



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

LORI GRIFA
Acting Commissioner

FINAL DECISION

April 8, 2010 Government Records Council Meeting

Russell Miller
Complainant

Complaint No. 2009-49

v.

Westwood Regional School District (Bergen)
Custodian of Record

At the April 8, 2010 public meeting, the Government Records Council (“Council”) considered the April 1, 2010 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian refunded to the Complainant \$2.65, representing the difference between the duplication costs charged the Complainant and the actual cost of duplication (\$2.35) via purchase order dated March 1, 2010 and provided a certification to the GRC that the actual cost of duplication of the requested audio tape was \$2.35 on March 3, 2010, the Custodian has complied with the Council’s February 23, 2010 Interim Order.
2. Although the Custodian violated N.J.S.A. 47:1A-5.b. and 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 pursuant to N.J.S.A. 47:1A-6, the Custodian certified that he provided the Complainant with a copy of the audio tape of the Board’s January 29, 2009 meeting on March 13, 2009 and timely complied with the Council’s February 23, 2010 Interim Order by promptly refunding the difference between the amount charged and the actual costs of duplication. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 8th Day of April, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: April 13, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 8, 2010 Council Meeting**

**Russell Miller¹
Complainant**

GRC Complaint No. 2009-49

v.

**Westwood Regional School District (Bergen)²
Custodian of Records**

Records Relevant to Complaint: Copy of an audio tape recording of the January 29, 2009 meeting of the Board of Education, including all questions and responses made during the public forum.³

Request Made: February 2, 2009

Response Made: February 3, 2009

Custodian: Keith Rosado

GRC Complaint Filed: February 5, 2009⁴

Background

February 23, 2010

Government Records Council's ("Council") Interim Order. At its February 23, 2010 public meeting, the Council considered the February 16, 2010 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. Because 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 advisory, consultative or deliberative (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.

¹ No legal representation listed on record

² Represented by the Law Office of Fogarty and Hara (Fairlawn, NJ).

³ The Complainant requested other records that are not the subject of this complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

2. Because the Custodian certified that he provided the Complainant with a copy of the audio tape of the Board's January 29, 2009 meeting on March 13, 2009, the Council declines to order disclosure of the requested record.
3. Pursuant to N.J.S.A. 47:1A-5.b. and Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Custodian must charge the actual cost of duplicating the requested record. As such, the Custodian's charge of \$5.00 for an audio recording of the requested public meeting is unreasonable and in violation of N.J.S.A. 47:1A-5.b. The Custodian must therefore charge the actual cost of the audio tape and shall not include the cost of labor or other overhead expenses associated with making the copy. To the extent that the actual cost of duplication of such audio tape is less than the \$5.00 per tape charged by the Custodian, the Custodian must refund the difference.
4. **The Custodian shall provide to the Council a certification of the actual costs associated with duplication of an audio tape, excluding labor or other overhead expenses associated with making the copy, and simultaneously provide certified confirmation of compliance with item #3 above, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director, within five (5) business days of receipt of the Council's Interim Order.**
5. 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 1, 2010

Council's Interim Order distributed to the parties.

March 3, 2010

Custodian's response to the Council's Interim Order. The Custodian certifies that the actual costs associated with duplication of the requested audio tape, excluding labor or other overhead expenses associated with making the copy, are \$2.35. The Custodian further certifies that he has refunded to the Complainant \$2.65, representing the difference between the duplication costs charged the Complainant and the actual cost of duplication (\$2.35) via purchase order dated March 1, 2010.

Analysis

Whether the Custodian complied with the Council's February 23, 2010 Interim Order?

On March 3, 2010, the second (2nd) business day following distribution of the Council's February 23, 2010 Interim Order, the Custodian provided a certification to the GRC that the actual cost of duplication of the requested audio tape was \$2.35, and also certified that he refunded to the Complainant \$2.65, representing the difference between the duplication costs charged the Complainant and the actual cost of duplication (\$2.35) via purchase order dated March 1, 2010.

Because the Custodian refunded to the Complainant \$2.65, representing the difference between the duplication costs charged the Complainant and the actual cost of duplication (\$2.35) via purchase order dated March 1, 2010 and provided a certification to the GRC that the actual cost of duplication of the requested audio tape was \$2.35 on March 3, 2010, the Custodian has complied with the Council's February 23, 2010 Interim Order.

Whether the Custodian's unlawful 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?

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ..." N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

"... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]..." N.J.S.A. 47:1A-7.e.

In the matter now before the Council, the evidence of record indicates that the Complainant requested an audio recording of a public meeting. The evidence of record further indicates that the Complainant's request did not require a substantial amount of manipulation or programming of information technology pursuant to N.J.S.A. 47:1A-5.d. Moreover, the Custodian admitted that the fee was based on the cost of the tape, as well as the time and labor required to produce the copy. OPRA provides that "the actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, *but shall not include the cost of labor or other overhead expenses* associated with making the copy..." (Emphasis added). N.J.S.A. 47:1A-5.b. The GRC determined that the Custodian's charge of \$5.00 each for an audio recording of the requested public meeting was unreasonable and in violation of N.J.S.A. 47:1A-5.b. See also Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006). Additionally, the Custodian 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. However, because the Custodian certified that he provided the Complainant with a copy of the audio tape of the Board's January 29, 2009 meeting on March 13, 2009, the Council declined to order disclosure of the requested record.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian

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

Although the Custodian violated N.J.S.A. 47:1A-5.b. and 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 pursuant to N.J.S.A. 47:1A-6, the Custodian certified that he provided the Complainant with a copy of the audio tape of the Board’s January 29, 2009 meeting on March 13, 2009 and timely complied with the Council’s February 23, 2010 Interim Order by promptly refunding the difference between the amount charged and the actual costs of duplication. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that

1. Because the Custodian refunded to the Complainant \$2.65, representing the difference between the duplication costs charged the Complainant and the actual cost of duplication (\$2.35) via purchase order dated March 1, 2010 and provided a certification to the GRC that the actual cost of duplication of the requested audio tape was \$2.35 on March 3, 2010, the Custodian has complied with the Council’s February 23, 2010 Interim Order.
2. Although the Custodian violated N.J.S.A. 47:1A-5.b. and 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 pursuant to N.J.S.A. 47:1A-6, the Custodian certified that he provided the Complainant with a copy of the audio tape of the Board’s January 29, 2009 meeting on March 13, 2009 and timely complied with the Council’s February 23, 2010 Interim Order by promptly refunding the difference between the amount charged and the actual costs of duplication. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

April 1, 2010



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GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
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CHRIS CHRISTIE
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LORI GRIFA
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INTERIM ORDER

February 23, 2010 Government Records Council Meeting

Russell Miller
Complainant

Complaint No. 2009-49

v.

Westwood Regional School District (Bergen)
Custodian of Record

At the February 23, 2010 public meeting, the Government Records Council (“Council”) considered the February 16, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because 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 advisory, consultative or deliberative (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.
2. Because the Custodian certified that he provided the Complainant with a copy of the audio tape of the Board’s January 29, 2009 meeting on March 13, 2009, the Council declines to order disclosure of the requested record.
3. Pursuant to N.J.S.A. 47:1A-5.b. and Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Custodian must charge the actual cost of duplicating the requested record. As such, the Custodian’s charge of \$5.00 for an audio recording of the requested public meeting is unreasonable and in violation of N.J.S.A. 47:1A-5.b. The Custodian must therefore charge the actual cost of the audio tape and shall not include the cost of labor or other overhead expenses associated with making the copy. To the extent that the actual cost of duplication of such audio tape is less than the \$5.00 per tape charged by the Custodian, the Custodian must refund the difference.



4. **The Custodian shall provide to the Council a certification of the actual costs associated with duplication of an audio tape, excluding labor or other overhead expenses associated with making the copy, and simultaneously provide certified confirmation of compliance with item #3 above, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director, within five (5) business days of receipt of the Council's Interim Order.**
5. 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 23rd Day of February, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: March 1, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 23, 2010 Council Meeting**

**Russell Miller¹
Complainant**

GRC Complaint No. 2009-49

v.

**Westwood Regional School District (Bergen)²
Custodian of Records**

Records Relevant to Complaint: Copy of an audio tape recording of the January 29, 2009 meeting of the Board of Education, including all questions and responses made during the public forum.³

Request Made: February 2, 2009

Response Made: February 3, 2009

Custodian: Keith Rosado

GRC Complaint Filed: February 5, 2009⁴

Background

February 2, 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.

February 3, 2009

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the first (1st) business day following receipt of such request. The Custodian states that access to the requested record is denied because pursuant to Westwood Regional School District Board of Education ("Board") policy, the audio tape recording is an administrative aid used to prepare the meeting minutes. The Custodian indicates that Board policy states that the recording is to be destroyed once the meeting minutes have been approved. The Custodian states that once Board meeting minutes are approved, the minutes are then published on the Westwood Regional School District's website. The Custodian further indicates that Board policy states that at no time is the recording to be disclosed to the public. The Custodian states that the request for the audio tape of the January 29, 2009 meeting is denied in accordance with the Board's policy.

¹ No legal representation listed on record

² Represented by the Law Office of Fogarty and Hara (Fairlawn, NJ).

³ The Complainant requested other records that are not the subject of this complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

February 5, 2009

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

- Complainant’s OPRA request dated February 2, 2009;
- E-mail from the Custodian to the Complainant dated February 3, 2009.⁵

The Complainant states that the Custodian unlawfully denied the Complainant access to the records requested. The Complainant agrees to mediate this complaint.

February 10, 2009

Offer of Mediation sent to both parties. The Custodian did not respond to the Offer of Mediation.

March 3, 2009

E-mail from the Custodian to the Complainant. The Custodian states that after further review and discussion with the Board’s attorney and the Borough of Westwood, it is clear that the policy needs to be revised. The Custodian also states that the policy will be amended at the next Board meeting. The Custodian states that a copy of the requested audio tape will be made available to the Complainant for a copying fee of \$5.00.

March 9, 2009

Letter from the Custodian to the Complainant. The Custodian restates the information relayed in the March 3, 2009 e-mail. The Custodian requests that the Complainant confirm that he will be picking up the copy of the audio tape of the January 29, Board meeting.

May 8, 2009

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

May 11, 2009

E-mail from the Custodian to the GRC. The Custodian indicates that he has released the requested record to the Complainant.

May 28, 2009

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for a Statement of Information on May 8, 2009 and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

June 3, 2009

Custodian’s SOI with the following attachments:

- Westwood Regional School District Policy Guide adopted December 14, 2006;

⁵ The Complainant included additional attachments that were not relevant to this adjudication.
Russell Miller v. Westwood Regional School District (Bergen), 2009 - 49 – Findings and Recommendations of the Executive Director

- Complainant’s OPRA request dated February 2, 2009;
- E-mail from the Custodian to the Complainant dated March 3, 2009;
- Letter from the Custodian to the Complainant dated March 9, 2009;
- U.S. Postal Service Return Receipt dated March 13, 2009;
- Westwood Regional School District Policy Guide adopted April 9, 2009.⁶

The Custodian certifies that he has provided the Complainant with the record requested. The Custodian further certifies that the Board has changed the policy that prohibited the Custodian from disclosing the record requested to the Complainant.

December 8, 2009

E-mail from the GRC to the Custodian. The GRC requests that the Custodian provide a legal certification indicating the date of disclosure and the copying fee assessed.

December 16, 2009

Facsimile transmission of the Custodian’s certification attaching Receipt No. 262934 dated March 13, 2009. The Custodian certifies that he disclosed the requested audio tape of the January 29, 2009 Board of Education meeting for a fee of \$5.00 on March 13, 2009. The Custodian also certifies that the copying fee was based on the cost of the blank tape and the time and labor required to produce a copy of the taped minutes.

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.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

⁶The Complainant included additional attachments that were not relevant to this adjudication.
Russell Miller v. Westwood Regional School District (Bergen), 2009 - 49 – Findings and Recommendations of the Executive Director

“...[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 Custodian responded to the Complainant’s OPRA request on the first (1st) business day denying access to the requested recording stating that, pursuant to the Board’s policy, the audio tape recording was an administrative aid used to prepare the meeting minutes. The Custodian stated that Board policy prohibits disclosure to the public. The Custodian contends that because the audio tape recording was used as an aid to create the agency’s official meeting minutes, said recording is exempt from disclosure as inter-agency or intra-agency advisory, consultative or deliberative material (“ACD”). OPRA excludes from the definition of a government record “inter-agency or intra-agency advisory, consultative or deliberative material.” N.J.S.A. 47:1A-1.1. It is evident that this phrase is intended to exclude from the definition of a government record the types of documents that are the subject of the “deliberative process privilege.”

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

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

The deliberative process privilege was discussed at length in In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000). There, the court addressed the question of whether the Commissioner of Insurance, acting in the capacity of Liquidator of a regulated entity, could protect certain records from disclosure which she claimed contained opinions, recommendations or advice regarding agency policy. *Id.* at 81. The court adopted a qualified deliberative process privilege based upon the holding of McClain v. College Hospital, 99 N.J. 346 (1985), Liquidation of Integrity, *supra*, 165 N.J. at 88. In doing so, the court noted that:

“[a] document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional. ... Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. ... Purely factual material that does not reflect deliberative processes is not protected. ... Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the "preponderating policy" and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.” (Citations omitted.) *Id.* at 84-85.

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

“[t]he initial burden falls on the state agency to show that the documents it seeks to shield are pre-decisional and deliberative in nature (containing opinions, recommendations, or advice about agency policies). Once the deliberative nature of the documents is established, there is a presumption against disclosure. The burden then falls on the party seeking discovery to show that his or her compelling or substantial need for the materials overrides the government's interest in non-disclosure. Among the considerations are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent discussion of contemplated government policies.” In Re Liquidation of Integrity, *supra*, 165 N.J. at 88, *citing McClain*, *supra*, 99 N.J. at 361-62.

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

- (1) The initial burden falls on the government agency to establish that matters are both *pre-decisional* and *deliberative*.
 - a. Pre-decisional means that the records were generated before an agency adopted or reached its decision or policy.

- b. Deliberative means that the record contains opinions, recommendations, or advice about agency policies or decisions.
 - i. Deliberative materials do not include purely factual materials.
 - ii. Where factual information is contained in a record that is deliberative, such information must be produced so long as the factual material can be separated from its deliberative context.
- c. The exemption covers recommendations, draft documents, proposals, suggestions, and other subjective documents *which reflect the personal opinions of the writer rather than the policy of the agency*.
- d. Documents which are protected by the privilege are those which *would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is only a personal position*.
- e. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves *whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency*.

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

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

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

In the instant matter, the Custodian denied access to the requested audio tape of the January 29, 2009 meeting of the Board of Education on the grounds that said audio tape is exempt from disclosure under the ACD exemption at N.J.S.A. 47:1A-1.1 because the tape is used as an aid to draft the official minutes of the Board of Education meeting. However, a recording of an agency's public meeting which is used to prepare the agency's official meeting minutes does not fall within the class of records protected by the deliberative process privilege and the ACD exemption in OPRA.

The information contained on a recording of a public meeting does not inaccurately reflect or prematurely disclose the views of the agency because any agency

views expressed at a public meeting are made in the context of a public forum: the meeting itself. A recording is merely a mechanical device that provides an unbiased, purely factual account of the public meeting; such recording does not reflect a personal opinion. A record that contains purely factual components may be exempt from disclosure under the ACD exemption in OPRA if the record is used in a decision-making process and its disclosure would reveal the deliberations that occurred during that process. Education Law Center, supra.

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. The agency's use of such a recording is limited to the preparation of the draft meeting minutes; 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.

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 meeting. The custodian denied the complainant access to the requested record on the basis that the recording was an aid used 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.

Because 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.

However, because the Custodian certified that he provided the Complainant with a copy of the audio tape of the Board's January 29, 2009 meeting on March 13, 2009, the Council declines to order disclosure of the requested record.

Whether the Custodian violated OPRA by charging a copy fee that includes time and labor to produce a copy of the audio tape of the public meeting requested?

OPRA sets forth the amount to be charged for a government record in printed form. Specifically, OPRA states:

“[a] copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the *actual cost* of duplicating the record.

Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following:

- First page to tenth page, \$0.75 per page;
- Eleventh page to twentieth page, \$0.50 per page;
- All pages over twenty, \$0.25 per page.

The actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy except as provided for in subsection c. of this section. If a public agency can demonstrate that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record.” (Emphasis added). N.J.S.A. 47:1A-5.b.

OPRA also states that:

“[a] custodian shall permit access to a government record and *provide a copy thereof in the medium requested* if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium...” (Emphasis added.) N.J.S.A. 47:1A-5.d.

The Custodian certified that he disclosed the requested audio tape of the January 29, 2009 Board of Education meeting for a copying fee of \$5.00 on March 13, 2009. The Custodian also certified that the copying fee assessed was based on the cost of the blank tape and the time and labor required to produce a copy of the taped minutes.

While OPRA provides that paper copies of government records may be obtained upon payment of the actual cost of duplication not to exceed the enumerated rates of \$0.75/0.50/0.25 per page (N.J.S.A. 47:1A-5.b.), the Act does not provide explicit copy rates for any other medium. N.J.S.A. 47:1A-5.b. goes on to state that the actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy. Additionally, OPRA provides that when a request for a record in a medium not routinely used by an agency, not routinely developed or maintained by an agency, or requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the *actual cost of duplication*, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both. N.J.S.A. 47:1A-5.d.

Thus, it appears that the Legislature included the central theme throughout OPRA that duplication cost should equal actual cost and when actual cost cannot be applied, the duplication cost should be reasonable. See Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006).

In Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Township of Edison charged \$55.00 for a computer diskette containing Township Council meeting minutes. The plaintiff asserted that the fee was excessive and not related to the actual cost of duplicating the record. The defendant argued that the plaintiff's assertion is moot because the fee was never imposed and the requested records were available on the Township's website free of charge. The court held that "...the appeal is not moot, and the \$55.00 fee established by the Township of Edison for duplicating the minutes of the Township Council meeting onto a computer diskette is unreasonable and unsanctioned by explicit provisions of OPRA." The court stated that:

"[i]n adopting OPRA, the Legislature made clear 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 accorded [under OPRA] as amended and supplemented, shall be construed in favor of the public's right of access.' N.J.S.A. 47:1A-1. The imposition of a facially inordinate fee for copying onto a computer diskette information the municipality stores electronically places an unreasonable burden on the right of access guaranteed by OPRA, and violates the guiding principle set by the statute that a fee should reflect the actual cost of duplication. N.J.S.A. 47:1A-5.b."

The court also stated that "...although plaintiffs have obtained access to the actual records requested, the legal question remains viable, because it is clearly capable of repetition. See New Jersey Div. of Youth & Family Servs. v. J.B., 120 N.J. 112, 118-19, 576 A.2d 261 (1990)." Further, the court stated that "...the fee imposed by the Township of Edison creates an unreasonable burden upon plaintiff's right of access and is not rationally related to the actual cost of reproducing the records."

In this complaint, the Complainant requested an audio recording of a public meeting. The evidence of record indicates that the Complainant's request does not require a substantial amount of manipulation or programming of information technology pursuant to N.J.S.A. 47:1A-5.d. Moreover, the Custodian has admitted that the fee was based on the cost of the tape, as well as the time and labor required to produce the copy. OPRA provides that "the actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, *but shall not include the cost of labor or other overhead expenses* associated with making the copy..." (Emphasis added). N.J.S.A. 47:1A-5.b.

Therefore, pursuant to N.J.S.A. 47:1A-5.b and Libertarian Party of Central New Jersey, *supra*, the Custodian must charge the actual cost of duplicating the requested records. As such, the Custodian's charge of \$5.00 each for an audio recording of the

requested public meeting is unreasonable and in violation of N.J.S.A. 47:1A-5.b. The Custodian must therefore charge the actual cost of the audio tapes and shall not include the cost of labor or other overhead expenses associated with making the copy. To the extent that the actual cost of duplication of such audio tape is less than the \$5.00 per tape charged by the Custodian, the Custodian must refund the difference.

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

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because 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 advisory, consultative or deliberative (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.
2. Because the Custodian certified that he provided the Complainant with a copy of the audio tape of the Board's January 29, 2009 meeting on March 13, 2009, the Council declines to order disclosure of the requested record.
3. Pursuant to N.J.S.A. 47:1A-5.b. and Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Custodian must charge the actual cost of duplicating the requested record. As such, the Custodian's charge of \$5.00 for an audio recording of the requested public meeting is unreasonable and in violation of N.J.S.A. 47:1A-5.b. The Custodian must therefore charge the actual cost of the audio tape and shall not include the cost of labor or other overhead expenses associated with making the copy. To the extent that the actual cost of duplication of such audio tape is less than the \$5.00 per tape charged by the Custodian, the Custodian must refund the difference.
4. **The Custodian shall provide to the Council a certification of the actual costs associated with duplication of an audio tape, excluding labor or other overhead expenses associated with making the copy, and simultaneously provide certified confirmation of compliance with item #3 above, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director, within five (5) business days of receipt of the Council's Interim Order.**

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

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In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

February 16, 2010