



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

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

January 31, 2012 Government Records Council Meeting

Matthew J. Zahorsky
Complainant

Complaint No. 2009-270

v.

New Jersey Department of Environmental Protection
Custodian of Record

At the January 31, 2012 public meeting, the Government Records Council (“Council”) considered the January 24, 2012 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the amended findings and recommendations. The Council, therefore, finds that:

1. The Custodian has complied with the Council’s March 29, 2011 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council’s Order.
2. The Council’s *in camera* review of the subject records reveals that the Custodian lawfully denied access to the following records because the records contain advisory, consultative or deliberative material exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1:
 - Freshwater Wetlands Location Plan dated February 28, 2007 with handwritten notes from internal application reviewing and evaluations;
 - Internal memorandum from Mr. David Jenkins, Chief of the New Jersey Department of Environmental Protection’s Endangered & Nongame Species Program to Mr. Avi Argaman, Bureau of Watershed Regulation dated February 23, 2009 (2 pages);
 - Internal memorandum from Mr. Avi Argaman, Bureau of Watershed Regulation, to Mr. Larry Torok, Division of Land Use Regulation, dated May 21, 2009 (2 pages);
 - E-mail chain between Mr. Avi Argaman and Mr. Larry Torok from June 4, 2009 to June 9, 2009 (2 pages).
 - Internal e-mail chain between Ms. Amanda Dey, Division of Fish & Wildlife and Mr. Larry Torok dated June 22, 2009 (1 page).
 - Draft Wastewater Management Plan Endangered & Threatened/Community Review (“WMP E&T/Community Review”) dated June 24, 2009.

Thus, the GRC declines to address whether the Custodian knowingly and willfully violated OPRA because no violation has occurred.

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3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved “the desired result because the complaint [did not bring] about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

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 31st Day of January, 2012

Robin Berg Tabakin, Chair
Government Records Council

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

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: February 6, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
January 31, 2012 Council Meeting**

**Matthew J. Zahorsky¹
Complainant**

GRC Complaint No. 2009-270

v.

**New Department of Environmental Protection²
Custodian of Records**

Records Relevant to Complaint: Inspection of:

1. Full file for Block 917, Lots No. 2, No. 3 and No.15 in the Township of Wall (“Township”)(File No. 1352-06-0015.1, Activity No. FWW 06001, WM P.I. No. 435462 Activity No. WMP 030001).
2. Copies of all internal and external e-mail correspondence regarding these properties sent and received by any New Jersey Department of Environmental Protection (“DEP”) staff member.
3. Dates of any site visits performed by DEP staff members, names of person(s) performing said visits and copies of all field notes and reports.

Request Made: July 29, 2009

Response Made: August 4, 2009

Custodian: Matt Coefer

GRC Complaint Filed: September 30, 2009³

Background

March 29, 2011

Government Records Council’s (“Council”) Interim Order. At its March 29, 2011 public meeting, the Council considered the March 22, 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 Represented by Thomas A. Segreto, Esq., of Scarinci Hollenbeck (Lyndhurst, NJ).

² Represented by DAG Mark Collier, on behalf of the NJ Attorney General.

³ The GRC received the Denial of Access Complaint on said date.

1. 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 following to determine the validity of the Custodian's assertion that the record contains information which is exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.:
 - i. Freshwater Wetlands Location Plan dated February 28, 2007 with handwritten notes from internal application reviewing and evaluations.
 - ii. Internal memorandum from Mr. David Jenkins, Chief of the New Jersey Department of Environmental Protection's Endangered & Nongame Species Program to Mr. Avi Argaman, Bureau of Watershed Regulation dated February 23, 2009 (2 pages).
 - iii. Internal memorandum from Mr. Avi Argaman, Bureau of Watershed Regulation, to Mr. Larry Torok, Division of Land Use Regulation, dated May 21, 2009 (2 pages).
 - iv. E-mail chain between Mr. Avi Argaman and Mr. Larry Torok from June 4, 2009 to June 9, 2009 (2 pages).
 - v. Internal e-mail chain between Ms. Amanda Dey, Division of Fish & Wildlife and Mr. Larry Torok dated June 22, 2009 (1 page).
 - vi. Draft Wastewater Management Plan Endangered & Threatened/Community Review ("WMP E&T/Community Review") dated June 24, 2009.
2. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁶, that the records provided are the records 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.**
3. 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.

March 30, 2011

Council's Interim Order distributed to the parties.

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

⁵ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

⁶ "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."

April 5, 2011

Custodian's certification. The Custodian provides a copy of the following records pursuant to the Council's March 30, 2011 Interim Order:

- Certification of the Custodian dated April 5, 2011;
- Nine (9) unredacted copies of:
 - Freshwater Wetlands Location Plan dated February 28, 2007 with handwritten notes from internal application reviewing and evaluations;
 - Internal memorandum from Mr. David Jenkins, Chief of the New Jersey Department of Environmental Protection's Endangered & Nongame Species Program to Mr. Avi Argaman, Bureau of Watershed Regulation dated February 23, 2009 (2 pages);
 - Internal memorandum from Mr. Avi Argaman, Bureau of Watershed Regulation, to Mr. Larry Torok, Division of Land Use Regulation, dated May 21, 2009 (2 pages);
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 - Internal e-mail chain between Ms. Amanda Dey, Division of Fish & Wildlife and Mr. Larry Torok dated June 22, 2009 (1 page).
 - Draft Wastewater Management Plan Endangered & Threatened/Community Review ("WMP E&T/Community Review") dated June 24, 2009;
- Redaction Index for the subject records.

Analysis

Whether the Custodian complied with the Council's March 29, 2011 Interim Order?

At its March 29, 2011 public meeting, the Council determined that the GRC must conduct an *in camera* review of the records set forth at Paragraph 1 therein to determine the validity of the Custodian's assertion that the record contains information which is exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.

The Council therefore ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records, 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 records provided are the records 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 on April 6, 2011.

The Custodian's Counsel provided the records for an *in camera* review and the Custodian's certified confirmation of compliance to the Executive Director on April 5, 2011.

Therefore, the Custodian timely complied with the Council's March 29, 2011 Interim Order by providing the records for an *in camera* review and Custodian's certified

confirmation of compliance to the Executive Director within the deadline to comply with said Order.

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

The GRC conducted an *in camera* examination on the submitted records. The results of this examination are set forth in the following table:

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the In Camera Examination⁷
February 28, 2007	Freshwater Wetlands Location Plan with handwritten notes from internal application reviewing and evaluations.	Access denied.	Pursuant to <u>N.J.S.A.</u> 47:1A-1.1, the definition of a government record shall not include inter-agency or intra-agency advisory, consultative or deliberative material.	The record is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1 because it contains advisory, consultative or deliberative material in the form of notes conveying preliminary information.
February 23, 2009	Internal memorandum from Mr. David Jenkins, Chief of the New Jersey Department of Environmental	Access denied.	Pursuant to <u>N.J.S.A.</u> 47:1A-1.1, the definition of a government record shall not	The record is exempt from disclosure pursuant to <u>N.J.S.A.</u> 47:1A-1.1

⁷ **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.

	Protection's Endangered & Nongame Species Program to Mr. Avi Argaman, Bureau of Watershed Regulation (2 pages)		include inter-agency or intra-agency advisory, consultative or deliberative material.	because it contains advisory, consultative or deliberative material in the form of preliminary information.
May 21, 2009	Internal memorandum from Mr. Avi Argaman, Bureau of Watershed Regulation, to Mr. Larry Torok, Division of Land Use Regulation, (2 pages)	Access denied.	Pursuant to <u>N.J.S.A. 47:1A-1.1</u> , the definition of a government record shall not include inter-agency or intra-agency advisory, consultative or deliberative material.	The record is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> because it contains advisory, consultative or deliberative material in the form of preliminary information.
June 4, 2009 to June 9, 2009	E-mail chain between Mr. Avi Argaman and Mr. Larry Torok (2 pages)	Access denied.	Pursuant to <u>N.J.S.A. 47:1A-1.1</u> , the definition of a government record shall not include inter-agency or intra-agency advisory, consultative or deliberative material.	The record is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> because it contains advisory, consultative or deliberative material in the form of preliminary information.
June 22, 2009	Internal e-mail chain between Ms. Amanda Dey, Division of Fish & Wildlife and Mr. Larry Torok (1 page).	Access denied.	Pursuant to <u>N.J.S.A. 47:1A-1.1</u> , the definition of a government record shall not include inter-agency or intra-agency	The record is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> because it contains advisory,

			advisory, consultative or deliberative material.	consultative or deliberative material in the form of preliminary information.
June 24, 2009	Draft Wastewater Management Plan Endangered & Threatened/Community Review (“WMP E&T/Community Review”) (6 pages)	Access denied.	Pursuant to <u>N.J.S.A. 47:1A-1.1</u> , the definition of a government record shall not include inter-agency or intra-agency advisory, consultative or deliberative material.	The record is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> because it is a draft document and contains advisory, consultative or deliberative material in the form of preliminary information.

Therefore, the Council’s *in camera* review of the subject records reveals that the Custodian lawfully denied access to the following records because the records contain advisory, consultative or deliberative material exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1:

- Freshwater Wetlands Location Plan dated February 28, 2007 with handwritten notes from internal application reviewing and evaluations;
- Internal memorandum from Mr. David Jenkins, Chief of the New Jersey Department of Environmental Protection’s Endangered & Nongame Species Program to Mr. Avi Argaman, Bureau of Watershed Regulation dated February 23, 2009 (2 pages);
- Internal memorandum from Mr. Avi Argaman, Bureau of Watershed Regulation, to Mr. Larry Torok, Division of Land Use Regulation, dated May 21, 2009 (2 pages);
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- Draft Wastewater Management Plan Endangered & Threatened/Community Review (“WMP E&T/Community Review”) dated June 24, 2009.

Thus, the GRC declines to address whether the Custodian knowingly and willfully violated OPRA because no violation has occurred.

Whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees?

OPRA provides that:

“[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.” N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a complainant is a “prevailing party” if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct. *Id.* at 432. Additionally, the court held that attorney’s fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f., against the Division of Youth and Family Services (“DYFS”). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS’s part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney’s fees to the GRC for adjudication.

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, supra, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the

Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney’s fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

As the New Jersey Supreme Court noted in Mason, Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, *citing* Teeters, *supra*, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court then examined the catalyst theory within the context of New Jersey law, stating that:

“New Jersey law has long recognized the catalyst theory. In 1984, this Court considered the term “prevailing party” within the meaning of the federal Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C.A. § 1988. Singer v. State, 95 N.J. 487, 495, *cert. denied*, New Jersey v. Singer, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984). The Court adopted a two-part test espousing the catalyst theory, consistent with federal law at the time: (1) there must be “a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved;” in other words, plaintiff’s efforts must be a “necessary and important factor in obtaining the relief,” *Id.* at 494-95, 472 A.2d 138 (internal quotations and citations omitted); and (2) “it must be shown that the relief ultimately secured by plaintiffs had a basis in law,” *Id.* at 495. *See also* North Bergen Rex Transport v. TLC, 158 N.J. 561, 570-71 (1999)(applying Singer fee-shifting test to commercial contract).

Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that “[a] plaintiff is considered a prevailing party ‘when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.’” *Id.* at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); *see also* Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart “generously” defines “a prevailing party [a]s one who succeeds ‘on any significant issue in litigation [that] achieves some of the benefit the parties

sought in bringing suit" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

This Court affirmed the catalyst theory again in 2001 when it applied the test to an attorney misconduct matter. Packard-Bamberger, *supra*, 167 N.J. at 444. In an OPRA matter several years later, New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 143-44 (2005)(NJDPM), this Court directed the Department of Corrections to disclose records beyond those it had produced voluntarily. In ordering attorney's fees, the Court acknowledged the rationale underlying various fee-shifting statutes: to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to "even the fight" when citizens challenge a public entity. *Id.* at 153.

After Buckhannon, and after the trial court's decision in this case, the Appellate Division decided Teeters. The plaintiff in Teeters requested records from the Division of Youth and Family Services (DYFS), which DYFS declined to release. 387 N.J. Super. at 424. After the GRC preliminarily found in plaintiff's favor, the parties reached a settlement agreement leaving open whether plaintiff was a "prevailing party" under OPRA. *Id.* at 426-27.

The Appellate Division declined to follow Buckhannon and held that plaintiff was a "prevailing party" entitled to reasonable attorney's fees; in line with the catalyst theory, plaintiff's complaint brought about an alteration in DYFS's position, and she received a favorable result through the settlement reached. *Id.* at 431-34. In rejecting Buckhannon, the panel noted that "New Jersey statutes have a different tone and flavor" than federal fee-shifting laws. *Id.* at 430. "Both the language of our statutes and the terms of court decisions in this State dealing with the issue of counsel fee entitlements support a more indulgent view of petitioner's claim for an attorney's fee award than was allowed by the majority in Buckhannon ... " *Id.* at 431, 904 A.2d 747. As support for this proposition, the panel surveyed OPRA, Packard-Bamberger, Warrington, and other cases.

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues ... may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4

(repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award. Those changes expand counsel fee awards under OPRA.” (Footnote omitted.) Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

The Court in Mason, *supra*, at 76, held that “requestors are entitled to attorney’s fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) ‘a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved’; and (2) ‘that the relief ultimately secured by plaintiffs had a basis in law.’ Singer v. State, 95 N.J. 487, 495, cert denied (1984).”

In the matter before the Council, the Council’s *in camera* review of the subject records revealed that the Custodian lawfully denied access to such records as such records contained advisory, consultative and deliberative material exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1

Pursuant to Teeters, *supra*, the Complainant has not achieved “the desired result because the complaint [did not bring] about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason, *supra*, no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council’s March 29, 2011 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council’s Order.
2. The Council’s *in camera* review of the subject records reveals that the Custodian lawfully denied access to the following records because the records contain advisory, consultative or deliberative material exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1:
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3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved “the desired result because the complaint [did not bring] about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

Prepared By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

January 24, 2012



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

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INTERIM ORDER

March 29, 2011 Government Records Council Meeting

Matthew J. Zahorsky
Complainant

Complaint No. 2009-270

v.

New Jersey Department of Environmental Protection
Custodian of Record

At the March 29, 2011 public meeting, the Government Records Council (“Council”) considered the March 22, 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. 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 following to determine the validity of the Custodian’s assertion that the record contains information which is exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1:
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 - v. Internal e-mail chain between Ms. Amanda Dey, Division of Fish & Wildlife and Mr. Larry Torok dated June 22, 2009 (1 page).
 - vi. Draft Wastewater Management Plan Endangered & Threatened/Community Review (“WMP E&T/Community Review”) dated June 24, 2009.



2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4³, that the records provided are the records 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.**
3. 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 29th Day of March, 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: March 30, 2011

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

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

³ "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
March 29, 2011 Council Meeting**

**Matthew J. Zahorsky¹
Complainant**

GRC Complaint No. 2009-270

v.

**New Department of Environmental Protection²
Custodian of Records**

Records Relevant to Complaint: Inspection of:

1. Full file for Block 917, Lots No. 2, No. 3 and No.15 in the Township of Wall (“Township”)(File No. 1352-06-0015.1, Activity No. FWW 06001, WM P.I. No. 435462 Activity No. WMP 030001).
2. Copies of all internal and external e-mail correspondence regarding these properties sent and received by any New Jersey Department of Environmental Protection (“DEP”) staff member.
3. Dates of any site visits performed by DEP staff members, names of person(s) performing said visits and copies of all field notes and reports.

Request Made: July 29, 2009

Response Made: August 4, 2009

Custodian: Matt Coefer

GRC Complaint Filed: September 30, 2009³

Background

July 29, 2009

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.

August 4, 2009

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the fourth (4th) business day following receipt of such request. The Custodian states that records responsive to the Complainant’s OPRA request have been identified and are available for access. The Custodian requests that the

¹ Represented by Thomas A. Segreto, Esq., of Scarinci Hollenbeck (Lyndhurst, NJ).

² Represented by DAG Mark Collier, on behalf of the NJ Attorney General.

³ The GRC received the Denial of Access Complaint on said date.

Complainant contact the Office of Record Access to schedule a file review, obtain copies or to obtain further information.⁴

August 7, 2009

E-mail from the Custodian to the Complainant. The Custodian requests an extension until August 12, 2009 to respond to the Complainant’s OPRA request. The Custodian states that this extension is needed to check for additional records and determine whether any of the records responsive are exempt from disclosure under OPRA.⁵

August 12, 2009

E-mail from the Custodian to the Complainant. The Custodian requests an extension until August 13, 2009 to respond to the Complainant’s OPRA request.

The Custodian states that records have been located but that some of these records are deemed to be confidential as inter-agency or intra-agency advisory, consultative, or deliberative (“ACD”) material. The Custodian states that if the Complainant still wishes to obtain these records, the records will be provided with redactions or the Complainant will be provided with a privilege log. The Custodian finally notes that a special service charge may be incurred depending on the amount of time expended to fulfill the Complainant’s OPRA request.⁶

August 12, 2009

Facsimile from the Custodian to the Complainant. The Custodian states that access to the following records is being denied:

Date of Record	Sender	Recipient	Type of Record	Legal Basis for Denial of Access
February 23, 2009	Division of Fish & Wildlife	Mr. Avi Argaman (“Mr. Argaman”), Bureau of Watershed Regulation (“BWR”)	Memo	ACD material
March 11, 2009	Mr. Argaman, BWR	Land Use Regulation	Memo	ACD material
June 1, 2009	Land Use Regulation	Mr. Argaman, BWR	Draft Wastewater Management Plan Endangered & Threatened/Community Review (“WMP E&T/Community	ACD material

⁴ The Custodian notes his response directly on the Complainant’s OPRA request form.

⁵ See F.N. No. 4.

⁶ See F.N. No. 4.

			Review”)	
June 9, 2009	Land Use Regulation	Mr. Argaman, BWR	e-mail	ACD material
June 22, 2009	Land Use Regulation	Division of Fish & Wildlife	e-mail	ACD material
June 22, 2009	Land Use Regulation	Land Use Regulation	Freshwater wetlands location plan/hand written notes	ACD material

September 30, 2009

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

- Complainant’s OPRA request dated July 29, 2009 with the Custodian’s notes dated August 7, 2009 thereon.
- Facsimile from the Custodian to the Complainant dated August 12, 2009 attaching a privilege log.

The Complainant⁷ states that he submitted an OPRA request electronically to the DEP on July 29, 2009. The Complainant states that the Custodian initially responded to the OPRA request in writing on August 4, 2009 stating that the requested records would be made available; however, the Custodian wrote to the Complainant again on August 7, 2009 requesting an extension until August 12, 2009 because the records were not ready for review. The Complainant states that the Custodian wrote to the Complainant on August 12, 2009 advising that some records were deemed to be exempt from disclosure under OPRA. The Complainant states that on the same day, the Custodian provided a privilege log identifying six (6) records that were being withheld from disclosure under OPRA as ACD material.

The Complainant states that 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 ... The terms shall not include *inter-agency or intra-agency advisory, consultative, or deliberative material.*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

The Complainant states that a custodian of record as defined under OPRA has an obligation to respond in writing to an OPRA request within seven (7) business days (unless the requestor consents to an extension of time) granting or denying access to the requested record(s). N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. The Complainant states that when a custodian denies access to a record, in part or whole, the custodian is required to “indicate the specific lawful basis” for said denial. N.J.S.A. 47:1A-5.g.

⁷ The Complainant is also the Engineer for the Township of Wall.

The Complainant contends that the privilege log does not comply with the provisions of OPRA and established case law. The Complainant asserts that the lack of detail in said log renders it useless and does not allow him to determine whether the asserted exemption applies to the records withheld. Specifically, the Complainant argues that the DEP alleges that the identified records are exempt from disclosure under OPRA as ACD material; however, the DEP failed to comply with Paff v. Department of Labor, 392 N.J. Super. 334 (App. Div. 2007) which requires that:

“[t]he index is essentially a ‘privilege log’ that must provide sufficient information ‘respecting the basis of the privilege-confidentiality-exception *vis a vis* each document.’ Hartz Mountain Indus., Inc. v. NJ Sports & Exposition Auth., 369 N.J. Super. 175, 185 (App. Div.), cert. denied 182 N.J. 147 (2004). An accurate index is necessary for substantive review by the requesting party as well as the reviewing court. After its *in camera* review, the GRC shall then produce the following to the requesting party: (1) the redacted or unredacted documents responsive to the request; (2) sworn statement provided by the agency with the index or ‘privilege log’ appended thereto; and (3) the minutes of the meeting at which the documents were reviewed *in camera* reflecting its explanation for all redactions or withheld documents.” (citations omitted.)

The Complainant states that the GRC has the ability to order an *in camera* review of the requested records to determine whether the asserted privilege was correctly applied. See Paff v. N.J. Dept. of Labor, Bd. Of Review, 379 N.J. Super. 346, 355 (App. Div. 2005). The Complainant states pursuant to Paff, the DEP is required to provide a Vaughn Index; a term originating from Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert denied, 415 U.S. 977 (1974). The Complainant states that according to Vaughn, the index must include “... (1) identify each document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure would damage the interests protected by the claimed exemption.” Citizens Comm’n on Human Rights v. Food and Drug Administration, 45 F. 3d 1325, 1326 n.1 (9th Cir. 1995). The Complainant states that the index “usually consists of a detailed affidavit, the purpose of which is to ‘permit the court system effectively and efficiently to evaluate the factual nature of disputed information.’” John Doe Agency v. John Doe Corp., 493 U.S. 146, 149 n.2 (1989)(quoting Vaughn, 484 F. 2d, at 826).

The Complainant argues that because the DEP has asserted that the six (6) records at issue are exempt from disclosure under OPRA as ACD material, the Complainant can still obtain said records upon showing that the need for the materials overrides the DEP’s interest in confidentiality. See Education Law Center v. New Jersey Department of Education, 198 N.J. 274 (2009).

The Complainant states that the in Education Law Center, *supra*, the court held that:

“The deliberative process privilege ‘permits the government to withhold documents that reflect advisory opinions, recommendations, and

deliberations comprising part of a process by which governmental decisions and policies are formulated.’ *Integrity*, *supra*, 165 N.J. at 83 (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150, 95 5. Ct. 1504. 1516, 44 L. Ed.2d 29, 47 (1975)) ... The justification for a deliberative process privilege also arises out of the desire to prevent disclosure of proposed policies before they have been fully vetted and adopted by a government agency, see *Jordan v. United States Dep’t of Justice*, 591 F.2d 753, 773 (D.C. Cir. 1978)(explaining that privilege is designed to ensure that agency is judged by policy adopted, not policy merely considered), as well as the desire to prevent the confusion that could result from release of information concerning matters that do not bear on an agency’s chosen outcome, *See Id.* at 772-73.

This Court addressed the deliberative process privilege in *Integrity*. In addition to officially recognizing the privilege that had enjoyed long acceptance in the federal courts, we set standards for its application. *Integrity*, *supra*, 165 N.J. at 84. First, the document must be ‘pre-decisional,’ which means that ‘it must have been generated before the adoption of an agency’s policy or decision.’ *Ibid.* Second, we said that the document must be deliberative; explaining that such documents ‘contain opinions, recommendations, or advice about agency policies.’ *Id.* at 84-85.

Once the threshold requirements have been proved by the government, the privilege is invoked, resulting in a presumption of confidentiality because the ‘government’s interest in candor is the preponderating policy and ... the balance is said to have been struck in favor of non-disclosure.’ *Id.* at 85 (internal quotations omitted). *Because the privilege is a qualified one, a litigant can still obtain the requested materials upon a showing that the need for the materials overrides the government’s interest in confidentiality. Ibid.* At that point, the burden is on the litigant to demonstrate such a compelling need: ‘[i]n all but exceptional cases it is considered against the public interest to compel the government to produce inter-agency advisory opinions.’ *Ibid.* (quoting *E.W. Bliss Co. v. United States*, 203 F. Supp. 175, 176 (N.D. Ohio 1961)). In making the determination whether a litigant has demonstrated an overriding need, a court should consider the following factors: ‘(1) the relevance of the evidence; (2) the availability of other evidence; (3) the government’s role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.’ *Id.* at 85-86.

Although we emphasized in *Integrity* that ‘the government, like its citizens, ‘needs open but protected channels for the kind of plain talk that is essential to the quality of its functioning,’ *Id.* at 88 (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss*, 40 F.R.D. 318, 325 (D.C. Cir. 1966)), we also said that ‘[p]urely factual material that does not reflect deliberative processes is not protected.’ *Id.* at 85 (citing *Mink*, *supra*, 410 U.S. at 88, 93 S. Ct. at 837, 35 L. Ed. 2d at 132). That comment reflected the widely

accepted notion that strictly factual material should not be confidential because the disclosure of such material would not chill free communication and deliberation due to the static nature of facts as compared to the dynamic nature of opinions. Mink, *supra*, 410 U.S. at 88, 93 S. Ct. at 837, 35 L. Ed. 2d at 132.

As our only decision to touch on the subject, Integrity has been the Rosetta stone for questions arising about the deliberative process privilege in New Jersey, and has been repeatedly relied on by our courts when the government has sought to invoke the privilege. *See, e.g., Fisher*, *supra*, 400 N.J. Super. at 74; Gannett, *supra*, 379 N.J. Super. at 219; In Re Readoption with Amendments of Death Penalty Regulations, 367 N.J. Super. 61, 73 (App. Div. 2004); Paff v. Dir., Office of Attorney Ethics, 399 N.J. Super. 632, 646 (Law Div. 2007). That said, Integrity did not address and, therefore, did not explore how to determine precisely when material is ‘deliberative.’ in those instances involving statistical and like data that have factual components, but may project opinions or expose an agency’s deliberations or reasoning process.” *Id.* at 285-288.

The Complainant states that to this end, he has an emergent need for the requested records for the following reasons. The Complainant states that the subject land is in the control of the Township Sewer Department. The Complainant states that this land is approximately 100 acres, consisting of 65 acres of wetlands and 35 acres of developable land. The Complainant states that since December 2008, the subject property has been designated as part of the Township’s affordable housing plan. The Complainant states that a contract has been executed with a developer who plans to build approximately 200 affordable housing units on the 35 acre parcel of property. The Complainant states that this property is an integral part of the Township’s “Third Round Affordable Housing Plan,” which states that:

“This site was in the Township’s 2005 Round III Plan as an inclusionary site, however is now included as a *municipal partnership site*. The owner of Lot 2 has expressed interest in keeping the entire site in the Housing Plan, and Boulder Development has prepared a concept plan for the entire site (see Appendix 3 for site mapping). The current proposal for the site is a total of *300 affordable family rental units*. Site feasibility will be enhanced by re-zoning of the property to permit affordable units as well as up to 110 market rate multi-family units and approximately 15,500 [square feet] of retail ... The site is currently zoned Office Research on minimum 10-acre lots. The current zoning does not permit multi-family residential or retail uses, therefore a re-zoning of the site would be required. The subject property is 91.35 acres and is located on Asbury Road, just west of its intersection with Route 34 southbound.” (Emphasis added.)

The Complainant states that on July 20, 2009, the DEP removed the subject property from the approved sewer service area without any explanation to the Township, thus rendering the property undevelopable for affordable housing or any other type of development.

The Complainant contends that the Township has a right to know what environmental issues the DEP discussed and the basis for the DEP's actions because the property is within the Township's municipal border and within the Township's sewer service area. The Complainant notes that this information is not available through any other source; thus, the denial of access to this information denies the Township the ability to be made aware of the facts and circumstance by which the DEP made its decision.

Moreover, the Complainant states that the Appellate Division stated in O'Shea v West Milford BOE, 391 N.J. Super. 534, (2007), that deliberative materials do not include factual statements. Further, the Complainant states that in In Re Liquidation of Integrity Ins. Co., 165 N.J. 75, 83 (2000), the court held that "[purely factual material that does not reflect deliberative processes is not protected." The Complainant states that the court in Education Law Center v. New Jersey Department of Education, 198 N.J. 274 (2009) clarified this to mean that:

"a record, which contains or involves factual components, is subject to the deliberative process privilege when it was used in the decision-making process and its disclosure would reveal the nature of the deliberations that occurred during that process. By that standard, individual documents may not be capable of being determined to be, necessarily, deliberative material, or not, standing alone. A court must assess such fact-based documents against the backdrop of an agency's deliberative efforts in order to determine a document's nexus to that process, and its capacity to expose the agency's deliberative thought-processes." (citations omitted.)

The Complainant states that in Fisher v Division of Law, 400 N.J. Super. 61 (Law Div. 2008), the Appellate Division reasoned that, "[t]o be protected under this privilege, '(1) the document must be pre-decisional, meaning it was 'generated before the adoption of an agency's policy or decision,' and (2) it 'must be deliberative in nature, containing opinions, recommendations, or advice about agency policies.' Gannett N.J. Partners. LP v. County of Middlesex, 379 N.J. Super. 205, 219 (App. Div. 2005) (quoting In Re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85 (2000)). If a public agency claims that documents are protected from disclosure under the deliberative process privilege, the Council may review the documents in camera to determine whether the privilege has been properly invoked. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005)." *Id.* at 74.

The Complainant states that New Jersey has a "tradition of openness and hostility to secrecy in government." North Jersey Newspapers v. Passaic County Bd. of Chosen Freeholders, 127 N.J. 9, 16 (1992). The Complainant states that the purpose of OPRA is "to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." Mason v. City of Hoboken, 196 N.J. 51, 64 (2008) (quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). The Complainant states that to achieve that purpose, OPRA's legislative policy states that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations

on the right of access shall be construed in favor of the public's right of access." N.J.S.A. 47:1A-1.

The Complainant reiterates that he needs the requested records to obtain an explanation why the subject property has been removed from the Township's sewer area. The Complainant argues that the Township has a right to know what environmental issues the DEP has discussed with regard to property within its municipal borders and within its sewer service area, as well as the basis for the determinations.

The Complainant argues that the records identified by the Custodian as exempt from access as ACD material exist with regard to a deliberative discussion of any decision which decision has since been made. The Complainant argued that even if the DEP could establish a need for confidentiality, it seems improper to apply that analysis to the Complainant, who is the Engineer of the Township in which the subject property is located. The Complainant contends that to deny the Township access to the records at issue is to deny relevant information available only from one source, to ignore the premise of home rule and deny to the Township the ability to be aware of facts and circumstances of properties within its own borders. The Complainant further contends that the Custodian failed to comply with OPRA, which requires access to certain records sought in this matter.

The Complainant contends that for all of the above reasons, he is entitled to receive the requested records. The Complainant requests, as an alternative, that the Council should review the documents *in camera* pursuant to *N.J.A.C. 5:105-2.8* and order disclosure of those records deemed to be subject to disclosure.

The Complainant does not agree to mediate this complaint.

October 20, 2009

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

October 21, 2009

E-mail from the Custodian to the GRC. The Custodian requests an extension of time until November 3, 2009 to submit the requested SOI.

October 21, 2009

E-mail from the GRC to the Custodian. The GRC grants an extension of time until November 3, 2009 to submit the requested SOI.

November 4, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated July 29, 2009 with the Custodian's notes dated August 4, 2009 thereon.
- Complainant's OPRA request dated July 29, 2009 with the Custodian's notes dated August 7, 2009 thereon.

- Complainant's OPRA request dated July 29, 2009 with the Custodian's notes dated August 12, 2009 thereon.⁸

The Custodian certifies that DEP's search for the requested records involved forwarding the Complainant's OPRA request to Ms. Pat Mullaney (Ms. Mullaney"), Custodian for the Land Use Management Program within the DEP, who reviewed and assigned the request to Ms. Samantha Gordon ("Ms. Gordon"), File Officer of the Division of Land Use Regulation. The Custodian certifies that Ms. Gordon responded to Ms. Mullaney on August 3, 2009 advising that records with no privileged material were located. The Custodian certifies that Ms. Mullaney advised the Custodian that she located records responsive consisting of 120 pages and three (3) oversized maps. The Custodian states that on August 4, 2009, his office responded to the Complainant in writing advising that the records were available for review. The Custodian certifies that the Complainant responded scheduling an appointment on August 10, 2009 to review the records.

The Custodian certifies that on August 7, 2009, DEP identified another area within the Land Use Management Program where records may be located. The Custodian states that he contacted Ms. Mullaney who assigned the request to Ms. Debra Frails ("Ms. Frails"), File Officer for the Division of Watershed Management. The Custodian certifies that he subsequently contacted the Complainant in writing requesting an extension of time until August 13, 2009, which the Complainant granted and cancelled the August 10, 2009 appointment.

The Custodian certifies that on August 11, 2009, Ms. Frails advised Ms. Mullaney that approximately one (1) inch of responsive records were located and created a privilege log for six (6) records deemed to be privileged pursuant to N.J.S.A. 47:1A-1.1. The Custodian certifies that Ms. Mullaney forwarded Ms. Frails's response to the Custodian on August 11, 2009.

The Custodian certifies that his office responded to the Complainant on August 12, 2009 indicating that additional records were available for review. The Custodian certifies that the Complainant contacted DEP on August 12, 2009 and scheduled a review for the same day. The Custodian subsequently forwarded on the same day a privilege log indicating that six (6) records were identified as privileged pursuant to N.J.S.A. 47:1A-1.1. The Custodian certifies that the Complainant cancelled the review after expressing dissatisfaction that some records were being withheld.

The Custodian also certifies that no records 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").

The Custodian certifies that the following six (6) records were withheld from disclosure:

⁸ The Custodian also attached DEP records request receipt No. 83499 for each response to the Complainant.
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1. Freshwater Wetlands Location Plan dated February 28, 2007 with handwritten notes from internal application reviewing and evaluations. The Custodian certifies that the original Freshwater Wetlands Location Plan dated February 28, 2007 was made available to the Complainant.
2. Internal memorandum from Mr. David Jenkins (“Mr. Jenkins”), Chief of the DEP’s Endangered & Nongame Species Program to Mr. Avi Argaman (“Mr. Argaman”), Bureau of Watershed Regulation (“BWR”) dated February 23, 2009 (2 pages). This memorandum concerns Mr. Jenkins’s input on proposed housing sites in the Township and Township of Marlboro. Mr. Jenkins provided his comments on the proposal.
3. Internal memorandum from Mr. Argaman, BWR, to Mr. Larry Torok (“Mr. Torok”), Division of Land Use Regulation, dated May 21, 2009 (2 pages). The Custodian certifies that this memorandum concerns comments on the Habitat suitability Determination for the proposed Township housing site.
4. E-mail chain between Mr. Argaman and Mr. Torok from June 4, 2009 to June 9, 2009 (2 pages). The Custodian certifies that the e-mail exchange consists of comments, opinions and shared evaluations. The Custodian certifies that although the privilege log identifies the record date as June 9, 2009, the actual string of e-mails consists of thirteen (13) individual e-mails, only seven (7) of the e-mails are dated June 9, 2009.
5. Internal e-mail chain between Ms. Amanda Dey (“Ms. Dey”), Division of Fish & Wildlife and Mr. Torok dated June 22, 2009 (1 page). The Custodian certifies that this e-mail chain concerns the draft review of the proposed housing site in the Township. The Custodian certifies that Ms. Dey provides comments and opinions in the body of the e-mail.
6. Draft Wastewater Management Plan Endangered & Threatened/Community Review (“WMP E&T/Community Review”) dated June 24, 2009. The Custodian certifies that this document is an internal review containing notes, advisory opinions and comments concerning the review of the application.⁹

The Custodian argues that the records set forth above are precisely the type of deliberative documents exempt from disclosure under OPRA. The Custodian argues that such records are both pre-decisional and were generated prior to adoption of a decision by DEP. The Custodian asserts that based on the foregoing he lawfully denied access to the records at issue above.

The Custodian notes that because the Complainant failed to inspect the records for which access was provided (totaling 181 pages) the Complainant cannot make a strong argument that the Township’s need for disclosure of the deliberative records overrides DEP’s interest in keeping said records confidential. The Custodian asserts that without reviewing the records made available for inspection, the Complainant is unable to weigh the information contained within the records available for inspection against the information assumed to be contained within the privileged records. The Custodian argues that the Complainant’s failure to review the 181 pages of records available for

⁹ The GRC notes that the dates of one of the memoranda and WMP E&T/Community Review differ slightly from the dates provided to the Complainant in the initial privilege log.
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inspection contradicts his position that exceptional circumstances exist in which the Complainant has a compelling need to access the thirteen (13) pages of records withheld from disclosure.

The Custodian reiterates that he responded within four (4) business days of receipt of the Complainant's OPRA request granting access to records. The Custodian certifies that he subsequently requested an extension on the seventh (7th) business day in order to search for additional records. The Custodian certifies that he responded within the extension of time, scheduling an appointment for the Complainant to review the records available for inspection and providing a privilege log of those records being withheld pursuant to N.J.S.A. 47:1A-1.1. The Custodian argues that he provided a privilege log although OPRA does not require a custodian to extend such a courtesy.

The Custodian asserts that based on the foregoing, the GRC should hold that the Custodian responded in a sufficient manner lawfully denying access to those records noted in the privilege log.

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 ... The terms shall *not include inter-agency or intra-agency advisory, consultative, or deliberative material.*" (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA 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.

In the instant complaint, the Complainant disputes the Custodian's denial of access to the six (6) records identified as exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1. The Custodian argued in the SOI that the six (6) records are precisely the type of deliberative documents exempt from access under OPRA. The Custodian argues that they are both pre-decisional and were generated prior to adoption of a decision by DEP.

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 GRC¹⁰ 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."

Therefore, pursuant to Paff, *supra*, the GRC must conduct an *in camera* review of the following to determine the validity of the Custodian's assertion that the record

¹⁰ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
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contains information which is exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1.:

- i. Freshwater Wetlands Location Plan dated February 28, 2007 with handwritten notes from internal application reviewing and evaluations.
- ii. Internal memorandum from Mr. David Jenkins (“Mr. Jenkins”), Chief of the DEP’s Endangered & Nongame Species Program to Mr. Avi Argaman (“Mr. Argaman”), Bureau of Watershed Regulation (“BWR”) dated February 23, 2009 (2 pages).
- iii. Internal memorandum from Mr. Argaman, BWR, to Mr. Larry Torok (“Mr. Torok”), Division of Land Use Regulation, dated May 21, 2009 (2 pages).
- iv. E-mail chain between Mr. Argaman and Mr. Torok from June 4, 2009 to June 9, 2009 (2 pages).
- v. Internal e-mail chain between Ms. Amanda Dey (“Ms. Dey”), Division of Fish & Wildlife and Mr. Torok dated June 22, 2009 (1 page).
- vi. Draft Wastewater Management Plan Endangered & Threatened/Community Review (“WMP E&T/Community Review”) dated June 24, 2009.

The GRC notes that the Complainant argued in the Denial of Access Complaint that the privilege log did not include the sworn information required by John Paff v. N.J. Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

In Paff, the court directed public agencies to provide the following information in response to Denial of Access Complaints filed with the GRC:

1. the search undertaken to satisfy the request
2. the documents found that are responsive to the request
3. the determination of whether the document or any part thereof is confidential and the source of the confidential information
4. a statement of the agency's document retention/destruction policy and the last date on which documents that may have been responsive to the request were destroyed

The GRC requires custodians provide the above information with the Custodian’s SOI in the form of a legal certification pursuant to N.J. Court Rule 1:4-4. *See O’Shea v. Township of West Milford (Passaic)*, GRC Complaint No. 2007-237 (Interim Order dated May 21, 2008)(citing to Bellan-Boyer v. NJ Department of Community Affairs, Commissioner’s Office, GRC Complaint No. 2007-114 (October 2007).

The GRC further notes that it will not address whether access to the 181 pages of records for which access was granted was unlawfully denied because such records are not at issue in this complaint. Specifically, the evidence of record indicates that the Complainant scheduled an appointment to review said records. Further, the Custodian certified in the SOI that the Complainant cancelled this appointment following receipt of the privilege log.

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. 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 following to determine the validity of the Custodian's assertion that the record contains information which is exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1:
 - i. Freshwater Wetlands Location Plan dated February 28, 2007 with handwritten notes from internal application reviewing and evaluations.
 - ii. Internal memorandum from Mr. David Jenkins, Chief of the New Jersey Department of Environmental Protection's Endangered & Nongame Species Program to Mr. Avi Argaman, Bureau of Watershed Regulation dated February 23, 2009 (2 pages).
 - iii. Internal memorandum from Mr. Avi Argaman, Bureau of Watershed Regulation, to Mr. Larry Torok, Division of Land Use Regulation, dated May 21, 2009 (2 pages).
 - iv. E-mail chain between Mr. Avi Argaman and Mr. Larry Torok from June 4, 2009 to June 9, 2009 (2 pages).
 - v. Internal e-mail chain between Ms. Amanda Dey, Division of Fish & Wildlife and Mr. Larry Torok dated June 22, 2009 (1 page).
 - vi. Draft Wastewater Management Plan Endangered & Threatened/Community Review ("WMP E&T/Community Review") dated June 24, 2009.
2. **The Custodian must deliver¹¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction index¹², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4¹³, that the records provided are the records 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.**

¹¹ 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.

¹² The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

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."

3. 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.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

March 22, 2011