



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

May 24, 2011 Government Records Council Meeting

Robert G. Campbell
Complainant

Complaint No. 2009-219

v.

Township of Downe (Cumberland)
Custodian of Record

At the May 24, 2011 public meeting, the Government Records Council (“Council”) considered the April 20, 2011 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 this complaint be dismissed because the Complainant voluntarily withdrew this complaint from consideration in an e-mail to the GRC dated April 18, 2011. Therefore, no further adjudication is required.

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 24th Day of May, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: June 3, 2011



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
May 24, 2011 Council Meeting**

**Robert G. Campbell¹
Complainant**

GRC Complaint No. 2009-219

v.

**Township of Downe (Cumberland)²
Custodian of Records**

Records Relevant to Complaint:

February 5, 2009 OPRA request: Copies of all municipal electric bills for all accounts paid by the municipality during the time period from January 2008 to January 2009.

February 19, 2009 OPRA request: Copy of Housing and Zoning summons for mining on Railroad Avenue.

March 2, 2009 OPRA request: Copy of executive session minutes dated October 15, 2008.

March 19, 2009 OPRA request: Copy of recording of the January 5, 2009 executive session in either tape or compact disc ("CD") and meeting minutes.

March 24, 2009 OPRA request: Copy of electric bills for 298 Main Street, Downe Township.

March 26, 2009 OPRA request: Copies of any and all letters, memos, e-mails, notes and correspondence of any type of legal opinion from the Custodian's Counsel to the Mayor and/or Committee regarding a three (3) year appointment of the Zoning Officer in January 2007.

May 5, 2009 OPRA request: Copy of two (2) letters to Mr. Fisher regarding the Pilot funding program to which the Mayor made reference at the Township's May 4, 2009 public meeting.³

¹ No legal representation listed on record.

² Represented by John G. Carr, Esq., of Cresse & Carr Law Firm (Woodbury, NJ).

³ The Complainant requested additional records that are not at issue in this complaint.

Request Made: February 5, 2009, February 19, 2009, March 2, 2009, March 19, 2009, March 24, 2009, March 26, 2009, and May 5, 2009

Response Made: Undated, February 26, 2009, March 3, 2009, March 19, 2009, None, April 1, 2009, and Undated⁴

Custodian: Richard Devillasanta⁵

GRC Complaint Filed: July 16, 2009⁶

Background

January 25, 2011

Government Records Council's ("Council") Interim Order. At its January 25, 2011 public meeting, the Council considered the January 18, 2011 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 original Custodian's failure to respond in writing to the Complainant's March 24, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007), and O'Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005). Further, because the original Custodian failed to immediately deny access to the requested electric bills, the original Custodian has violated N.J.S.A. 47:1A-5.e. See Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. The original Custodian certified in the Statement of Information that all records responsive to the Complainant's February 5, 2009, March 24, 2009 and May 5, 2009 OPRA requests were provided to the Complainant and there is no credible evidence in the record to refute the original Custodian's certification. Therefore, the original Custodian did not unlawfully deny access to the records responsive to the February 5, 2009, March 24, 2009 and May 5, 2009 OPRA requests pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
3. Because the original Custodian certified that no records responsive to the Complainant's February 19, 2009 OPRA request exist, and because the Complainant has provided no credible evidence to refute the original Custodian's certification in this regard, the original Custodian did not

⁴ The GRC has identified the response dates of March 3, 2009 and March 19, 2009 based on the Complainant's statements in the Denial of Access Complaint. Moreover, the two (2) undated responses are based on the Custodian's notations in response to the OPRA requests, which appear on the Complainant's February 5, 2009 and May 5, 2009 OPRA request forms.

⁵ The original Custodian of Record was Diane Patterson.

⁶ The GRC received the Denial of Access Complaint on said date.

unlawfully deny access to the requested records. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).

4. The unapproved, draft executive session meeting minutes dated October 18, 2008 and January 5, 2009 responsive to the Complainant's March 2, 2009 and March 19, 2009 OPRA requests constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1 and are exempt from disclosure pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). Accordingly, the original Custodian has borne her burden of proving a lawful denial of access to the October 18, 2008 and January 5, 2009 draft minutes pursuant to N.J.S.A. 47:1A-6 because the requested draft executive minutes were not approved by the governing body at the time of the Complainant's March 2, 2009 and March 19, 2009 OPRA requests, respectively.
5. Although the requested audio recording is a verbatim account of the executive session meeting, the Custodian still has an obligation under N.J.S.A. 47:1A-5.g. to redact information that is exempt from disclosure under OPRA in a manner similar to how the Custodian would redact information exempt from OPRA in approved executive session minutes. **Thus, the Custodian shall disclose the requested January 5, 2009 executive session audio recording with redactions, if necessary.**
6. **The Custodian shall comply with Item No. 5 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁷, to the Executive Director.⁸**
7. 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 correspondence containing legal advice of the Custodian's Counsel (responsive to the Complainant's March 26, 2009 OPRA request)** to determine whether the records responsive to the Complainant's OPRA request contain information which is exempt from disclosure as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1.

⁷ "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."

⁸ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

8. **The Custodian must deliver⁹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 7 above), a document or redaction index¹⁰, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4¹¹, that the record provided is the record 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.**
9. The Council defers analysis of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the current Custodian's compliance with the Council's Interim Order.

February 4, 2011

Council's Interim Order distributed to the parties.

February 14, 2011

Custodian's response to the Council's Interim Order. The Custodian certifies that he is providing an audible copy of the January 5, 2009 executive session on CD and correspondence containing legal advice of the Custodian's Counsel response to the Complainant's March 26, 2009 OPRA request for an *in camera* review.¹²

February 17, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC states that compliance with the Council's January 25, 2011 Interim Order was due on February 14, 2011. The GRC states that on February 15, 2011 it received the Custodian's certification dated February 14, 2011 accompanied by the nine (9) CD copies of an audio recording of the January 5, 2009 executive session and four (4) items of correspondence deemed to be responsive to the Complainant's March 26, 2009 OPRA request.

The GRC states that it appears that there was some confusion between the instant complaint and Taylor v. Township of Downe (Cumberland), GRC Complaint No. 2009-174 in which the recording of the January 5, 2009 executive session is also at issue. Specifically in Taylor, supra, on February 2, 2011, the GRC requested that the Custodian advise as to whether an audible copy of the January 5, 2009 executive session could be located. The GRC notes that it is accepting the nine (9) CDs as part of Taylor, supra, for an *in camera* review.

⁹ 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.

¹⁰ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹¹ "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."

¹² The GRC notes that it ordered disclosure, with redactions where necessary, of the January 5, 2009 meeting recording to the Complainant and those records identified as responsive by the original Custodian in the Statement of Information. The Custodian attached several correspondences regarding this complaint, but none of the attachments were the records required to be provided for *in camera* review.

The GRC states that the Council's January 25, 2010 Interim Order ordered the following:

"... Thus, the Custodian shall disclose the requested January 5, 2009 executive session audio recording with redactions, if necessary.

The Custodian shall comply with Item No. 5 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹³ to the Executive Director.¹⁴

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 correspondence containing legal advice of the Custodian's Counsel (responsive to the Complainant's March 26, 2009 OPRA request) to determine whether the records responsive to the Complainant's OPRA request contain information which is exempt from disclosure as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1.

The Custodian must deliver¹⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 7 above), a document or redaction index,¹⁶ as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹⁷ that the record provided is the record 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."

The GRC states that based on the apparent confusion regarding this complaint and Taylor, supra, the GRC is granting an extension of the deadline to comply with the Council's Interim Order until February 23, 2011.

¹³ "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."

¹⁴ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

¹⁵ 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.

¹⁶ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹⁷ "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."

February 22, 2011

Letter from the Custodian's Counsel to the Custodian. Counsel states that he is in receipt of an e-mail from the GRC regarding compliance with the Council's January 25, 2011 Interim Order. Counsel states that the Custodian should review the portion of said Order which identifies the records required to be provided for an *in camera* review. Counsel notes that the Township's deadline to comply is February 23, 2011.

February 23, 2011

Facsimile from the Custodian's Counsel to the GRC. Counsel resubmits the Custodian's legal certification with amendments to reflect that same is being provided in response to the instant complaint. Counsel also submits nine (9) more CD copies of the January 5, 2009 executive session.

March 1, 2011

Letter from Mr. Michael P. Madden, Esq. ("Mr. Madden"), Counsel for the former Mayor of the Township, to the Custodian's Counsel. Mr. Madden states that he represents the former Mayor in separate litigation commenced by the Complainant. Mr. Madden states that he was informed that the Township was recently served with an OPRA request received by the Township from Mr. Thomas P. Farnoly, Esq. ("Mr. Farnoly"), former Township Solicitor.

Mr. Madden states that he objects to the release of the requested bills, invoices and documents received by the Township from Mr. Farnoly in that the records may contain confidential information deemed to be attorney-client privileged material.

March 2, 2011

Letter from the Custodian's Counsel to Mr. Madden. Counsel states that he is in receipt of Mr. Madden's letter and has forwarded same to the Custodian. Counsel states that he does not believe he has seen a recent OPRA request similar to the one described by Mr. Madden. Counsel requests that, if Mr. Madden is in possession of the OPRA request, Mr. Madden forward the OPRA request to Counsel for review.

March 4, 2011

E-mail from the GRC to the Custodian. The GRC requests that the Custodian contact the GRC regarding compliance for the instant complaint.

March 7, 2011

Email from the Custodian to the GRC. The Custodian states that he left a voicemail message with the GRC and that he is available all day.

March 9, 2011

Letter from Mr. Madden to the GRC attaching the following:

- Custodian's legal certification dated February 14, 2011.
- Letter from the Custodian's Counsel to the Custodian dated February 22, 2011.
- Letter from Mr. Madden to the Custodian's Counsel dated March 1, 2011.
- Letter from the Custodian's Counsel to Mr. Madden dated March 2, 2011.

Mr. Madden states that he represents the former Mayor in separate litigation commenced by the Complainant. Mr. Madden states that he has attached correspondence between himself and the Custodian's Counsel requesting that no records containing attorney-client privileged information be released. Mr. Madden restates his objection to the release of any information from Mr. Farnoly to the Township in light of the fact that the Complainant is presently suing the Township and former Mayor.

March 11, 2011

Letter from the Custodian's Counsel to Mr. Madden. Counsel reiterates that he has no recent OPRA request similar to the one referred to in Mr. Madden's March 9, 2011 letter. Counsel states that his discussions with the GRC were in regard to the instant complaint, which was filed against the Township during Mr. Farnoly's tenure. Counsel states that the GRC has confirmed that this complaint was filed in 2009.

April 4, 2011

E-mail from the GRC to the Custodian. The GRC states that compliance with the Council's January 25, 2011 Interim Order was due by close of business on February 23, 2011. This deadline represents a five (5) day extension of the original deadline to comply. The GRC states that in order for the Township to comply with the Council's January 25, 2011 Interim Order, the Custodian was required to:

"... disclose the requested January 5, 2009 executive session audio recording with redactions, if necessary.

The Custodian shall comply with Item No. 5 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹⁸ to the Executive Director.¹⁹

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 correspondence containing legal advice of the Custodian's Counsel (responsive to the Complainant's March 26, 2009 OPRA request) to determine whether the records responsive to the Complainant's OPRA request contain information which is exempt from disclosure as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1.

¹⁸ "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."

¹⁹ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

The Custodian must deliver²⁰ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 7 above), a document or redaction index,²¹ as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,²² that the record provided is the record 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."

The GRC states that in the time since compliance was due, the GRC twice received nine (9) CD copies of the January 5, 2009 executive session recording. The GRC states that it is aware that some confusion may exist based on the fact that this identical recording is at issue in the matter of Taylor v. Township of Downe (Cumberland), GRC Complaint No. 2009-174, another complaint in which the GRC has ordered an *in camera* review; however, the Council's January 25, 2011 Interim Order in the matter herein specifically stated that the recording with redactions, where necessary, be provided to the Complainant and not to the GRC for an *in camera* review.

Additionally, the GRC states that there appears to be more confusion regarding those records responsive to the Complainant's March 26, 2009 OPRA request. The GRC states that it appears as though the records which were required to be provided to the GRC for an *in camera* review are being held by another attorney who has expressed an aversity to releasing said records.

The GRC states that the Custodian was also required to submit certified confirmation of his compliance with the Council's Interim Order to the GRC prior to February 23, 2011.

The GRC states that on April 1, 2011, the Custodian advised the GRC that Counsel may have attempted to contact the GRC and that the matter would be taken care of on that day. The GRC states that as compliance is grossly overdue, the GRC requests the Custodian's immediate attention to resolve this matter.

April 8, 2011

E-mail from the Custodian to the GRC. The Custodian states that he spoke with the Complainant and will retrieve a copy of the January 5, 2009 executive session recording. The Custodian further states that in regard to the records required to be provided for an *in camera* review, the Custodian has obtained a letter from a Township attorney advising not to disclose the records.

April 11, 2011

E-mail from the GRC to the Custodian. The GRC states that it looks forward to receiving the Custodian's legal certification on April 11, 2011.

²⁰ 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.

²¹ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

²² "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."

The GRC states that as for the records required to be forwarded to the GRC for an *in camera* review, it should be made clear to the Township attorney that the GRC will conduct a review to determine whether those records responsive to the Complainant's March 26, 2009 OPRA request are exempt from disclosure, as the court in Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005) stressed the GRC's authority to conduct such reviews.

The GRC notes that this *in camera* order is not optional: it will be up to the Township to provide the specific lawful basis for exempting the record from disclosure under OPRA. The GRC states that it will then review the records to determine whether access was unlawfully denied.

The GRC reiterates that in order for the Custodian to properly comply with the Council's Interim Order, the Custodian must legally certify whether any redactions to the January 5, 2009 executive session recording were made prior to supplying same to the Complainant and include a document index with the records responsive to the Complainant's March 26, 2009 OPRA request being submitted for an *in camera* review. The GRC states that the Custodian should consult the Council's Interim Order if he has any additional questions regarding said order.

April 11, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel states that he has set up a meeting with the Custodian for April 12, 2011 in order to prepare the Township's certified confirmation of compliance for the Council's Interim Order. Counsel thus requests an extension of time until April 13, 2011 to submit the certified confirmation of compliance.

April 11, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension of time until April 13, 2011 to submit the Custodian's certified confirmation of compliance.

The GRC also restates that the Custodian must provide certified confirmation of compliance that the Complainant was provided with the requested recording of the January 5, 2009 executive session. The GRC further states that it will also need a detailed redaction index if any redactions are made to the recording.

Additionally, the GRC states that the Custodian must provide nine (9) copies of the records requested in the Complainant's March 26, 2009 OPRA request for an *in camera* review. The GRC refers Counsel to the document index submitted as part of the Statement of Information ("SOI"). The GRC finally states that Counsel should review the Council's Interim Order if there are any questions regarding exactly how to comply with said order.

April 13, 2011

Custodian's legal certification. The Custodian certifies that he is providing to the GRC nine (9) unredacted CD copies of the January 5, 2009 executive session recording,

as well as nine (9) unredacted CD copies of a January 14, 2009 special and executive session.²³

April 18, 2011

E-mail from the Complainant to the GRC. The Complainant states that he is in possession of the requested January 5, 2009 executive session recording, as well as an unredacted copy of the January 14, 2009 special and executive session recording.

April 18, 2011

Custodian's second (2nd) legal certification. The Custodian certifies that he provided the Complainant with a copy of the requested January 5, 2009 executive session recording, as well as a copy of the January 14, 2009 special and executive session recording.

April 18, 2011

E-mail from the GRC to the Complainant. The GRC states that it is in receipt of the Custodian's second (2nd) legal certification and the Complainant's e-mail confirming receipt of the January 5, 2009 executive session recording. The GRC states that if the Complainant is satisfied with the Custodian's response and wishes to withdraw the instant complaint, the Complainant may do so in writing by replying to the instant e-mail.

April 18, 2011

E-mail from the Complainant to the GRC. The Complainant states that he wishes to withdraw the instant complaint.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant voluntarily withdrew this complaint from consideration in an e-mail to the GRC dated April 18, 2011. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

April 20, 2011

²³ The January 14, 2009 special and executive session recording is not at issue in the complaint now before the Council. However, such recording is at issue in Taylor v. Township of Downe (Cumberland), GRC Complaint No. 2009-174.



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INTERIM ORDER

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Township of Downe (Cumberland)
Custodian of Record

At the January 25, 2011 public meeting, the Government Records Council (“Council”) considered the January 18, 2011 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 original Custodian’s failure to respond in writing to the Complainant’s March 24, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007), and O’Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005). Further, because the original Custodian failed to immediately deny access to the requested electric bills, the original Custodian has violated N.J.S.A. 47:1A-5.e. See Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. The original Custodian certified in the Statement of Information that all records responsive to the Complainant’s February 5, 2009, March 24, 2009 and May 5, 2009 OPRA requests were provided to the Complainant and there is no credible evidence in the record to refute the original Custodian’s certification. Therefore, the original Custodian did not unlawfully deny access to the records responsive to the February 5, 2009, March 24, 2009 and May 5, 2009 OPRA requests pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
3. Because the original Custodian certified that no records responsive to the Complainant’s February 19, 2009 OPRA request exist, and because the Complainant has provided no credible evidence to refute the original Custodian’s certification in this regard, the original Custodian did not unlawfully deny access to the requested



records. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

4. The unapproved, draft executive session meeting minutes dated October 18, 2008 and January 5, 2009 responsive to the Complainant's March 2, 2009 and March 19, 2009 OPRA requests constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are exempt from the definition of a government record at pursuant to N.J.S.A. 47:1A-1.1 and are exempt from disclosure pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). Accordingly, the original Custodian has borne her burden of proving a lawful denial of access to the October 18, 2008 and January 5, 2009 draft minutes pursuant to N.J.S.A. 47:1A-6 because the requested draft executive minutes were not approved by the governing body at the time of the Complainant's March 2, 2009 and March 19, 2009 OPRA requests, respectively.
5. Although the requested audio recording is a verbatim account of the executive session meeting, the Custodian still has an obligation under N.J.S.A. 47:1A-5.g. to redact information that is exempt from disclosure under OPRA in a manner similar to how the Custodian would redact information exempt from OPRA in approved executive session minutes. **Thus, the Custodian shall disclose the requested January 5, 2009 executive session audio recording with redactions, if necessary.**
6. **The Custodian shall comply with Item No. 5 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.²**
7. 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 correspondence containing legal advice of the Custodian's Counsel (responsive to the Complainant's March 26, 2009 OPRA request)** to determine whether the records responsive to the Complainant's OPRA request contain information which is exempt from disclosure as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1.
8. **The Custodian must deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 7 above), a document or redaction index⁴, as well as a legal certification from the Custodian, in accordance with**

¹ "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."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

³ 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.

⁴ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

N.J. Court Rule 1:4-4⁵, that the record provided is the record 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.

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

Interim Order Rendered by the
Government Records Council
On The 25th Day of January, 2011

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: February 4, 2011

⁵ "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
January 25, 2011 Council Meeting**

**Robert G. Campbell¹
Complainant**

GRC Complaint No. 2009-219

v.

**Township of Downe (Cumberland)²
Custodian of Records**

Records Relevant to Complaint:

February 5, 2009 OPRA request: Copies of all municipal electric bills for all accounts paid by the municipality during the time period from January 2008 to January 2009.

February 19, 2009 OPRA request: Copy of Housing and Zoning summons for mining on Railroad Avenue.

March 2, 2009 OPRA request: Copy of executive session minutes dated October 15, 2008.

March 19, 2009 OPRA request: Copy of recording of the January 5, 2009 executive session in either tape or compact disc ("CD") and meeting minutes.

March 24, 2009 OPRA request: Copy of electric bills for 298 Main Street, Downe Township.

March 26, 2009 OPRA request: Copies of any and all letters, memos, e-mails, notes and correspondence of any type of legal opinion from the Custodian's Counsel to the Mayor and/or Committee regarding a three (3) year appointment of the Zoning Officer in January 2007.

May 5, 2009 OPRA request: Copy of two (2) letters to Mr. Fisher regarding the Pilot funding program to which the Mayor made reference at the Township's May 4, 2009 public meeting.³

¹ No legal representation listed on record.

² Represented by Thomas P. Farnoly, Esq., of the Law Offices of Thomas P. Farnoly, P.A. (Vineland, NJ).

³ The Complainant requested additional records that are not at issue in this complaint.

Request Made: February 5, 2009, February 19, 2009, March 2, 2009, March 19, 2009, March 24, 2009, March 26, 2009, and May 5, 2009

Response Made: Undated, February 26, 2009, March 3, 2009, March 19, 2009, None, April 1, 2009, and Undated⁴

Custodian: Richard Devillasanta⁵

GRC Complaint Filed: July 16, 2009⁶

Background

February 5, 2009

Complainant's first (1st) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.⁷

February 19, 2009

Complainant's second (2nd) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

February 26, 2009

Custodian's response to the second (2nd) OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fifth (5th) business day following receipt of such request. The Custodian provides access to a letter from Mr. Anthony Lamanteer ("Mr. Lamanteer"), Housing and Zoning Office, to the Complainant dated February 23, 2009 indicating that no summons was issued.

March 2, 2009

Complainant's third (3rd) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

March 3, 2009

Custodian's response to the third (3rd) OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the same day as receipt of such request. The Custodian notes on the back of the Complainant's request form that the requested meeting minutes have not been approved by the Township.

March 19, 2009

Complainant's fourth (4th) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

⁴ The GRC has identified the response dates of March 3, 2009 and March 19, 2009 based on the Complainant's statements in the Denial of Access Complaint. Moreover, the two (2) undated responses are based on the Custodian's notations in response to the OPRA requests, which appear on the Complainant's February 5, 2009 and May 5, 2009 OPRA request forms.

⁵ The original Custodian of Records was Diane Patterson.

⁶ The GRC received the Denial of Access Complaint on said date.

⁷ The Custodian states in an undated note on the Complainant's request form that ninety-three (93) pages of records responsive are being provided to the Complainant.

March 19, 2009

Custodian's response to the fourth (4th) OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the same day as receipt of such request. The Custodian notes on the Complainant's request form that the requested meeting minutes have not yet been approved by the Township.

March 24, 2009

Complainant's fifth (5th) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

March 26, 2009

Complainant's sixth (6th) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

April 1, 2009

Custodian's response to the sixth (6th) OPRA request. The Custodian's Counsel responds on behalf of the Custodian in writing on the fourth (4th) business day following receipt of such request. Counsel states that access to the requested correspondence containing Counsel's legal advice related to term limits for elected officials is denied because said records fall within the exemption from disclosure under OPRA for attorney-client privileged material. N.J.S.A. 47:1A-1.1.

May 5, 2009

Complainant's seventh (7th) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.⁸

July 16, 2009

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

- Complainant's first (1st) OPRA request dated February 5, 2009 with the Custodian's notes thereon.
- Complainant's second (2nd) OPRA request dated February 19, 2009 with the Custodian's notes thereon.
 - Letter from Mr. Lamanteer to the Complainant dated February 23, 2009.⁹
- Complainant's third (3rd) OPRA request dated March 2, 2009 with the Custodian's notes thereon.
- Complainant's fourth (4th) OPRA request dated March 19, 2009 with the Custodian's notes thereon.
- Complainant's fifth (5th) OPRA request dated March 24, 2009.
- Complainant's sixth (6th) OPRA request dated March 26, 2009.
- Letter from the Custodian's Counsel to the Complainant dated April 1, 2009.
- Complainant's seventh (7th) OPRA request dated May 5, 2009.

⁸ The evidence of record indicates that the Custodian provided the Complainant with one (1) letter on an unknown date.

⁹ This record was provided in response to the Complainant's February 19, 2009 OPRA request (the Complainant's second (2nd) OPRA request).

- Letter from Mayor Renee C. Blizzard to Assemblyman Douglas Fisher dated August 20, 2008.¹⁰

The Complainant states that he submitted his first (1st) OPRA request to the Township on February 5, 2009. The Complainant states that the Custodian responded to the request in a timely manner providing access to nearly all of the electric bills requested. The Complainant states that he subsequently submitted another OPRA request seeking electric bills for 298 Main Street (*See* Complainant's fifth (5th) OPRA request) and received no response.

The Complainant states that he submitted his second (2nd) OPRA request to the Township on February 19, 2009. The Complainant states that the Custodian provided a letter from the Zoning and Housing Office dated February 23, 2009 indicating that no summons was issued.

The Complainant states that he submitted his third (3rd) OPRA request to the Township on February 26, 2009. The Complainant states that the Custodian responded to the request on March 3, 2009 noting on the back of the request form that the requested October 15, 2008 executive session meeting minutes were not yet approved.

The Complainant states that he submitted his fourth (4th) OPRA request to the Township on March 19, 2009. The Complainant states that the Custodian responded to the request on the same day noting that the requested January 5, 2009 executive session meeting minutes were not yet approved.

The Complainant states that he submitted his sixth (6th) OPRA request to the Township on March 26, 2009. The Complainant states that Counsel responded to the request in writing on April 1, 2009 denying access to the requested correspondence and stating that said correspondence is exempt from disclosure as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1.

The Complainant states that he submitted his seventh (7th) OPRA request to the Township on May 5, 2009. The Complainant states that the Custodian provided one (1) of the two (2) letters responsive and never provided a lawful basis for denying access to the second (2nd) letter.

The Complainant questions how the Township failed to approve the requested executive session meeting minutes given the substantial amount of time between the meeting dates and the Complainant's OPRA requests for said minutes.¹¹ Further, the Complainant argues that the correspondence sought in his March 26, 2009 OPRA request could not be attorney-client privileged in the absence of some type of lawsuit.¹²

¹⁰ The Custodian provided this record in response to the Complainant's May 5, 2009 OPRA request.

¹¹ The Complainant also questions whether it is lawful to amend minutes from a previous year after the minutes were approved. Although there is no evidence to indicate that this in fact occurred with the requested minutes, the GRC notes that issues dealing with the approval of meeting minutes fall within the purview of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., over which the GRC has no authority.

¹² The Complainant noted that he was undecided whether to agree to participate in mediation.

August 19, 2009

Offer of Mediation sent to both parties.

August 25, 2009¹³

The Complainant declines mediation.¹⁴

September 9, 2009

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

September 15, 2009

Custodian’s SOI with the following attachments:

- Complainant’s first (1st) OPRA request dated February 5, 2009 with the Custodian’s notes thereon.
- Complainant’s second (2nd) OPRA request dated February 19, 2009 with the Custodian’s notes thereon and the following attached:
 - Letter from Mr. Lamanteer to the Complainant dated February 23, 2009.
- Complainant’s third (3rd) OPRA request dated March 2, 2009 with the Custodian’s notes thereon.
- Complainant’s fourth (4th) OPRA request dated March 19, 2009 with the Custodian’s notes thereon.
- Complainant’s fifth (5th) OPRA request dated March 24, 2009.
- Complainant’s sixth (6th) OPRA request dated March 26, 2009.
- Letter from the Custodian’s Counsel to the Complainant dated April 1, 2009.
- Complainant’s seventh (7th) OPRA request dated May 5, 2009 with the following attached:
 - Letter from Mayor Renee C. Blizzard to Assemblyman Douglas Fisher dated August 20, 2008.

The Custodian certifies that her search for the requested records included reviewing all files maintained by the Township or contacting the appropriate Township official who may have been in possession of the requested records.

The Custodian also certifies that whether any records that may have been responsive to the request 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”) is not applicable in this complaint.

The Custodian certifies that the Township’s response to each OPRA request is as follows:

¹³ The Complainant provided additional information that is not relevant to the instant complaint. The GRC notes that Counsel submitted an objection to this information on September 14, 2009.

¹⁴ The Custodian agreed to mediate this complaint on August 27, 2009.

Records Requested	Records Provided	Explanation of Response
February 5, 2009 OPRA request: copies of all municipal electric bills paid by Township for time period between January 2008 and 2009, consisting of ninety-three (93) pages of records.	Yes.	The Custodian certifies that she did not physically maintain copies of the records provided to the Complainant; however, the Complainant was provided with the requested records. <i>See</i> Complainant's February 5, 2009 OPRA request with Custodian's notes thereon.
February 19, 2009 OPRA request: Copy of Housing and Zoning summons for mining on Railroad Avenue.	No.	The Custodian certifies that she forwarded a letter to the Complainant from Mr. Lamanteer advising that no summons was issued. <i>See</i> Letter from Mr. Lamanteer to the Complainant dated February 23, 2009.
March 2, 2009 OPRA request: Executive session meeting minutes dated October 15, 2008.	No.	The Custodian certifies that the requested minutes were not completed or approved by the Township until March 18, 2009. Further, the Custodian argues that the requested minutes would have been exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-9.a.</u> and <u>N.J.S.A. 10:4-12</u> of the Open Public Meetings Act ("OPMA") because said minutes contain information regarding personnel matters, attorney-client privileged material, collective bargaining agreements and matters involving pending or anticipated litigation.
March 19, 2009 OPRA request: Copy of recording and meeting minutes of the January 5, 2009 executive session meeting.	No.	The Custodian argues that the requested records are exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-9.a.</u> and <u>N.J.S.A. 10:4-12</u> of OPMA because said minutes contain information regarding personnel matters, attorney-client privileged material and collective bargaining agreements.
March 24, 2009 OPRA request: Copy of electric bill for 298 Main Street.	No.	The Custodian certifies that all electric bills provided to the Complainant in response to his February 5, 2009 OPRA request represent all the records that exist.
March 26, 2009 OPRA	No. <i>See</i> Letter from	The Custodian argues that the

request: Legal opinion letter from Counsel dated January 2, 2009.	Counsel to the Complainant dated April 1, 2009.	requested correspondence is exempt from disclosure under OPRA pursuant to <u>N.J.S.A. 47:1A-1.1</u> . as attorney-client privileged material.
May 5, 2009 OPRA request: Letter from Mayor Renee C. Blizzard to Assemblyman Douglas Fisher dated August 20, 2008.	Yes.	The Custodian certifies that she provided the Complainant with all records in her possession.

The Custodian certifies that she provided the Complainant with all records responsive to the Complainant’s February 5, 2009, February 19, 2009, March 24, 2009, March 26, 2009 and May 5, 2009 OPRA requests that were maintained by her office and other offices within the Township.

The Custodian certifies that with respect to the Complainant’s March 2, 2009 OPRA request, the requested minutes were not approved by the Township until March 18, 2009, or sixteen (16) days after receipt of the Complainant’s OPRA request.

The Custodian argues that with respect to the Complainant’s March 19, 2009 OPRA request for the minutes and recording of the January 5, 2009 executive session meeting minutes, OPMA provides that:

“A public body may exclude the public only from that portion of a meeting at which the public body discusses:

(4) Any collective bargaining agreement, or the terms and conditions which are proposed for inclusion in any collective bargaining agreement, including the negotiation of the terms and conditions thereof with employees or representatives of employees of the public body.

(7) Any pending or anticipated litigation or contract negotiation ... which the public body is, or may become a party.

Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.

(8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body ...” N.J.S.A. 10:4-12.b.

The Custodian contends that the subject matters of the executive session meeting at issue related to collective bargaining, personnel matters and matters subject to the attorney-client privilege.

The Custodian asserts that in addition to the foregoing, executive session meeting minutes are reviewed by the Township Committee and are approved for content but are

not released to the public unless and until the reasons for the issues being discussed in executive session have ceased to exist. The Custodian asserts that approval to release any executive session meeting minutes is based upon review by the Township Solicitor and his recommendations regarding disclosure. The Custodian asserts that a resolution to release the minutes must be approved by the Township Committee following the Township's Solicitor's review.

The Custodian certifies that it is important to note that the Township Committee took no formal action in the executive session with respect to any issues discussed at either the October 15, 2008 or January 9, 2009 meetings. The Custodian certifies that any formal action taken with regard to any issue occurring in executive session actually occurred during the public session.

Moreover, the Custodian contends that the Counsel's letter responsive to the Complainant's March 26, 2009 OPRA request was not provided pursuant to N.J.S.A. 47:1A-1.1., which exempts from disclosure records containing attorney-client privileged information.

The Custodian states that for all of the foregoing reasons, the Custodian lawfully denied access to the October 15, 2008 executive session meeting minutes, the recording of the January 9, 2009 executive session meeting and Counsel's legal opinion letter.

October 25, 2010

E-mail from the GRC to the Custodian. The GRC states that it needs additional information regarding this complaint. Specifically, the GRC states that the Custodian certifies in the SOI that the Township did not approve the October 15, 2008 executive session meeting minutes (responsive to the Complainant's March 2, 2009 OPRA request) until March 18, 2009. The GRC states that the Custodian further certified that no formal action was taken with respect to the aforementioned meeting minutes and the January 5, 2009 executive session meeting minutes. The GRC requests that the Custodian legally certify to the following:

1. Whether the requested January 5, 2009 executive session meeting minutes responsive to the Complainant's March 19, 2009 OPRA request were approved prior to the Complainant's request, and if so, on what date?
2. What is the length (time-wise) of the audio recording of the January 5, 2009 executive session meeting?

The GRC requests that the Custodian provide the requested legal certification by no later than close of business on October 27, 2010.

October 25, 2010

Letter from the Custodian's Counsel to the GRC. Counsel states that he is in receipt of the GRC's request for a legal certification. Counsel states that the original Custodian of Records is no longer employed by the Township. Counsel states that the current Custodian will have to review the matter and respond to the GRC's request for a legal certification.

Counsel states that based on the foregoing, the Township will need an extension until October 29, 2010 to provide the Custodian's certification.

October 25, 2010

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension until October 29, 2010 to provide the Custodian's legal certification.

October 29, 2010

Custodian's legal certification. The Custodian certifies that he is currently the Municipal Clerk for the Township but that he was not the Clerk at the time of the filing of this Denial of Access Complaint.

The Custodian certifies that January 5, 2009 executive session meeting minutes were approved on May 4, 2009, which was subsequent to the filing of the Denial of Access Complaint. Moreover, the Custodian certifies that the audio recording of the January 5, 2009 executive session meeting is approximately ninety (90) minutes in duration.

November 19, 2010

E-mail from the GRC to the Custodian. The GRC states that it needs additional information. The GRC states that the original Custodian provided ninety-three (93) pages of records to the Complainant in response to his February 5, 2009 OPRA request for municipal electric bills paid by the Township between January 2008 and January 2009; however, the original Custodian failed to respond to the Complainant's March 24, 2009 OPRA request for electric bills for 298 Main Street. The GRC states that the original Custodian certified in the SOI that all records responsive to both requests that existed were provided; however, it is unclear whether the electric bills for 298 Main Street were part of those ninety-three (93) pages provided to the Complainant. The GRC requests that the Custodian certify to the following:

1. Whether the electric bills for 298 Main Street responsive to the Complainant's March 24, 2009 OPRA request were provided as part of the Custodian's response to the Complainant's February 5, 2009 OPRA request or do said electric bills not exist?

The GRC requests that the Custodian provide the requested legal certification by close of business on November 22, 2010.

November 22, 2010

E-mail from the Custodian's Counsel to the GRC. Counsel states that he received the GRC's request for a legal certification from the Custodian today. Counsel requests a one (1) day extension to provide the Custodian's legal certification.

November 22, 2010

E-mail from the GRC to the Custodian's Counsel. The GRC grants an extension until November 23, 2010 to submit the Custodian's legal certification.

November 23, 2010

Custodian's legal certification. The Custodian certifies that he was not the clerk at the time of the submission of the Complainant's February 5, 2009 and March 24, 2009 OPRA requests.

The Custodian certifies that the Complainant's February 5, 2009 OPRA request sought municipal electric bills paid by the Township between January 2008 and January 2009. The Custodian certifies that the Complainant was provided with ninety-three (93) pages of records. The Custodian certifies that the Complainant's actual request form denotes the "Rescue Bldg." as one of the locations for which electric bills were sought.

The Custodian certifies that the Complainant's March 24, 2009 OPRA request sought electric bills related to 298 Main Street, which is the Rescue Squad building.

The Custodian certifies that based on the foregoing, it appears that any and all electric bills for 298 Main Street were supplied in response to the February 5, 2009 OPRA request. The Custodian certifies that he is not aware of the existence of any other bills for that address during that time period.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

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.

Further OPRA provides that:

"[i]mmediate access *ordinarily shall be granted to* budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." (Emphasis added.) N.J.S.A. 47:1A-5.e.

OPRA also provides that:

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

Further, 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.

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 GRC first turns to the issue of whether the original Custodian properly responded to the Complainant’s March 24, 2009 OPRA request.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.¹⁵ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g.,

¹⁵ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

The evidence of record indicates that the original Custodian herein responded in writing to each of the Complainant's seven (7) OPRA requests within the statutorily mandated seven (7) business days, save one: the Complainant's March 24, 2009 OPRA request. The original Custodian certified in the SOI that all electric bills that the Township had on file were provided to the Complainant in response to the Complainant's February 5, 2009 OPRA request.

OPRA specifically states that a custodian "shall promptly comply with a request... [for] a government record." (Emphasis added.) N.J.S.A. 47:1A-5.g. Additionally, in O'Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005), the GRC held that the custodian's initial response to the complainant's June 22, 2007 request that the complainant's request was a duplicate of a previous request was legally insufficient because the custodian has a duty to answer each request individually. Based on OPRA and the GRC's holding in O'Shea, a custodian is vested with the responsibility to respond to each individual request within seven (7) business days after receipt of such request.

The GRC's holding in O'Shea, *supra*, speaks to a custodian's obligation under OPRA to respond to each request individually. The GRC previously expanded its holding in O'Shea, *supra*, to apply to individual request items contained within a single OPRA request. See Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).

The basic tenet of O'Shea, *supra*, can also be applied to the current matter. Although the electric bills sought may have been provided in response to an earlier OPRA request, the original Custodian was not relieved of her responsibility under OPRA to respond in writing to the Complainant's March 24, 2009 OPRA request separately even though the record responsive had been previously provided in response to a different OPRA request.

Moreover, the electric bills sought in the Complainant's March 24, 2009 OPRA request are specifically classified as "immediate access" records pursuant to N.J.S.A. 47:1A-5.e. In Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that the "immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggests that the Custodian was still obligated to immediately notify the Complainant..." Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian should immediately respond to the request for those records, granting or denying access, requesting additional time to respond or requesting clarification of the request.

There is no evidence in the record to indicate that the original Custodian provided any written response to the Complainant's March 24, 2009 OPRA request for electric bills for 298 Main Street, Downe Township within the statutorily mandated time frame, which in this instance would be immediately upon receipt of the Complainant's OPRA request because the requested electric bills are immediate access records pursuant to

N.J.S.A. 47:1A-5.e. As in Herron, *supra*, the original Custodian had a duty to respond immediately because the Complainant's OPRA request sought immediate access records, *i.e.*, bills, pursuant to N.J.S.A. 47:1A- 5.e.

Therefore, the original Custodian's failure to respond in writing to the Complainant's March 24, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, *supra*, and O'Shea, *supra*. Further, because the original Custodian failed to immediately deny access to the requested electric bills, the original Custodian has violated N.J.S.A. 47:1A-5.e. See Herron, *supra*.

Complainant's February 5, 2009, March 24, 2009 and May 5, 2009 OPRA requests:

The original Custodian certified in the SOI that the Complainant was provided with ninety-three (93) pages of records in response to the February 5, 2009 OPRA request. The original Custodian further certified that all records responsive were provided. Moreover, the original Custodian certified that all records responsive to the Complainant's March 24, 2009 OPRA request were previously provided as part of the Township's response to the Complainant's February 5, 2009 OPRA request. The current Custodian also certified that it appears that any and all records responsive to the March 24, 2009 OPRA request were included as part of the ninety-three (93) pages of records provided in response to the Complainant's February 5, 2009 OPRA request. Additionally, the original Custodian certified that all records responsive were provided in response to the Complainant's May 5, 2009 OPRA request (*i.e.* one of the two letters requested). The Complainant has provided no evidence to refute the original Custodian's certifications.

In Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the custodian stated in the SOI that one (1) record responsive to the complainant's March 2, 2005, OPRA request was provided and that no other records responsive existed. The complainant contended that she believed more records responsive did, in fact, exist. The GRC requested that the custodian certify as to whether all records responsive had been provided to the complainant. The custodian subsequently certified on August 1, 2005 that the record provided to the complainant was the only record responsive. The GRC held that:

"[t]he Custodian certified that the Complainant was in receipt of all contracts and agreements responsive to the request. The Custodian has met the burden of proving that all records in existence responsive to the request were provided to the Complainant. Therefore there was no unlawful denial of access."

In this complaint, the original Custodian certified in the SOI that all records responsive to the Complainant's February 5, 2009, March 24, 2009 and May 5, 2009 OPRA requests were provided to the Complainant and there is no credible evidence in the record to refute the Custodian's certification. Therefore, the original Custodian did not

unlawfully deny access to the records responsive to the February 5, 2009, March 24 2009 and May 5, 2009 OPRA requests pursuant to Burns, *supra*. The GRC notes that although the records were provided to the Complainant on an unspecified date, the Complainant did not take issue with the timeliness of the original Custodian's responses.

Complainant's February 19, 2009 OPRA request:

In response to the Complainant's February 19, 2009 OPRA request, the original Custodian provided a letter from Mr. Lamanteer advising that no summons was issued.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian responded stating that there was no record of any telephone calls made to the complainant. The custodian subsequently certified that no records responsive to the complainant's request existed. The GRC determined the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

In the matter before the Council, the original Custodian certified in the SOI that no records responsive to the Complainant's February 19, 2009 OPRA request exist, and the Complainant did not submit competent, credible evidence sufficient to refute the original Custodian's certification. Therefore, because the original Custodian certified that no records responsive to the Complainant's February 19, 2009 OPRA request exist, and because the Complainant has provided no credible evidence to refute the original Custodian's certification, the original Custodian did not unlawfully deny access to the requested records. *See Pusterhofer, supra*.

Complainant's March 2, 2009 and March 19, 2009 OPRA requests:

In the instant complaint, the original Custodian responded to the Complainant's March 2, 2009 and March 19, 2009 OPRA requests for a copy of executive meeting minutes of the October 15, 2008 meeting and recordings and meeting minutes of the January 5, 2009 meeting, respectively, stating that the minutes had not yet been approved. The original Custodian subsequently certified in the SOI that the requested October 15, 2008 minutes were not approved by the Township until March 18, 2009 and argued that the January 5, 2009 minutes were exempt from disclosure pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 10:4-12. The original Custodian argued that the approval to release any executive session meeting minutes is based upon review by the Township Solicitor and his recommendations regarding disclosure. The original Custodian further asserted that following this review a resolution to release the minutes must be approved by the Township Committee.

The original Custodian's response in the SOI caused some confusion regarding the status of the January 5, 2009 executive session minutes; thus, the GRC requested that the current Custodian legally certify as to whether the January 5, 2009 executive session minutes were, in fact, not approved by the Township at the time of the Complainant's March 19, 2009 OPRA request. In response to the GRC's request for a legal

certification, the current Custodian certified that the Township approved the January 5, 2009 executive session minutes on May 4, 2009.

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

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

The New Jersey Appellate Division also has reached this conclusion with regard to draft documents. In the unreported section of In re Readoption With Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004), the court reviewed an OPRA request to the Department of Corrections (“DOC”) for draft regulations and draft statutory revisions. The court stated that these drafts were “all clearly pre-decisional and reflective of the deliberative process.” *Id.* at 18. It further held:

“[t]he trial judge ruled that while appellant had not overcome the presumption of non-disclosure as to the entire draft, it was nevertheless entitled to those portions which were eventually adopted. Appellant appeals from the portions withheld and DOC appeals from the portions required to be disclosed. We think it plain that all these drafts, in their entirety, are reflective of the deliberative process. On the other hand, appellant certainly has full access to all regulations and statutory revisions ultimately adopted. We see, therefore, no basis justifying a conclusion that the presumption of nondisclosure has been overcome. *Ibid.* (Emphasis added.)”

Additionally, the GRC has previously ruled on the issue of whether draft meeting minutes are exempt from disclosure pursuant to OPRA. In Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006), the Council held that “...the Custodian has not unlawfully denied access to the requested meeting minutes as the Custodian certifies that at the time of the request said minutes had not been approved by the governing body and as such, they constitute inter-agency, intra-

agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.”

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

Therefore, in the matter before the Council, the unapproved, draft executive session minutes dated October 18, 2008 and January 5, 2009 responsive to the Complainant’s March 2, 2009 and March 19, 2009 OPRA requests constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are exempt from the definition of a government record at pursuant to N.J.S.A. 47:1A-1.1 and are exempt from disclosure pursuant to Parave-Fogg, supra. Accordingly, the original Custodian has borne her burden of proving a lawful denial of access to the October 18, 2008 and January 5, 2009 draft minutes pursuant to N.J.S.A. 47:1A-6 because the requested draft executive session minutes were not approved by the governing body at the time of the Complainant’s March 2, 2009 and March 19, 2009 OPRA requests, respectively.

The GRC notes that the Custodian argued in the SOI that approval to release any executive session minutes is based upon review by the Township Solicitor and approval by the Township Committee of a resolution to release the minutes. However, the Custodian’s assertions are erroneous. The Council has previously found that once the governing body of an agency has approved meeting minutes as to accuracy and content (per the requirement of the Open Public Meetings Act), said minutes are disclosable pursuant to the provision of OPRA. Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Although properly approved executive session minutes are disclosable, pursuant to N.J.S.A. 47:1A-5.g., custodians may redact from the minutes those discussions that require confidentially because the matters discussed therein are unresolved or still pending.

The Complainant also sought in his March 19, 2009 OPRA request a copy of the audio recording of the January 5, 2009 executive session meeting.

In Burlett v. Monmouth County Board of Freeholders, GRC Complaint No. 2004-75 (August 2004), the complainant sought access to an audio tape recording of the Board of Freeholders’ May 27, 2004 public meeting. The custodian denied the complainant access to the requested record on the basis that the recording was used as an aid by the custodian to draft the official meeting minutes and therefore was exempt from disclosure as ACD material. The Council found that because the audio tape recording of the May 27, 2004 Freeholders’ meeting was made, maintained, kept on file by and did not fall within any of the exemptions recognized by OPRA, said recording was subject to disclosure pursuant to the provisions of OPRA.

The Council's holding in Burlett, *supra*, was later revisited in Miller v. Westwood Regional School District (Bergen), GRC Complaint No. 2009-49 (February 2010). The Council was tasked with deciding whether an audio recording of a public meeting was exempt from disclosure as ACD material because the custodian argued that the recording was used as an aid in the preparation of meeting minutes. The Council reasoned that:

“[a] recording of an agency's public meeting that is used to draft the agency's official meeting minutes is not involved in a decision-making process ... it is the meeting minutes which reflect the agency's decision-making process. Therefore, a recording of an agency's public meeting that is used to draft the agency's official meeting minutes is not exempt from disclosure under OPRA as ACD material.” *Id.*

Based on the foregoing and the Council's past holding in Burlett, *supra*, the Council held that:

“[b]ecause a recording of an agency's public meeting that is used to draft the agency's official meeting minutes is not deliberative in nature, such recording is not exempt from disclosure under OPRA as ACD material pursuant to In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000), Education Law Center v. NJ Department of Education, 198 N.J. 274 (2009), and Burlett v. Monmouth County Board of Freeholders, GRC Complaint No. 2004-75 (August 2004). Therefore, the Custodian has failed to bear his burden of proving that he lawfully denied the Complainant access to the recording of the Board's January 29, 2009 meeting. N.J.S.A. 47:1A-6.”

The record at issue here is distinguishable from the record at issue in both Burlett and Miller; specifically, the record requested herein is an audio recording of an executive session, rather than a public meeting. The GRC acknowledges that although an audio record is a verbatim account of a meeting, OPMA provides that “[a] public body may exclude the public only from that portion of a meeting” in which the body discusses certain subjects such as those identified by the original Custodian to be personnel matters, attorney-client privileged matters and collective bargaining agreement matters. *See N.J.S.A. 10:4-12.*

OPRA provides that:

“[i]f the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA], the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.” N.J.S.A. 47:1A-5.g.

Based on the foregoing, although the requested audio recording is a verbatim account of the executive session meeting, the Custodian still has an obligation under N.J.S.A. 47:1A-5.g. to redact information that is exempt from disclosure under OPRA in

a manner similar to how the Custodian would redact information exempt from OPRA in approved executive session minutes. Thus, the Custodian shall disclose the requested January 5, 2009 executive session audio recording with redactions, if necessary.

Complainant's March 26, 2009 OPRA request:

The Custodian's Counsel initially responded to this OPRA request on behalf of the original Custodian denying access to any correspondence sent to the Township Committee containing Counsel's opinion pursuant to N.J.S.A. 47:1A-1.1. The original Custodian subsequently argued that one (1) letter from Counsel dated January 2, 2009 existed, but that it was exempt from disclosure as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1.

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 GRC¹⁶ 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."

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."

¹⁶ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005). Robert G. Campbell v. Township of Downe (Cumberland), 2009-219 – Findings and Recommendations of the Executive Director

Therefore, pursuant to Paff, *supra*, the GRC must conduct an *in camera* review of the audio recording of the January 5, 2009 executive session meeting (responsive to the Complainant's March 19, 2009 OPRA request) to determine whether the records responsive to the Complainant's OPRA request contain information which is exempt from disclosure as information pertaining to personnel matters, attorney-client privileged matters and collective bargaining agreements pursuant to N.J.S.A. 47:1A-9.a. and N.J.S.A. 10:4-12.

Pursuant to Paff, *supra*, the GRC must conduct an *in camera* review of the correspondence containing legal advice of the Custodian's Counsel (responsive to the Complainant's March 26, 2009 OPRA request) to determine whether the records responsive to the Complainant's OPRA request contain information which is exempt from disclosure as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1.

Whether the original 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 original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the current Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The original Custodian's failure to respond in writing to the Complainant's March 24, 2009 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007), and O'Shea v. Township of West Milford, GRC Complaint No. 2004-17 (April 2005). Further, because the original Custodian failed to immediately deny access to the requested electric bills, the original Custodian has violated N.J.S.A. 47:1A-5.e. See Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).
2. The original Custodian certified in the Statement of Information that all records responsive to the Complainant's February 5, 2009, March 24, 2009 and May 5, 2009 OPRA requests were provided to the Complainant and there is no credible evidence in the record to refute the original Custodian's certification. Therefore, the original Custodian did not unlawfully deny access to the records responsive to the February 5, 2009, March 24, 2009 and May 5, 2009 OPRA requests pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).

3. Because the original Custodian certified that no records responsive to the Complainant's February 19, 2009 OPRA request exist, and because the Complainant has provided no credible evidence to refute the original Custodian's certification in this regard, the original Custodian did not unlawfully deny access to the requested records. *See Pusterhofer v. New Jersey Department of Education*, GRC Complaint No. 2005-49 (July 2005).
4. The unapproved, draft executive session meeting minutes dated October 18, 2008 and January 5, 2009 responsive to the Complainant's March 2, 2009 and March 19, 2009 OPRA requests constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are exempt from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1 and are exempt from disclosure pursuant to Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). Accordingly, the original Custodian has borne her burden of proving a lawful denial of access to the October 18, 2008 and January 5, 2009 draft minutes pursuant to N.J.S.A. 47:1A-6 because the requested draft executive minutes were not approved by the governing body at the time of the Complainant's March 2, 2009 and March 19, 2009 OPRA requests, respectively.
5. Although the requested audio recording is a verbatim account of the executive session meeting, the Custodian still has an obligation under N.J.S.A. 47:1A-5.g. to redact information that is exempt from disclosure under OPRA in a manner similar to how the Custodian would redact information exempt from OPRA in approved executive session minutes. **Thus, the Custodian shall disclose the requested January 5, 2009 executive session audio recording with redactions, if necessary.**
6. **The Custodian shall comply with Item No. 5 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹⁷, to the Executive Director.¹⁸**
7. 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 correspondence containing legal advice of the Custodian's Counsel (responsive to the Complainant's March 26, 2009 OPRA request)** to determine whether the records responsive to the Complainant's OPRA request

¹⁷ "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."

¹⁸ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

contain information which is exempt from disclosure as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1.

8. **The Custodian must deliver¹⁹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see No. 7 above), a document or redaction index²⁰, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4²¹, that the record provided is the record 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.**
9. The Council defers analysis of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the current Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

January 18, 2011

¹⁹ 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.

²⁰ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

²¹ "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."