not fall under the definition of a government record pursuant to N.J.S.A. 47:1A-1.1.

The Custodian herein states that the documents sought contain not only the interviewer's questions, but also the interviewer's notes regarding the applicant's responses. The Custodian also states that the documents contain a numerical evaluation of each candidate which is utilized in the decision-making process regarding the promotion.

The questions, answers and interview notes of Brown and Weinbaum are pre-decisional in that the records were generated before an agency adopted or reached its decision as to who would hold the Administrative Analyst I position. These documents are deliberative because they contain opinions, recommendations or advice about agency policies or decisions. Thus, the requested documents are both pre-decisional and deliberative. Based on the holding in In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000), the requested notes, questions and candidate answers are ACD and do not fall within the definition of a government record pursuant to N.J.S.A. 47:1A-1.1. Therefore, the Custodian has borne the burden of proof that he lawfully denied access to the questions, candidate answers and interview notes of Brown and Weinbaum. N.J.S.A. 47:1A-6.

Although the Custodian asserts that the records are also exempt from disclosure as personnel records under N.J.S.A. 47:1a-10 and EO 26, there is no evidence that these records constitute a personnel record. Moreover, the Complainant did not request resumes of candidates or other job applicant information, which are specifically addressed in EO 26. Therefore, N.J.S.A. 47:1A-10 and EO 26 do not apply to exempt from disclosure the requested records.

Information related to the evaluation criteria used by Brown and Weinbaum in the final selection of candidates

The Custodian argues that the requested information related to the evaluation criteria used by Brown and Weinbaum is exempt from disclosure pursuant to EO 26 and N.J.S.A. 47:1A-10, and contains ACD material exempt from OPRA under N.J.S.A. 47:1A-1.1. Moreover, the Custodian claims that Complainant's request is not a valid request for records under OPRA. Custodian argues that the evaluation criteria the Complainant requests is "general information" not subject to OPRA pursuant to MAG Entertainment LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005)(holding that public agencies are required under OPRA to disclose only "identifiable" governmental records not otherwise exempt, and that wholesale requests for general information to be analyzed, collated, and compiled by the responding government entity are not encompassed therein).

Pursuant to the court's decision in MAG Entertainment, the Complainant's request for information related to the evaluation criteria used by Brown and Weinbaum in the final selection of candidates is not a request for a specific government record. In order to fulfill this request, the Custodian would have been required to identify, analyze,

collate, and compile documents responsive to the request. This type of request is invalid under OPRA. *Id.* Therefore, the Custodian lawfully denied access to Complainant regarding this request, because the Complainant's request does not specify particular records.

Personnel Action Memorandums ("PAM") noting the provisional appointment, subsequent regular appointment and displacement of provisional employees Mary Barbato and Diane Angelucci.

The Custodian asserts that the PAMs sought by Complainant may not be disclosed pursuant to EO 26 and also contain personnel records not considered a government record under N.J.S.A. 47:1A-10.

EO 26 prohibits disclosure of information concerning job applicants while a recruitment search is ongoing. There is no evidence that the PAMs sought by Complainant contain resumes, job applications, or other information concerning job applicants. EO 26, therefore, does not apply to exempt from disclosure the requested records.

The records may constitute personnel records under N.J.S.A. 47:1A-10. However, the statute specifically includes within the definition of government record a person's name, title, position, salary, payroll record, length of service, date of separation, type and amount of pension. N.J.S.A. 47:1A-10. To the extent that the PAMs contain this information, the Custodian should have granted access to the document and redacted any confidential or privileged information. The Custodian has, therefore, failed to bear his burden of proof that the denial of access of the PAMs was authorized by law. N.J.S.A. 47:1A-6.

Letters sent to candidates other than the Complainant regarding scheduling interviews and the outcome of the interview process

The Custodian denied the Complainant access to the letters to candidates other than Complainant regarding the scheduling of interviews and the outcome of the interview process. The Custodian claims that these letters are subject to EO 26 and are also personnel records under N.J.S.A. 47:1A-10.

There is no evidence in the record that these letters are personnel records within the meaning of N.J.S.A. 47:1A-10.

However, the letters to candidates other than Complainant regarding the scheduling of interviews and the outcome of the interview process are part of the job application process and are, therefore, subject to EO 26. These documents memorialize interview dates and inform candidates of the disposition of the interview process. Because these documents are part of the job application process, the Custodian has borne his burden of proof that the denial of access to Complainant of these letters was authorized by law pursuant to EO 26, N.J.S.A. 47:1A-1, and N.J.S.A. 47:1A-10.

Whether the Custodian’s delay in 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 and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If 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 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, 107 (App. Div. 1996).

The totality of the circumstances indicates that the Custodian herein may have unreasonably denied access to the Complainant.

Complainant’s OPRA request was filed June 23, 2006. Although the Custodian replied to the request the same day, his response neither granted nor denied access to the requested records, nor did the Custodian request a specific extension of time within which to respond to Complainant’s OPRA request. This failure resulted in a deemed denial of access to Complainant. On July 26, 2006, twenty-two (22) business days after Complainant’s OPRA request, the Custodian stated that he would make available to Complainant copies of certain documents requested. On August 7, 2006, thirty (30) business days after Complainant’s OPRA request, the Custodian stated that other documents would not be made available because they were considered confidential.

The Custodian's SOI dated October 3, 2006 contained a log of records Complainant requested which noted for the first time that the SPB retains e-mails for only ninety (90) days and that e-mails were therefore not available. The log also noted that a Certification of Eligibles form responsive to Complainant's request for a completed Disposition of Certification form returned to the Department of Personnel was not made available pursuant to EO 26 because it is considered a personnel record exempt from OPRA. However, on November 17, 2006, the Custodian submitted to the GRC a Certification wherein the Custodian certified that he would require an additional two weeks for the Office of Information Technology to ascertain whether any e-mails responsive to Complainant's request exist. The Custodian further certified that he did not, in fact, withhold the Certification of Eligibles form from the Complainant, but did not provide it to the Complainant because the Custodian thought that the Complainant would receive the form from the Department of Personnel.

Conflicting evidence also exists regarding the availability of the requested e-mails. The Custodian initially contended that the e-mails were not available because the SPB purges e-mails from its system every ninety (90) days. The Complainant, however, contended not only that the time period for purging of documents was inaccurate, but also that e-mails are not purged from an individual's "sent items" folder and should therefore be available. In his December 27, 2006 Certification, the Custodian certifies that a December 18, 2006 search of e-mails between Brown and Weinbaum from April 1, 2005 though June 23, 2006 disclosed 146 e-mails from Weinbaum to Brown. The Custodian apparently failed to conduct a search for the requested e-mails for almost six months from the date of Complainant's OPRA request on June 23, 2006. The Custodian also certifies that it cannot be determined whether any of the e-mails contain the keywords requested by the Complainant. However, the Custodian was apparently able to identify and locate specific e-mails related to the State promotional and hiring freeze, because in his letter to Complainant dated July 26, 2006, the Custodian stated that these documents were part of a package of documents available to Complainant upon payment of a \$9.00 copying fee. Moreover, when he finally located them, the Custodian failed to print out or review the e-mails to ascertain whether any of them were subject to privilege or statutory exemption.

Based on the Custodian's denial of access to government records, misstatements regarding the existence of documents relating to this request and other contested facts in this complaint, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the complaint should be referred to the Office of Administrative Law for determination of a knowing and willful violation of the Act under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Based on the GRC decision in Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), the Custodian has violated N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. by failing to respond to the Complainant's request in writing

by granting access, denying access, requesting an extension of the statutory response time, or asking for clarification of the request within the statutorily mandated seven (7) business days, resulting in a deemed denial of access.

2. Because the completed Status of Interview forms for interviews conducted by Brown and Weinbaum in April 2006 may contain data “disclos[ing] conformity with specific experiential, educational or medical qualifications required for” the position of Administrative Analyst I with the SPB, the Custodian should have granted access to such records. The Custodian, therefore, has failed to bear his burden of proof that the denial of access to Complainant was authorized by law pursuant to N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-10. **The Custodian shall disclose this record with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and 47:1A-5.g.**
3. To the extent that the e-mails and written memoranda contain government records pursuant to N.J.S.A. 47:1A-10 and are not otherwise exempt from disclosure, the Custodian should have granted access to such records, redacting confidential or privileged information as necessary. The Custodian, therefore, has failed to bear his burden of proof that the denial of access to Complainant regarding the e-mails and other written communications between Brown and Weinbaum from April 1, 2005 through June 23, 2006 with certain key words was authorized by law. N.J.S.A. 47:1A-1. **The Custodian shall disclose this record with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and 47:1A-5.g.**
4. Because the Custodian certifies that he has not printed out or reviewed these e-mails, the Custodian cannot know whether any of these e-mails contain the kind of material protected by EO 26. The GRC should, therefore, conduct an *in camera* review of these records to determine if EO 26 applies. Because there is insufficient evidence in the record to determine if N.J.S.A. 47:1A-10 or any other exemption applies to the completed Statement of Interview forms requested by Complainant, the GRC should conduct an *in camera* review of these records.

The Custodian must deliver⁵ to the Council in a sealed envelope six copies of the requested unredacted documents, a document or redaction index detailing the document and/or

⁵ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

each redaction asserted and the lawful basis for the denial, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the document requested by the Council for the *in camera* inspection within five (5) business days from receipt of the Council's Interim Order.

5. Because the questions, answers and interview notes of Brown and Weinbaum are pre-decisional and deliberative, the requested notes, questions and candidate answers are advisory, consultative or deliberative material and do not fall within the definition of a government record pursuant to N.J.S.A. 47:1A-1.1. See, In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000), Therefore, the Custodian has borne the burden of proof that he lawfully denied access to the questions, candidate answers and interview notes of Brown and Weinbaum. N.J.S.A. 47:1A-1.
6. Because the Custodian would have been required to identify, analyze, collate, and compile documents responsive to the Complainant's request for information related to the evaluation criteria used by Brown and Weinbaum in the final selection of candidates, this request is not a request for a specific government record under OPRA and is therefore invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 549 (App. Div. 2005). Therefore, the Custodian lawfully denied access to Complainant regarding this request. N.J.S.A. 47:1A-1.
7. To the extent that the Personnel Action Memoranda for Barbato and Angelucci requested by Complainant contain government records, i.e., a person's name, title, position, salary, payroll record, length of service, date of separation, type and amount of pension, the Custodian should have redacted confidential or privileged information and granted access to the document pursuant to N.J.S.A. 47:1A-10. Custodian has, therefore, failed to bear his burden of proof that the denial of access of the PAMs was authorized by law pursuant to N.J.S.A. 47:1A-1. **The Custodian shall disclose this record with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and 47:1A-5.g.**
8. Because the letters to candidates other than Complainant regarding the scheduling of interviews and the outcome of the interview process are part of the job application process and are therefore exempt from disclosure pursuant to Executive Order #26, the Custodian has borne his burden of proof that the denial of access to Complainant was authorized by law. N.J.S.A. 47:1A-1.

9. Based on the Custodian's denial of access to government records, misstatements regarding the existence of documents relating to this request and other contested facts in this case, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the complaint should be referred to the Office of Administrative Law for determination of a knowing and willful violation of the Act under the totality of the circumstances. N.J.S.A. 47:1A-7.e.

10. **The Custodian shall comply with items #2, 3, 4, and 7 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance to the Executive Director.**

Prepared By:

Karyn Gordon, Esq.
In House Counsel

Approved By:

Catherine Starghill, Esq.
Executive Director

March 21, 2007