



**State of New Jersey**  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

**FINAL DECISION**

**January 26, 2010 Government Records Council Meeting**

Frank Amoresano  
Complainant

Complaint No. 2008-186

v.

Rowan University  
Custodian of Record

At the January 26, 2010 public meeting, the Government Records Council (“Council”) considered the January 20, 2010 *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 timely complied with the Council’s November 4, 2009 Interim Order.
2. The *In Camera* Examination set forth in the table below reveals the Custodian has lawfully denied access to the record listed in the document index pursuant to N.J.S.A. 47:1A-6 because the record was used in the deliberative or decision-making process regarding the scope of the Fiscal 2007 internal audits.
3. There is no need to determine whether the Custodian’s actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances because the Custodian lawfully denied access to the requested records.



Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination <sup>1</sup>
Audit Risk Assessment & Recommended Audit Plan	Audit Risk Assessment & Recommended Audit Plan dated June 2006	Record withheld from disclosure in its entirety.	Internal Audit Report is ACD material not considered a government record under <u>N.J.S.A. 47:1A-1.1</u> . OPRA is a records law not an "information" law. State entities are obligated to provide identifiable government records not otherwise exempt.	The record contains recommendations for the Audit Committee and management to consider in determining the scope of the Fiscal 2007 internal audits (and thus cost) based on the risk assessment estimates of Rowan University made by Accume Partners. Report is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> .

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<sup>1</sup> **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

Human Resources/ Payroll Internal Audit	Human Resources/ Payroll Internal Audit Audit #2007-1 dated October 2006	Record withheld from disclosure in its entirety.	Internal Audit Report is ACD material not considered a government record under <u>N.J.S.A. 47:1A-1.1</u> . OPRA is a records law not an “information” law. State entities are obligated to provide identifiable government records not otherwise exempt.	The record contains recommendations for the Audit Committee and management to consider in determining the scope of the Fiscal 2007 internal audits (and thus cost) based on the risk assessment estimates of Rowan University made by Accume Partners. Report is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
Gift Receipts Internal Audit	Gift Receipts Internal Audit dated October 2007	Record withheld from disclosure in its entirety.	Internal Audit Reports is ACD material not considered a government record under <u>N.J.S.A. 47:1A-1.1</u> . OPRA is a records law not an “information” law. State entities are obligated to provide identifiable government records not otherwise exempt.	The record contains recommendations for the Audit Committee and management to consider in determining the scope of the Fiscal 2007 internal audits (and thus cost) based on the risk assessment estimates of Rowan University made by Accume Partners. Report is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> .

Self Funded Programs Internal Audit	Self Funded Programs Internal Audit dated February 2007	Record withheld from disclosure in its entirety.	Internal Audit Reports is ACD material not considered a government record under <u>N.J.S.A. 47:1A-1.1</u> . OPRA is a records law not an “information” law. State entities are obligated to provide identifiable government records not otherwise exempt.	The record contains recommendations for the Audit Committee and management to consider in determining the scope of the Fiscal 2007 internal audits (and thus cost) based on the risk assessment estimates of Rowan University made by Accume Partners. Report is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
Purchasing, Accounts Payable, Travel & University Credit Cards Internal Audit	Purchasing, Accounts Payable, Travel & University Credit Cards Internal Audit dated April 2007	Record withheld from disclosure in its entirety.	Internal Audit Reports is ACD material not considered a government record under <u>N.J.S.A. 47:1A-1.1</u> . OPRA is a records law not an “information” law. State entities are obligated to provide identifiable government records not otherwise exempt.	The record contains recommendations for the Audit Committee and management to consider in determining the scope of the Fiscal 2007 internal audits (and thus cost) based on the risk assessment estimates of Rowan University made by Accume Partners. Report is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> .

Construction Internal Audit	Construction Internal Audit dated March 2007	Record withheld from disclosure in its entirety.	Internal Audit Report is ACD material not considered a government record under <u>N.J.S.A. 47:1A-1.1</u> . OPRA is a records law not an “information” law. State entities are obligated to provide identifiable government records not otherwise exempt.	The record contains recommendations for the Audit Committee and management to consider in determining the scope of the Fiscal 2007 internal audits (and thus cost) based on the risk assessment estimates of Rowan University made by Accume Partners. Report is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
LAN/WAN Internal IT Audit	LAN/WAN Internal IT Audit dated November 2006	Record withheld from disclosure in its entirety.	Internal Audit Reports is ACD material not considered a government record under <u>N.J.S.A. 47:1A-1.1</u> . OPRA is a records law not an “information” law. State entities are obligated to provide identifiable government records not otherwise exempt.	The record contains recommendations for the Audit Committee and management to consider in determining the scope of the Fiscal 2007 internal audits (and thus cost) based on the risk assessment estimates of Rowan University made by Accume Partners. Report is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> .

Contract/Grant Administration Internal Audit	Contract/Grant Administration Internal Audit dated November 2007	Record withheld from disclosure in its entirety.	Internal Audit Reports is ACD material not considered a government record under <u>N.J.S.A. 47:1A-1.1</u> . OPRA is a records law not an “information” law. State entities are obligated to provide identifiable government records not otherwise exempt.	The record contains recommendations for the Audit Committee and management to consider in determining the scope of the Fiscal 2007 internal audits (and thus cost) based on the risk assessment estimates of Rowan University made by Accume Partners. Report is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> .
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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 26<sup>th</sup> Day of January, 2010

Robin Berg Tabakin, Chair  
Government Records Council

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

Harlynn A. Lack, Secretary  
Government Records Council

**Decision Distribution Date: January 29, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
January 26, 2010 Council Meeting**

**Frank Amoresano<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-186**

**v.**

**Rowan University<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** The actual date of completed reports of the following services rendered by Accume Partners and review (inspection) of such reports:

- Risk Assessment.
- Human Resources and Payroll.
- Rowan University gift reports.
- Self-funded programs.
- Purchasing and Accounts Payable.
- Construction management.
- Information technology network.
- Grant Administration.

**Request Made:** March 20, 2008

**Response Made:** March 27, 2008

**Custodian:** Marguerite Carbonaro-Davey<sup>3</sup>

**GRC Complaint Filed:** August 21, 2008<sup>4</sup>

**Records Submitted for *In Camera* Examination:** Risk Assessment Audit Report June 2006; Human Resources and Payroll Audit Report October 2006; Rowan University Gift Receipts Report October 2007; Self Funded Programs February 2007; Purchasing and Accounts Payable April 2007; Construction Management March 2007; Information Technology Network February 2008; Grant Administration November 2007.

**Background**

**November 4, 2009**

Government Records Council's Interim Order. At the November 4, 2009 public meeting, the Government Records Council ("Council") considered the October 21, 2009

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

<sup>2</sup> Represented by DAG Cheryl Clarke, on behalf of the NJ Attorney General.

<sup>3</sup> The Custodian originally named in this complaint is Richard Hale.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.



Executive Director's Findings and Recommendations 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. Because the Complainant's request for the specific dates of the completed audits of Accume Partners seeks information rather than an identifiable government record, that portion of the request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested audit plans for the following eight (8) departments identified in the Complainant's request to determine the validity of the Custodian's assertion that the records constitute inter-agency or intra-agency advisory, consultative and deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. :
  - Risk Assessment.
  - Human Resources and Payroll.
  - Rowan University gift reports.
  - Self-funded programs.
  - Purchasing and Accounts Payable.
  - Construction management.
  - Information technology network.
  - Grant Administration.
3. **The Custodian must deliver<sup>5</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see No. 2 above), a document or redaction index<sup>6</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>7</sup>, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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<sup>5</sup> 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.

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

<sup>7</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**November 5, 2009**

Council's Interim Order ("Order") distributed to the parties.

**November 12, 2009**

Certification of the Custodian in response to the Council's Interim Order attaching the required document index and copies of the unredacted requested records. The Custodian certifies that he is the Chief Financial Officer for Rowan University. The document index submitted by the Custodian indicates that the requested records must be retained for seven (7) years under the records retention schedule promulgated by the New Jersey Division of Archives and Records Management.

### **Analysis**

#### **Whether the Custodian complied with the Council's November 4, 2009 Interim Order?**

At its November 4, 2009 public meeting, the Council determined that because the Custodian argues that the requested reports contain recommendations on which areas of Rowan University have significant issues and those areas in which improvement is required, and therefore should be considered advisory, consultative or deliberative material not subject to disclosure pursuant to N.J.S.A. 47:1A-1.1., the Council must conduct an *in camera* examination of the requested records pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005).

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted documents, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order, or no later than November 12, 2009.

The Custodian provided the GRC with the requested records, the document index and the Custodian's certification in compliance with the Council's November 4, 2009 Interim Order on November 12, 2009, in a timely manner. Therefore, the Custodian did comply with the Council's November 4, 2009 Interim Order in a timely manner.

#### **Whether the Custodian unlawfully denied the Complainant access to the records requested?**

The Custodian asserts in the Statement of Information that he lawfully denied the Complainant access to the requested records because the records are advisory, consultative or deliberative ("ACD") material which is exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1.

OPRA excludes from the definition of a government record "inter-agency or intra-agency advisory, consultative or deliberative material." N.J.S.A. 47:1A-1.1. It is

evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the “deliberative process privilege.”

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

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

The deliberative process privilege was discussed at length in 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.

In In Re Liquidation of Integrity, *supra*, 165 N.J. at 84-5, the judiciary set forth the legal standard for applying the deliberative process privilege as follows:

- (1) The initial burden falls on the government agency to establish that matters are both *pre-decisional* and *deliberative*.
  - a. Pre-decisional means that the records were generated before an agency adopted or reached its decision or policy.
  - b. Deliberative means that the record contains opinions, recommendations, or advice about agency policies or decisions.
    - i. Deliberative materials do not include purely factual materials.
    - ii. Where factual information is contained in a record that is deliberative, such information must be produced so long as the factual material can be separated from its deliberative context.
  - c. The exemption covers recommendations, draft documents, proposals, suggestions, and other subjective documents *which reflect the personal opinions of the writer rather than the policy of the agency*.
  - d. Documents which are protected by the privilege are those which *would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is only a personal position*.
  - e. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves *whether the*

*document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency.*

- (2) Please note that if an *in camera* inspection were conducted by the courts, the process would include the following:

Once it has been determined that a record is deliberative, there is a presumption against disclosure and the party seeking the document has the burden of establishing his or her compelling or substantial need for the record.

- a. That burden can be met by a showing of:
  - i. the importance of the information to the requesting party,
  - ii. its availability from other sources **and**
  - iii. the effect of disclosure on frank and independent discussion of contemplated government policies.

In its Interim Order dated November 4, 2009, the Council noted that the Custodian asserted that the requested reports were exempt from disclosure as advisory, consultative and deliberative material pursuant to N.J.S.A. 47:1A-1.1. The Custodian submitted these records for an *in camera* examination on November 12, 2009.

An *in camera* examination was performed on the submitted records. The results of this examination are set forth in the following table:

<b>Record or Redaction Number</b>	<b>Record Name/Date</b>	<b>Description of Record or Redaction</b>	<b>Custodian's Explanation/ Citation for Non-disclosure or Redactions</b>	<b>Findings of the <i>In Camera</i> Examination<sup>8</sup></b>

<sup>8</sup> **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

<p>Audit Risk Assessment &amp; Recommended Audit Plan</p>	<p>Audit Risk Assessment &amp; Recommended Audit Plan dated June 2006</p>	<p>Record withheld from disclosure in its entirety.</p>	<p>Internal Audit Report is ACD material not considered a government record under <u>N.J.S.A. 47:1A-1.1</u>. OPRA is a records law not an “information” law. State entities are obligated to provide identifiable government records not otherwise exempt.</p>	<p>The record contains recommendations for the Audit Committee and management to consider in determining the scope of the Fiscal 2007 internal audits (and thus cost) based on the risk assessment estimates of Rowan University made by Accume Partners. Report is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p>
<p>Human Resources/ Payroll Internal Audit</p>	<p>Human Resources/ Payroll Internal Audit #2007-1 dated October 2006</p>	<p>Record withheld from disclosure in its entirety.</p>	<p>Internal Audit Report is ACD material not considered a government record under <u>N.J.S.A. 47:1A-1.1</u>. OPRA is a records law not an “information” law. State entities are obligated to provide identifiable government records not otherwise exempt.</p>	<p>The record contains recommendations for the Audit Committee and management to consider in determining the scope of the Fiscal 2007 internal audits (and thus cost) based on the risk assessment estimates of Rowan University made by Accume Partners. Report is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p>

<p>Gift Receipts Internal Audit</p>	<p>Gift Receipts Internal Audit dated October 2007</p>	<p>Record withheld from disclosure in its entirety.</p>	<p>Internal Audit Reports is ACD material not considered a government record under <u>N.J.S.A.</u> 47:1A-1.1. OPRA is a records law not an “information” law. State entities are obligated to provide identifiable government records not otherwise exempt.</p>	<p>The record contains recommendations for the Audit Committee and management to consider in determining the scope of the Fiscal 2007 internal audits (and thus cost) based on the risk assessment estimates of Rowan University made by Accume Partners. Report is ACD material exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A- 1.1.</p>
<p>Self Funded Programs Internal Audit</p>	<p>Self Funded Programs Internal Audit dated February 2007</p>	<p>Record withheld from disclosure in its entirety.</p>	<p>Internal Audit Reports is ACD material not considered a government record under <u>N.J.S.A.</u> 47:1A-1.1. OPRA is a records law not an “information” law. State entities are obligated to provide identifiable government records not otherwise exempt.</p>	<p>The record contains recommendations for the Audit Committee and management to consider in determining the scope of the Fiscal 2007 internal audits (and thus cost) based on the risk assessment estimates of Rowan University made by Accume Partners. Report is ACD material exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A- 1.1.</p>

<p>Purchasing, Accounts Payable, Travel &amp; University Credit Cards Internal Audit</p>	<p>Purchasing, Accounts Payable, Travel &amp; University Credit Cards Internal Audit dated April 2007</p>	<p>Record withheld from disclosure in its entirety.</p>	<p>Internal Audit Reports is ACD material not considered a government record under <u>N.J.S.A. 47:1A-1.1</u>. OPRA is a records law not an “information” law. State entities are obligated to provide identifiable government records not otherwise exempt.</p>	<p>The record contains recommendations for the Audit Committee and management to consider in determining the scope of the Fiscal 2007 internal audits (and thus cost) based on the risk assessment estimates of Rowan University made by Accume Partners. Report is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p>
<p>Construction Internal Audit</p>	<p>Construction Internal Audit dated March 2007</p>	<p>Record withheld from disclosure in its entirety.</p>	<p>Internal Audit Report is ACD material not considered a government record under <u>N.J.S.A. 47:1A-1.1</u>. OPRA is a records law not an “information” law. State entities are obligated to provide identifiable government records not otherwise exempt.</p>	<p>The record contains recommendations for the Audit Committee and management to consider in determining the scope of the Fiscal 2007 internal audits (and thus cost) based on the risk assessment estimates of Rowan University made by Accume Partners. Report is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p>



LAN/WAN Internal IT Audit	LAN/WAN Internal IT Audit dated November 2006	Record withheld from disclosure in its entirety.	Internal Audit Reports is ACD material not considered a government record under <u>N.J.S.A.</u> 47:1A-1.1. OPRA is a records law not an “information” law. State entities are obligated to provide identifiable government records not otherwise exempt.	The record contains recommendations for the Audit Committee and management to consider in determining the scope of the Fiscal 2007 internal audits (and thus cost) based on the risk assessment estimates of Rowan University made by Accume Partners. Report is ACD material exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A- 1.1.
Contract/Grant Administration Internal Audit	Contract/Grant Administration Internal Audit dated November 2007	Record withheld from disclosure in its entirety.	Internal Audit Reports is ACD material not considered a government record under <u>N.J.S.A.</u> 47:1A-1.1. OPRA is a records law not an “information” law. State entities are obligated to provide identifiable government records not otherwise exempt.	The record contains recommendations for the Audit Committee and management to consider in determining the scope of the Fiscal 2007 internal audits (and thus cost) based on the risk assessment estimates of Rowan University made by Accume Partners. Report is ACD material exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A- 1.1.

Thus, the Custodian lawfully denied access to the requested record because it is exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. because the record was used in the deliberative or decision-making process regarding the scope of the Fiscal 2007 internal audits. As such, there is no need to determine whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances because the Custodian lawfully denied access to the requested record.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian timely complied with the Council's November 4, 2009 Interim Order.
2. The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to the record listed in the document index pursuant to N.J.S.A. 47:1A-6 because the record was used in the deliberative or decision-making process regarding the scope of the Fiscal 2007 internal audits.
3. There is no need to determine whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances because the Custodian lawfully denied access to the requested records.

Prepared By: Karyn Gordon, Esq.  
In House Counsel

Approved By: Catherine Starghill, Esq.  
Executive Director

January 20, 2010



**State of New Jersey**  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

JON S. CORZINE  
Governor

CHARLES A. RICHMAN  
Acting Commissioner

**INTERIM ORDER**

**November 4, 2009 Government Records Council Meeting**

Frank Amoresano  
Complainant

Complaint No. 2008-186

v.

Rowan University  
Custodian of Record

At the November 4, 2009 public meeting, the Government Records Council (“Council”) considered the October 21, 2009 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. Because the Complainant’s request for the specific dates of the completed audits of Accume Partners seeks information rather than an identifiable government record, that portion of the request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested audit plans for the following eight (8) departments identified in the Complainant’s request to determine the validity of the Custodian’s assertion that the records constitute inter-agency or intra-agency advisory, consultative and deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. :
  - Risk Assessment.
  - Human Resources and Payroll.
  - Rowan University gift reports.
  - Self-funded programs.
  - Purchasing and Accounts Payable.
  - Construction management.
  - Information technology network.



- Grant Administration.
3. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see No. 2 above), a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>3</sup>, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
  4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 4<sup>th</sup> Day of November, 2009

Robin Berg Tabakin, Chair  
Government Records Council

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

Janice L. Kovach, Secretary  
Government Records Council

**Decision Distribution Date: November 5, 2009**

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<sup>1</sup> 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.

<sup>2</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

<sup>3</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 4, 2009 Council Meeting**

**Frank Amoresano<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-186**

v.

**Rowan University<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** The actual date of completed reports of the following services rendered by Accume Partners and review (inspection) of such reports:

- Risk Assessment.
- Human Resources and Payroll.
- Rowan University gift reports.
- Self-funded programs.
- Purchasing and Accounts Payable.
- Construction management.
- Information technology network.
- Grant Administration.

**Request Made:** March 20, 2008

**Response Made:** March 27, 2008

**Custodian:** Marguerite Carbonaro-Davey<sup>3</sup>

**GRC Complaint Filed:** August 21, 2008<sup>4</sup>

**Background**

**March 20, 2008**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

**March 27, 2008**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fourth (4<sup>th</sup>) business day following receipt of such request. The Custodian states that public agencies are only required to provide identifiable government records under OPRA. The Custodian states that she is not

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

<sup>2</sup> Represented by DAG Cheryl Clarke, on behalf of the NJ Attorney General.

<sup>3</sup> The Custodian originally named in this complaint is Richard Hale.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

required to compile and provide information, which the Complainant is seeking in the form of dates the requested reports were completed.

Additionally, the Custodian states that access to the audit reports is denied because they are considered inter-agency or intra-agency advisory, consultative and deliberative (“ACD”) material pursuant to N.J.S.A. 47:1A-1.1.

**August 21, 2008**

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching the Complainant’s OPRA request dated March 20, 2008 with the Custodian’s notes thereon.

The Complainant states that he submitted an OPRA request to Rowan University on March 20, 2008. The Complainant states that the Custodian responded on March 27, 2008, stating that she is not required to produce dates under OPRA and that access to the requested reports is denied pursuant to N.J.S.A. 47:1A-1.1.

The Complainant agrees to mediate this complaint.

**August 25, 2008**

Offer of Mediation sent to both parties.

**September 2, 2008**

The Custodian agrees to mediate this complaint.

**September 9, 2008**

Complaint referred to mediation.

**October 3, 2008**

Complaint referred back from mediation.

**October 8, 2008**

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

**October 17, 2008**

E-mail from the Custodian’s Counsel to the GRC. Counsel advises that the instant e-mail memorializes that, on October 14, 2008, the GRC granted an extension of time until October 24, 2008 to submit the SOI.

**October 27, 2008**

Custodian’s SOI attaching the Complainant’s OPRA request dated March 20, 2008 with the Custodian’s notes thereon.

The Custodian certifies no records responsive were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management (“DARM”).<sup>5</sup>

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<sup>5</sup> The Custodian does not certify as to the search undertaken for the requested records.  
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The Custodian's Counsel states that the Custodian received the Complainant's OPRA request on March 20, 2008. Counsel states that the Custodian responded in writing in a timely manner on March 27, 2008, denying access to the Complainant's request for actual dates of a list of completed reports as a request for information not subject to OPRA. Further, the Counsel states that the Custodian also denied access to review of the listed audit reports as ACD material exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1.

Counsel states that Rowan University's internal auditor, Accume Partners, had prepared audit reports for the departments listed in the Complainant's record request at the request of Rowan's administration. Counsel avers that the purpose of the reports was to provide pre-decisional advice to Rowan's president and vice president of the Administration and Finance Division and management of each department for their consideration and action, including possible recommendations to the Audit Committee. Counsel contends that, as such, the audit reports are exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1.

Counsel states that in a prior GRC decision, Bellan-Boyer v. New Jersey Department of Community Affairs, GRC Complaint No. 2007-143 (July 2008), the GRC provided an analysis regarding the ACD exemption. Counsel states that in that complaint, the GRC stated that N.J.S.A. 47:1A-1.1 excludes ACD material from the definition of a government record, which is intended to exclude records that are subject of the "deliberative process privilege." Counsel states that the GRC cited to O'Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006)(in which the GRC examined the deliberative process privilege for guidance in implementing the ACD exemption) and In Re: Liquidation of Integrity Insurance Co., 165 N.J. 75,84 (2000).

Additionally, Counsel states that in another prior GRC decision, Meaders v. William Patterson University, GRC Complaint No. 2005-131 (April 2007), the GRC specifically addressed the issue of whether an audit report prepared by another state college's internal auditor fell within the ACD exemption. Counsel states that the GRC conducted an *in camera* review of the requested audit report and determined that said report prepared by William Patterson University's internal auditor should not be disclosed under N.J.S.A. 47:1A-1.1. Counsel points out that the GRC found that the audit report, which contained opinions of the internal auditor on the impact of managerial decisions on University operations, was pre-decisional and created for William Patterson University to assist in its decision-making process. Further, Counsel points out that the GRC found that the audit report contained recommendations for future University action which were not finalized as of the date of the request.

Counsel argues that, as in Meaders, *supra*, the audit reports requested by the Complainant in this complaint were prepared by Rowan University's internal auditor for the purpose of providing pre-decisional advice to the University and should be considered exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1.

**August 10, 2009**

E-mail from the GRC to the Custodian's Counsel. The GRC states that it has reviewed the evidence of record and has additional questions. The GRC requests that the Custodian provide a legal certification responding to the following:

1. What is the general nature of the requested audit reports, as prepared by Accume Partners, i.e. are the audits considered performance evaluations, as in Meaders, supra?
2. To what extent are said audits used in performance evaluations and/or employee assessments?
3. Whether Rowan University took any formal action based on the audits prepared by Accume Partners?

The GRC requests that the Custodian respond to each question as thoroughly as possible and provide the requested legal certification by close of business on August 14, 2009.

**August 12, 2009**

E-mail from the Custodian's Counsel to the GRC. Counsel requests an extension until August 21, 2009 to respond because she will need to personally review the records responsive in order to prepare an accurate legal certification.

**August 20, 2009**

Legal certification of the Custodian. The Custodian states that she received the Complainant's OPRA request for the actual dates of completed audit plans prepared by Accume for eight (8) departments and review of such reports on March 20, 2008 and responded in writing to the Complainant on March 27, 2008.

The Custodian certifies that Accume Partners prepared an audit risk assessment at the request of the Audit Committee. The Custodian certifies that the audit risk assessment included an organization-wide analysis consisting of a broad set of business risk assessment procedures and activities that identified high risk areas of Rowan University. The Custodian certifies that the Complainant requested the reports for those areas in which the Audit Committee directed Accume Partners to conduct audits.

The Custodian certifies that in response to the first two (2) questions posed by the GRC, the audit reports include an executive summary, financial and operational information, the scope of the audit, all observations and recommendations and management's responses. The Custodian certifies that the observations identified during the audit, which include recommendations to improve internal controls and enhance operational effectiveness, were included in the audit reports. The Custodian certifies that the audit reports are not considered performance evaluations and were not used in such evaluations or employee assessments.

The Custodian certifies that the purpose of the audit reports was to provide pre-decisional advice to Rowan University's management and the Audit Committee for their consideration and action. The Custodian certifies that Accume Partners created the audit reports to identify those areas with significant issues and those areas in which



improvement is required. The Custodian certifies that the audit reports also contained detailed recommendations for the areas reviewed.

The Custodian certifies that in response to question No. 3 posed by the GRC, Rowan University's management and Audit Committee took action as a result of the audit reports prepared by Accume Partners. The Custodian certifies that Rowan University took the appropriate action to implement the recommendations made by Accume Partners.

### **Analysis**

#### **Whether the Custodian unlawfully denied access to the requested record?**

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.

Additionally, OPRA defines a government record as:

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

OPRA 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.

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

The New Jersey Superior Court has held that "[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records "readily accessible for inspection, copying, or*

examination." *N.J.S.A. 47:1A-1.*" (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 *N.J. Super.* 534, 546 (March 2005). The Court further held that "[u]nder OPRA, agencies are required to disclose only "identifiable" government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 *N.J. Super.* 30, 37 (October 2005)<sup>7</sup>, the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."<sup>8</sup>

In the instant matter before the Council, the Complainant's request for "actual date of completed reports" for the eight (8) departments identified in the Complainant's records request is a request for information and not a specific government record and would have forced the Custodian to research all files in his possession to locate and identify the dates that the reports were completed. OPRA does not require that Custodians conduct research to fulfill requests. See MAG, *supra* and Bent, *supra*.

Therefore, because the Complainant's request for the specific dates of the completed audits of Accume Partners seeks information rather than an identifiable government record, that portion of the request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 *N.J. Super.* 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 *N.J. Super.* 30 (App. Div. 2005).

Additionally, the Custodian argues that the Complainant requested the reports for those areas in which the Audit Committee directed Accume Partners to conduct audits and those reports should be considered ACD material not subject to disclosure pursuant to *N.J.S.A. 47:1A-1.1*. The Custodian certifies that the reports contain recommendations on which areas of Rowan University have significant issues and those areas in which improvement is required. Further, the Custodian certifies that the Audit Committee took action based on said recommendations. Conversely, the Complainant argues that the audit report would give taxpayers a clear indication of how Rowan University is using public funds.

In Paff v. NJ Department of Labor, Board of Review, 379 *N.J. Super.* 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC<sup>6</sup> in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The court stated that:

"OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers."

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<sup>6</sup> Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005). Frank Amoresano v. Rowan University, 2008-186 – Findings and Recommendations of the Executive Director

The court also stated that:

“[t]he statute also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.”

Further, the court stated that:

“[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.”

Therefore, pursuant to Paff, supra, the GRC must conduct an *in camera* review of the requested audit plans for the following eight (8) departments identified in the Complainant’s request to determine the validity of the Custodian’s assertion that the records constitutes inter-agency or intra-agency advisory, consultative and deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1:

- Risk Assessment.
- Human Resources and Payroll.
- Rowan University gift reports.
- Self-funded programs.
- Purchasing and Accounts Payable.
- Construction management.
- Information technology network.
- Grant Administration.

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

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant's request for the specific dates of the completed audits of Accume Partners seeks information rather than an identifiable government record, that portion of the request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested audit plans for the following eight (8) departments identified in the Complainant's request to determine the validity of the Custodian's assertion that the records constitute inter-agency or intra-agency advisory, consultative and deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. :
  - Risk Assessment.
  - Human Resources and Payroll.
  - Rowan University gift reports.
  - Self-funded programs.
  - Purchasing and Accounts Payable.
  - Construction management.
  - Information technology network.
  - Grant Administration.
3. **The Custodian must deliver<sup>7</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see No. 2 above), a document or redaction index<sup>8</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>9</sup>, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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<sup>7</sup> 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.

<sup>8</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

<sup>9</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Prepared By: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

October 21, 2009