



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
Commissioner

FINAL DECISION

April 30, 2013 Government Records Council Meeting

Gary S. DeMarzo
Complainant

Complaint No. 2009-61

v.

City of Wildwood (Cape May)
Custodian of Record

At the April 30, 2013 public meeting, the Government Records Council (“Council”) considered the April 23, 2013 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, accepts the Administrative Law Judge’s Initial Decision dated March 18, 2013, which concludes: “*Based on the [findings of fact and conclusions of law], I hereby **FIND** that the unlawful denial of access by Christopher Wood was not knowing and willful. Based on this finding, I **ORDER** that the petitioner’s complaint against Christopher Wood and the City of Wildwood be **DISMISSED.**”*

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 30th Day of April, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

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

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 2, 2013



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 30, 2013 Council Meeting**

Gary S. DeMarzo¹
Complainant

GRC Complaint No. 2009-61

v.

City of Wildwood (Cape May)²
Custodian of Records

Record Relevant to Complaint:³ Copy of an Emergency Software Products (“ESP”) inspection report for 439 Tacony Road in Wildwood.

Request Made: December 4, 2008

Response Made: December 15, 2008

Custodian: Christopher H. Wood, Clerk

GRC Complaint Filed: February 26, 2009⁴

Background

November 30, 2010 Council Meeting:

On November 30, 2010, the Government Records Council (“Council”) considered the November 23, 2010 *Reconsideration* 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 because the Custodian failed to establish in his motion for reconsideration of the Council’s July 27, 2010 Interim Order that: 1) the GRC’s decision is based upon a “palpably incorrect or irrational basis”; or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing administratively of the complaint, said motion for reconsideration is denied. *See Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996), *D’Atria v. D’Atria*, 242 N.J. Super. 392 (Ch. Div. 1990) and In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). As such, the Council re-issues its July 27, 2010 decision to refer this complaint to the Office of Administrative Law for determination of whether the custodian knowingly and

¹ No legal representation listed on record.

² Represented by Marcus Karavan Esq. (Wildwood, NJ).

³ There were other records requested that are not relevant to this complaint.

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

willfully violated OPRA and unreasonably denied access under the totality of the circumstances.⁵

December 3, 2010 Interim Order:

On this date the Council's Interim Order was distributed to the parties.

May 2, 2011 Complaint to Office of Administrative Law:

On this date the complaint is forwarded to the Office of Administrative Law ("OAL").

March 18, 2013 Initial Decision:

On this date the Administrative Law Judge ("ALJ") delivered an Initial Decision after conducting a hearing. After reviewing the procedural history and facts of the complaint, the ALJ determined in relevant part that:

"In this matter the GRC specifically limited the issue as to whether the custodian has provided the ESP report to petitioner, and whether the custodian's denial of access amounted to a knowing and willful violation of OPRA and an unreasonable denial under the circumstances.

The record demonstrates, and the parties acknowledge, that petitioner (sic) has provided the ESP report to petitioner. The record also reflects that petitioner has failed to meet its burden of proving, by a preponderance of credible evidence, that the custodian's denial of access was knowing and willful.

*Accordingly, I **CONCLUDE** that Christopher Wood did not knowingly and willfully violate OPRA and did not unreasonably deny access under the totality of the circumstances.*

⁵ The Council's July 27, 2010 Interim Order provided: **1.** Because the Custodian failed and refused to comply with the terms of the Council's May 27, 2010 Interim Order by not disclosing a copy of the record relevant to the complaint in unredacted form to the Complainant and/or by failing to provide certified confirmation of compliance to the Executive Director within five (5) business days from receipt of the Order, the Custodian, Christopher H. Wood, is in contempt of the Council's May 27, 2010 Interim Order. **2.** Because there is an allegation by the Complainant that his denial of access to the requested record was politically motivated, and because the Council found that the Custodian did unlawfully withhold the requested record from disclosure, and because the Custodian failed to comply with the terms of the Council's February 23, 2010 Interim Order by not providing the Council with a document index or certify that the document provided was the document requested by the Council, and because the Custodian failed and refused to comply with the terms of the Council's May 27, 2010 Interim Order by not disclosing a copy of the unredacted record to the Complainant and/or failing to provide certified confirmation of compliance to the Executive Director within five (5) business days from receipt of said Order, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

DECISION AND ORDER

*Based on the foregoing, I hereby **FIND** that the unlawful denial of access by Christopher Wood was not knowing and willful. Based on this finding, I **ORDER** that the petitioner's complaint against Christopher Wood and the City of Wildwood be **DISMISSED**.*

*I hereby **FILE** my initial decision with the **GOVERNMENT RECORDS COUNCIL** for consideration.*

*This recommended decision may be adopted, modified or rejected by the **GOVERNMENT RECORDS COUNCIL**, who by law is authorized to make a final decision in this matter. If the Government Records Council does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.*

Analysis

Whether the GRC should adopt, modify or reject the ALJ's Initial Decision dated March 18, 2013?

The ALJ's findings of fact are entitled to deference from the GRC because they are based upon the ALJ's determination of the credibility of the parties.

"The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility." In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div.), *certif. denied* 121 N.J. 615 (1990). The Appellate Division affirmed this principle, underscoring that, "under existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor-based judgments." Whasun Lee v. Board of Education of the Township of Holmdel, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. "When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ's credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole." Cavalieri v. Board of Trustees of Public Employees Retirement System, 368 N.J. Super. 527, 537 (App. Div. 2004).

The ultimate determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them. State, Dep't of Health v. Tegnazian, 194 N.J. Super. 435, 442-43 (App. Div. 1984). The purpose of such findings "is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor." *Id.* at 443. Additionally, the sufficiency of evidence "must take into account whatever in the record fairly detracts from its weight"; the test is not for the courts to read only one side of the case and, if they find any evidence there,

the action is to be sustained and the record to the contrary is to be ignored (citation omitted). St. Vincent's Hospital v. Finley, 154 N.J. Super. 24, 31 (App. Div. 1977).

Here, the ALJ fairly summarized the testimony and evidence, explaining how he weighed the proofs before him and explaining why he credited, or discredited, certain testimony. The ALJ's conclusions are clearly aligned and consistent with those credibility determinations. As such, the Council finds that it can ascertain which testimony the ALJ accepted as fact, and further, finds that those facts provide a reasonable basis for the ALJ's conclusions.

Therefore, the Council accepts the ALJ's Initial Decision dated March 18, 2013, which concludes: "*Based on the [findings of fact and conclusions of law], I hereby **FIND** that the unlawful denial of access by Christopher Wood was not knowing and willful. Based on this finding, I **ORDER** that the petitioner's complaint against Christopher Wood and the City of Wildwood be **DISMISSED.***"

Conclusions and Recommendations

The Executive Director respectfully recommends the Council accepts the ALJ's Initial Decision dated March 18, 2013, which concludes: "*Based on the [findings of fact and conclusions of law], I hereby **FIND** that the unlawful denial of access by Christopher Wood was not knowing and willful. Based on this finding, I **ORDER** that the petitioner's complaint against Christopher Wood and the City of Wildwood be **DISMISSED.***"

Prepared By: John E. Stewart, Esq.

Approved By: Brandon D. Minde, Esq.
Executive Director

April 23, 2013



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
Commissioner

INTERIM ORDER

November 30, 2010 Government Records Council Meeting

Gary S. DeMarzo
Complainant

Complaint No. 2009-61

v.

City of Wildwood (Cape May)
Custodian of Record

At the November 30, 2010 public meeting, the Government Records Council (“Council”) considered the November 23, 2010 *Reconsideration* 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 because the Custodian has failed to establish in his motion for reconsideration of the Council’s July 27, 2010 Interim Order that 1) the GRC’s decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing administratively of the complaint, said motion for reconsideration is denied. *See Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996), *D’Atria v. D’Atria*, 242 N.J. Super. 392 (Ch. Div. 1990) and In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). As such, the Council re-issues its July 27, 2010 decision to refer this complaint to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 30th Day of November, 2010

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: December 3, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL
*Reconsideration***

**Supplemental Findings and Recommendations of the Executive Director
November 30, 2010 Council Meeting**

**Gary S. DeMarzo¹
Complainant**

GRC Complaint No. 2009-61

v.

**City of Wildwood (Cape May)²
Custodian of Records**

Record Relevant to Complaint:³ Copy of an Emergency Software Products (“ESP”) inspection report for 439 Tacony Road in Wildwood.

Request Made: December 4, 2008

Response Made: December 15, 2008

Custodian: Christopher H. Wood, Clerk

GRC Complaint Filed: February 26, 2009⁴

Background

July 27, 2010

At the July 27, 2010 public meeting, the Government Records Council (“Council”) considered the July 20, 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, found that:

1. Because the Custodian failed and refused to comply with the terms of the Council’s May 27, 2010 Interim Order by not disclosing a copy of the record relevant to the complaint in unredacted form to the Complainant and/or by failing to provide certified confirmation of compliance to the Executive Director within five (5) business days from receipt of the Order, the Custodian, Christopher H. Wood, is in contempt of the Council’s May 27, 2010 Interim Order.

2. Because there is an allegation by the Complainant that his denial of access to the requested record was politically motivated, and because the Council found that the Custodian did unlawfully withhold the requested record from disclosure, and because the Custodian failed to comply with the terms of the

¹ No legal representation listed on record.

² Represented by Daniel Gallagher, Esq. (Atlantic City, NJ).

³ There were other records requested that are not relevant to this complaint.

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

Council's February 23, 2010 Interim Order by not providing the Council with a document index or certify that the document provided was the document requested by the Council, and because the Custodian failed and refused to comply with the terms of the Council's May 27, 2010 Interim Order by not disclosing a copy of the unredacted record to the Complainant and/or failing to provide certified confirmation of compliance to the Executive Director within five (5) business days from receipt of said Order, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

July 28, 2010

Council's Interim Order distributed to the parties.

July 28, 2010

E-mail from the Custodian to the GRC. The Custodian informs the GRC that attached to his e-mail is verification that he sent the unredacted record to the Complainant pursuant to Paragraph 2 of the Council's May 27, 2010 Interim Order. Attached to the e-mail is a copy of page one (1) of the Council's May 27, 2010 Interim Order, the unredacted record relevant to the complaint and a copy of return receipt number 7009 2820 0001 4319 1153 for certified mail. The article is addressed to Gary DeMarzo, 503 W. Burk Avenue, Wildwood, NJ 08260 and it is postmarked June 19, 2010. The article is signed and printed received by "DEMARZO." The Custodian states that he also sent a copy of the same material to the Complainant and to the GRC via regular mail. The Custodian asks the GRC if he should file a request for reconsideration.

July 29, 2010

E-mail from the GRC to the Custodian. The GRC informs the Custodian that he may either appeal the decision to the Superior Court or file a request for reconsideration with the GRC pursuant to *N.J.A.C. 5:105 et seq.*

August 2, 2010

Custodian's request for reconsideration with the following attachments:

- Copy of the two (2) page unredacted record relevant to the complaint marked "#1" and dated January 28, 2009.
- Copy of the Complainant's Detail Summary (page 3) of the Denial of Access Complaint in this matter marked "#2," undated.⁵
- Copy of page one (1) of the Council's Interim Order marked "#1" and dated May 27, 2010.
- Copy of return receipt number 7009 2820 0001 4319 1153 for certified mail marked "#1" and postmarked June 19, 2010.

⁵ The Denial of Access Complainant in this matter was signed on page 2 by the Complainant and dated February 24, 2009.

The Custodian asserts “mistake” as the reason the Council’s July 27, 2010 Interim Order warrants reconsideration. The Custodian makes five (5) enumerated points in support of his reason for reconsideration of the Order:

First, the Custodian states that he disclosed to the Complainant the record that the Council ordered him to disclose via certified and regular mail.

Second, the Custodian contends that he sent a copy of the same material that was mailed to the Complainant by certified mail to the GRC via regular mail.

Third, the Custodian asserts that the Complainant alleged that the denial of the record he requested was politically motivated and the Custodian states that this allegation was noted by the Council in its July 27, 2010 Order.⁶ The Custodian further asserts that the Complainant stated in his Denial of Access Complaint that:

“...I will emphasize that this action is **NOT** bourn [sic] by the City Clerk, Mr. Christopher H. Wood. Mr. Wood has conducted himself with the utmost professionalism. This problem is solely bourn [sic] by the Captain Mark Gose, City Solicitor, Mr. Marcus Karavan, Commissioner William Davenport and Mayor Ernest Troiano, Jr...” (Emphasis in original.)

Fourth, the Custodian states that since the Complainant filed this complaint, Gose has been reassigned, Davenport and Troiano were recalled from elected office, Karavan was relieved of his duties as the Solicitor and the Complainant is now Mayor. The Custodian states that therefore “...[t]he people whom the Complainant alleged were politically motivated against him are gone, yet the Records Council has come to the conclusion that the torch of these alleged and unsubstantiated ‘politically motivated actions’ has been passed on to me. I take exception to the GRC’s conclusion...”

Fifth, the Custodian contends that he has followed all of the Council’s Orders. The Custodian asserts that he supplied the GRC with the unredacted record for an *in camera* examination in a timely fashion and, upon being ordered by the Council to do so, disclosed the record to the Complainant. The Custodian concludes that he has therefore fulfilled his responsibilities with regard to this complaint.

August 27, 2010

E-mail from the GRC to the Complainant. The GRC directs the Complainant to provide a certification to the GRC which avers (a) whether the Complainant has or has not received the requested record, (b) if the record was received, the date of receipt and (c) whether the record was redacted or unredacted.

⁶ The Custodian is making reference to a statement made by the Complainant in his Denial of Access Complaint, wherein the Complainant states, “...it seems nothing more than a ‘Political Domestic Dispute’ but the denial of public information has become a recurring theme with these [members of city government].” The Custodian also cites to the Supplemental Findings and Recommendations of the Executive Director dated July 27, 2010 at 3, 4.

August 27, 2010

E-mail from the Complainant to the GRC. The Complainant captions his e-mail “WOOD IS A LIAR.” (Emphasis in original.) The Complainant states that the Custodian’s request for reconsideration is “sanctimonious drivel.” The Complainant further states that Superior Court Judge Batten also called the Custodian a liar. The Complainant states that he will send a letter to the GRC on August 31, 2010.

August 27, 2010

E-mail from the GRC to the Complainant. The GRC informs the Complainant that his submission to the GRC on August 31, 2010 must be in the form of a legal certification. The GRC attaches a blank certification form as a guide.⁷

Analysis

Whether the Custodian has met the required standard for reconsideration of the Council’s July 27, 2010 Interim Order?

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

In the matter before the Council, the Council’s July 27, 2010 Interim Order was distributed via overnight delivery to the parties on July 28, 2010. The Custodian’s request for reconsideration of said Order dated August 2, 2010 was received by the GRC on August 6, 2010. Accordingly, the Custodian’s request for reconsideration of the Council’s Interim Order was filed with the GRC six (6) business days from receipt of the Council’s decision.

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” *D’Atria v. D’Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g., Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. *D’Atria, supra*, 242 N.J. Super. at 401. ‘Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an

⁷ The Complainant never responded to the GRC’s request for a certification.
Gary DeMarzo v. City of Wildwood (Cape May), 2009-61 – Supplemental Findings and Recommendations of the Executive Director - Reconsideration

overstatement.’ *Ibid.*” In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

The Council in its July 27, 2010 Interim Order recommended that this matter be forwarded to the Office of Administrative Law (“OAL”) for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances because:

1. There was an allegation by the Complainant that his denial of access to the requested record was politically motivated.
2. The Council found that the Custodian unlawfully withheld the requested record from disclosure.
3. The Custodian failed to comply with the terms of the Council’s February 23, 2010 Interim Order by not providing the Council with a document index or certify that the document provided was the document requested by the Council.
4. The Custodian failed and refused to comply with the terms of the Council’s May 27, 2010 Interim Order by not disclosing a copy of the unredacted record to the Complainant and/or failing to provide certified confirmation of compliance to the Executive Director within five (5) business days from receipt of said Order.

The Custodian argues five (5) enumerated points in support of his motion for reconsideration. In his first two (2) points, the Custodian asserts that he did disclose to the Complainant the record that the Council ordered him to disclose via certified and regular mail and sent a copy of the same material that was mailed to the Complainant by certified mail to the GRC via regular mail. The Council’s May 27, 2010 Interim Order, however, provided that the Custodian ***must disclose the unredacted record to the Complainant and simultaneously provide certified confirmation of compliance to the Executive Director within five (5) business days from receipt of the Council’s Order.*** (Emphasis added.) The Executive Director never received the Custodian’s submission containing his certification, moreover notwithstanding this fact, the Custodian failed to disclose the unredacted record to the Complainant within five (5) business days as ordered.

The Custodian received the Council’s May 27, 2010 Interim Order on June 2, 2010.⁸ Accordingly, the fifth (5th) business day from the Custodian’s receipt of the Order was June 9, 2010. The copy of the return receipt for certified mail marked “#1” that the Custodian attached to his request for reconsideration was postmarked June 19, 2010. Therefore the Custodian, if his statement is accurate, did not disclose the record to the Complainant until the thirteenth (13th) business day from receipt of the Council’s Order. The Custodian also stated in his request for reconsideration that he mailed the same material to the GRC that he mailed to the Complainant. The material that the Custodian allegedly mailed to the Complainant was attached to his request for reconsideration and

⁸ United Parcel Service Proof of Delivery reveals that a copy of the Council’s Order was delivered to the Custodian’s place of business on June 2, 2010 at 10:38 a.m.
Gary DeMarzo v. City of Wildwood (Cape May), 2009-61 – Supplemental Findings and Recommendations of the Executive Director - Reconsideration 5

marked “#1” and “#2.” The material did not include a certification of compliance. By not disclosing a copy of the unredacted record to the Complainant and failing to provide certified confirmation of compliance to the Executive Director in a timely manner, the Custodian was in contempt of the Council’s Order.

As such, the Council did not err in finding that the Custodian failed and refused to comply with the terms of the Council’s May 27, 2010 Interim Order by not disclosing a copy of the unredacted record to the Complainant and failing to provide certified confirmation of compliance to the Executive Director within five (5) business days from receipt of said Order. Further, the Custodian has failed to prove that the Council’s decision was based upon a palpably incorrect or irrational basis or that it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. Moreover, the Custodian failed to show that the Council acted in an arbitrary, capricious or unreasonable manner.

In the Custodian’s next two (2) points in support of his motion for reconsideration, the Custodian asserted that the people the Complainant alleged were politically motivated against the Complainant have been reassigned or are no longer municipal officials. The Custodian asserted that the Council now blames the Custodian for denying the requested records to the Complainant for political reasons. The Council, however, did not find that the Custodian was or was not politically motivated to withhold any otherwise disclosable records from disclosure. Rather, the GRC stated that there was “...an *allegation by the Complainant* that his denial of access to the requested record was politically motivated...” (Emphasis added.) Moreover, when the Complainant filed this complaint, he stated he was the Department Head for the Offices of Revenue and Finance, which included the Office of the City Clerk in Wildwood. As such, the Complainant knew, or should have known, that under OPRA the City Clerk is vested with the legal responsibility of granting and denying access in accordance with the law.

Because the Complainant alleged in his complaint that his denial of access to the requested record was politically motivated and there is no evidence of record to contradict the Complainant’s allegation, and because a politically motivated denial of access to records is highly relevant to a knowing and willful denial of access, the Council did not err by concluding that this issue militates toward one of the circumstances that an Administrative Law Judge should consider when weighing the likelihood of knowing and willful conduct.

Accordingly, the Custodian has failed to prove that the Council’s decision with respect to this issue was based upon a palpably incorrect or irrational basis or that it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. Further, the Custodian failed to show that the Council acted in an arbitrary, capricious or unreasonable manner.

In his final point, the Custodian asserted that he complied with all of the Council’s Orders. The Custodian stated that he supplied the GRC with the unredacted record for an *in camera* examination in a timely fashion and, upon being ordered by the Council to do so, disclosed the record to the Complainant.

The evidence of record reveals, however, that the Custodian did not comply with all of the Council's Orders. With respect to the Council's February 23, 2010 Interim Order, the Custodian did deliver the unredacted document to the GRC in a timely manner but the Council determined that:

"Because the Custodian failed to provide the Council with a document or redaction index and failed to certify that the document provided was the document requested by the Council for *in camera* inspection, the Custodian has failed to comply with the terms of the Council's February 23, 2010 Interim Order."

The Custodian dismissed his failure to comply with the Council's Order by stating, "...[t]he fact that I failed to provide a redaction index for a TWO PAGE document is pretty funny. I could see needing a redaction index for a 20-page documents (sic), or a forty page documents (sic), but a TWO page document?! Come on!" (Emphasis in original.)⁹

Although the Custodian views the requirement of a document index for less than a multiple-page document to be inconsequential, the New Jersey Superior Court has determined otherwise. In Paff v. Department of Labor, 392 N.J. Super. 334, 341 (App. Div. 2007), the court stated:

"The index is essentially a 'privilege log' that must provide sufficient information 'respecting the basis of the privilege-confidentiality-exception claim vis-à-vis *each* document.' Hartz Mountain Indus., Inc. v. N.J. Sports & Exposition Auth., 369 N.J. Super. 175, 185, 848 A.2d 793 (App., Div.), *certif. denied*, 182 N.J. 147, 862 A.2d 56 (2004). An accurate index is necessary for substantive review by the requesting party as well as the reviewing court..." (Emphasis added.)

With respect to the Council's May 27, 2010 Interim Order, the Council determined that the Custodian did not disclose the unredacted record to the Complainant and did not simultaneously provide certified confirmation of compliance to the Executive Director within five (5) business days from receipt of the Council's Order.

In his August 2, 2010 request for reconsideration, the Custodian stated that he did disclose the unredacted record to the Complainant and attached a certified mail receipt which he alleged is the receipt for delivery of said record to the Complainant. The Complainant, regarding the Custodian's request for reconsideration, stated, "...[the Custodian] is a liar."¹⁰ Because the GRC asked both parties for a certification with respect to delivery of the record and they refused to provide the GRC with such a certification, the ALJ must determine upon hearing the testimony whether the record was indeed delivered. This issue, therefore, remains unsettled.

⁹ Comments made by the Custodian in an e-mail to the GRC dated June 7, 2010.

¹⁰ This statement was contained in the Complainant's August 27, 2010 e-mail replying to the GRC's inquiry regarding whether the Complainant received the requested record from the Custodian.
Gary DeMarzo v. City of Wildwood (Cape May), 2009-61 – Supplemental Findings and Recommendations of the Executive Director - Reconsideration

It is undisputed, however, that the Custodian never delivered certified confirmation of compliance to the Executive Director, much less within the time provided. By failing to comply, at a minimum, with this provision of the Council's May 27, 2010 Interim Order, the Custodian cannot claim to have complied with the Council's Order.

Accordingly, the Custodian did not comply with all of the Council's Orders because the Custodian failed to comply with the terms of the Council's February 23, 2010 Interim Order by not providing the Council with a document index or certify that the document provided was the document requested by the Council and the Custodian failed to comply with the terms of the Council's May 27, 2010 Interim Order by not disclosing a copy of the unredacted record to the Complainant and/or provide certified confirmation of compliance to the Executive Director within five (5) business days from receipt of said Order.

Therefore, because the Council did not err in finding that the Custodian failed to comply with the Council's Interim Orders dated February 23, 2010 and May 27, 2010, the Custodian has failed to prove that the Council's decision was based upon a palpably incorrect or irrational basis or that it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. Moreover, the Custodian failed to show that the Council acted in an arbitrary, capricious or unreasonable manner with respect to these issues

As the moving party, the Custodian was required to establish that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra*. The Custodian failed to do so. The Custodian has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in reaching its decision. *See D'Atria, supra*.

Therefore, because the Custodian has failed to establish in his motion for reconsideration of the Council's July 27, 2010 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing administratively of the complaint, said motion for reconsideration is denied. *See Cummings, supra, D'Atria, supra, and Comcast Cablevision, supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Custodian has failed to establish in his motion for reconsideration of the Council's July 27, 2010 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in disposing administratively of the complaint, said motion for reconsideration is denied. *See Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996), *D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990) and *In The*

Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). As such, the Council re-issues its July 27, 2010 decision to refer this complaint to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

November 23, 2010



State of New Jersey
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Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

INTERIM ORDER

July 27, 2010 Government Records Council Meeting

Gary S. DeMarzo
Complainant

Complaint No. 2009-61

v.

City of Wildwood (Cape May)
Custodian of Record

At the July 27, 2010 public meeting, the Government Records Council ("Council") considered the July 20, 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 failed and refused to comply with the terms of the Council's May 27, 2010 Interim Order by not disclosing a copy of the record relevant to the complaint in unredacted form to the Complainant and/or by failing to provide certified confirmation of compliance to the Executive Director within five (5) business days from receipt of the Order, the Custodian, Christopher H. Wood, is in contempt of the Council's May 27, 2010 Interim Order.
2. Because there is an allegation by the Complainant that his denial of access to the requested record was politically motivated, and because the Council found that the Custodian did unlawfully withhold the requested record from disclosure, and because the Custodian failed to comply with the terms of the Council's February 23, 2010 Interim Order by not providing the Council with a document index or certify that the document provided was the document requested by the Council, and because the Custodian failed and refused to comply with the terms of the Council's May 27, 2010 Interim Order by not disclosing a copy of the unredacted record to the Complainant and/or failing to provide certified confirmation of compliance to the Executive Director within five (5) business days from receipt of said Order, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.



Interim Order Rendered by the
Government Records Council
On The 27th Day of July, 2010

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: July 28, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
July 27, 2010 Council Meeting**

Gary S. DeMarzo¹
Complainant

GRC Complaint No. 2009-61

v.

City of Wildwood (Cape May)²
Custodian of Records

Record Relevant to Complaint:³ Copy of an Emergency Software Products (“ESP”) inspection report for 439 Tacony Road in Wildwood.

Request Made: December 4, 2008

Response Made: December 15, 2008

Custodian: Christopher H. Wood, Clerk

GRC Complaint Filed: February 26, 2009⁴

Background

May 27, 2010

At the May 27, 2010 public meeting, the Government Records Council (“Council”) considered the May 20, 2010 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Custodian failed to provide the Council with a document or redaction index and failed to certify that the document provided was the document requested by the Council for *in camera* inspection, the Custodian has failed to comply with the terms of the Council’s February 23, 2010 Interim Order.

2. Because the *in camera* examination of the Emergency Software Products inspection report for 439 Tacony Road revealed the Custodian unlawfully denied the Complainant access to said record pursuant to N.J.S.A. 47:1A-6., the Custodian must disclose the unredacted record to the Complainant within five (5) business days of the Council’s Interim Order.

¹ No legal representation listed on record.

² No legal representation listed on record.

³ There were other records requested that are not relevant to this complaint.

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

3. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in paragraph 2 above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

June 1, 2010

Council’s Interim Order distributed to the parties.

June 7, 2010

E-mail from the Custodian to the GRC. The Custodian informs the GRC that he plans to provide the requested record to the Complainant and copy the GRC pursuant to the Council’s Interim Order. The Custodian states that his failure to provide a redaction index for a two (2) page document is “pretty funny.”⁵ The Custodian also criticizes the GRC at length because the GRC’s priorities and goals do not meet with the Custodian’s approval.

Analysis

Whether the Custodian complied with the Council’s May 27, 2010 Interim Order?

Because the *in camera* examination of the record relevant to the complaint revealed the record was not exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. and was not otherwise exempt from disclosure under N.J.S.A. 47:1A-3.a. because it did not pertain to an investigation in progress, the Council found that the Custodian unlawfully denied the Complainant access to the record and by Interim Order dated May 27, 2010, directed the Custodian to disclose a copy of the unredacted record to the Complainant within five (5) business days of said Order.

The Custodian knew he had an obligation to comply with the terms of the Council’s May 27, 2010 Interim Order because he acknowledged in correspondence to the GRC dated June 7, 2010, that he was in receipt of the Order and that his plan was to provide the requested record to the Complainant and send a copy to the GRC. Notwithstanding his acknowledged obligation to comply with the Council’s Order, the Custodian failed and refused to do so by not disclosing a copy of the unredacted record to

⁵ The document index the Custodian is referencing is the document index the Council directed him to deliver to the Council pursuant to the terms of its February 23, 2010 Interim Order.
Gary DeMarzo v. City of Wildwood (Cape May), 2009-61 – Supplemental Findings and Recommendations of the Executive Director 2

the Complainant and/or failing to provide certified confirmation of compliance to the Executive Director within five (5) business days from receipt of said Order.⁶

Therefore, because the Custodian failed and refused to comply with the terms of the Council's May 27, 2010 Interim Order by not disclosing a copy of the record relevant to the complaint in unredacted form to the Complainant and/or by failing to provide certified confirmation of compliance to the Executive Director within five (5) business days from receipt of the Order, the Custodian, Christopher H. Wood, is in contempt of the Council's May 27, 2010 Interim Order.

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

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

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

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

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996).

In the instant matter, the Complainant stated that he is a Commissioner with the City of Wildwood and that he believed his denial of access to the requested record was

⁶ The GRC was not notified that the Custodian disclosed the requested record to the Complainant as ordered.
Gary DeMarzo v. City of Wildwood (Cape May), 2009-61 – Supplemental Findings and Recommendations of the Executive Director 3

politically motivated; however, the Custodian certified in his Statement of Information that the only reason the record was exempt from disclosure was because it constituted advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.

After the Council by Interim Order dated February 23, 2010 ordered an *in camera* examination of the record, the Custodian alleged that the record was also exempt from disclosure under N.J.S.A. 47:1A-3.a. because it pertained to an investigation in progress. The Custodian delivered the record to the GRC for *in camera* examination, but the Council found that the Custodian failed to comply with the terms of the Order because the Custodian did not provide the Council with a document index or certify that the document provided was the document requested by the Council.

Upon examining the record, the Council determined that the record was not exempt from disclosure. By Interim Order dated May 27, 2010, the Council directed the Custodian to disclose a copy of the unredacted record to the Complainant within five (5) business days of the Order. In a letter to the GRC dated June 7, 2010, the Custodian acknowledged that he had an obligation to comply with the terms of the Council's Interim Order; however, the Custodian failed and refused to comply with the Order, and is in contempt thereof, by not disclosing a copy of the unredacted record to the Complainant and/or failing to provide certified confirmation of compliance to the Executive Director within five (5) business days from receipt of said Order.

Therefore, because there is an allegation by the Complainant that his denial of access to the requested record was politically motivated, and because the Council found that the Custodian did unlawfully withhold the requested record from disclosure, and because the Custodian failed to comply with the terms of the Council's February 23, 2010 Interim Order by not providing the Council with a document index or certify that the document provided was the document requested by the Council, and because the Custodian failed and refused to comply with the terms of the Council's May 27, 2010 Interim Order by not disclosing a copy of the unredacted record to the Complainant and/or failing to provide certified confirmation of compliance to the Executive Director within five (5) business days from receipt of said Order, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed and refused to comply with the terms of the Council's May 27, 2010 Interim Order by not disclosing a copy of the record relevant to the complaint in unredacted form to the Complainant and/or by failing to provide certified confirmation of compliance to the Executive Director within five (5) business days from receipt of the Order, the

Custodian, Christopher H. Wood, is in contempt of the Council's May 27, 2010 Interim Order.

2. Because there is an allegation by the Complainant that his denial of access to the requested record was politically motivated, and because the Council found that the Custodian did unlawfully withhold the requested record from disclosure, and because the Custodian failed to comply with the terms of the Council's February 23, 2010 Interim Order by not providing the Council with a document index or certify that the document provided was the document requested by the Council, and because the Custodian failed and refused to comply with the terms of the Council's May 27, 2010 Interim Order by not disclosing a copy of the unredacted record to the Complainant and/or failing to provide certified confirmation of compliance to the Executive Director within five (5) business days from receipt of said Order, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

July 20, 2010



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Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

INTERIM ORDER

May 27, 2010 Government Records Council Meeting

Gary S. DeMarzo
Complainant

Complaint No. 2009-61

v.

City of Wildwood (Cape May)
Custodian of Record

At the May 27, 2010 public meeting, the Government Records Council (“Council”) considered the May 20, 2010 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed to provide the Council with a document or redaction index and failed to certify that the document provided was the document requested by the Council for *in camera* inspection, the Custodian has failed to comply with the terms of the Council’s February 23, 2010 Interim Order.
2. Because the *in camera* examination of the Emergency Software Products inspection report for 439 Tacony Road revealed the Custodian unlawfully denied the Complainant access to said record pursuant to N.J.S.A. 47:1A-6., the Custodian must disclose the unredacted record to the Complainant within five (5) business days of the Council’s Interim Order.
3. **On the basis of the Council’s determination in this matter, the Custodian shall comply with the Council’s Findings of the *In Camera* Examination set forth in paragraph 2 above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.



Interim Order Rendered by the
Government Records Council
On The 27th Day of May, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: June 1, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
May 27, 2010 Council Meeting**

**Gary S. DeMarzo¹
Complainant**

GRC Complaint No. 2009-61

v.

**City of Wildwood (Cape May)²
Custodian of Records**

Record Relevant to Complaint:³ Copy of an Emergency Software Products (“ESP”) inspection report for 439 Tacony Road in Wildwood.

Request Made: December 4, 2008

Response Made: December 15, 2008

Custodian: Christopher H. Wood, Clerk

GRC Complaint Filed: February 26, 2009⁴

Background

February 23, 2010

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, found 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 Emergency Software Products inspection report for 439 Tacony Road to determine the validity of the assertion by the Custodian that the record was not disclosed because it constitutes intra-agency advisory, consultative or deliberative material.
2. **The Custodian must deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted Emergency Software Products inspection report for 439 Tacony Road, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents**

¹ No legal representation listed on record.

² Represented by Marcus Karvan, Esq. (Wildwood, NJ).

³ There were other records requested that are not relevant to this complaint.

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

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.

March 1, 2010

Council's Interim Order distributed to the parties.

March 2, 2010

Custodian's certification in response to the Council's Interim Order. The Custodian certifies that he received the Council's February 23, 2010 Interim Order. The Custodian also certifies that he has provided to the GRC nine (9) copies of the requested unredacted ESP inspection report ordered by the Council for *in camera* inspection. The Custodian further certifies that the record is exempt from disclosure as advisory, consultative or deliberative ("ACD") material and also because it pertains to an ongoing investigation by a non-law enforcement agency. The Custodian failed to deliver to the Council a document or redaction index.

Analysis

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

The Custodian was ordered to deliver to the Council within five (5) business days from receipt of the Council's February 23, 2010 Interim Order, nine (9) copies of the requested unredacted record, a document or redaction index and a legal certification that the documents provided are the documents requested by the Council for the *in camera* inspection.

The Custodian provided nine (9) copies of the ESP inspection report ordered by the Council for *in camera* inspection in a timely manner; however he did not provide the Council with a document or redaction index as required pursuant to the Interim Order. By not providing the document or redaction index, the Custodian failed to describe the document and certify that the document provided is the document requested by the Council for the *in camera* inspection. Instead, the Custodian only certified that enclosed with his certification the Council would find nine (9) copies of the ESP report for the *in camera* examination. The Custodian certified that the record was exempt from disclosure as "[i]nter-agency or intra-agency advisory, consultative or deliberative material" and also due to "[o]ngoing investigations of non-law enforcement agencies." The Custodian failed to cite statute numbers applicable to the exemptions; however, it is clear from his word description that the correct provision of OPRA for an ACD exemption is N.J.S.A. 47:1A-1.1. The Custodian's second reason for denying the Complainant access to the record was not clearly set forth but the only statute under OPRA that could apply is N.J.S.A. 47:1A-3.a.

Therefore, because the Custodian failed to provide the Council with a document or redaction index and failed to certify that the document provided was the document requested by the Council for *in camera* inspection, the Custodian has failed to comply with the terms of the Council's February 23, 2010 Interim Order.

Whether the Custodian unlawfully denied the Complainant access to the ESP inspection report for 439 Tacony Road?

OPRA provides that:

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

OPRA defines a government record as:

“...any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business...[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 further provides that:

“...where it shall appear that the record or records that are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any public agency, the right of access provided for in [OPRA]...*may be denied if the inspection, copying, or examination of such record or records shall be inimical to the public interest*; provided, however, that this provision shall nor be construed to allow any public agency to prohibit access to a record of that agency that was open for public inspection, examination, or copying before the investigation commenced.” (Emphasis added.) N.J.S.A. 47:1A-3.a.

The Complainant alleged that the Custodian unlawfully denied him access to the requested record. The Complainant further alleged that there is no reason the Custodian should have denied him access to the report because it is a public record; however, the Complainant stated that he is a Commissioner with the City of Wildwood and he believes the Custodian’s refusal to disclose the record was politically motivated.

The Custodian certified in his Statement of Information that the record relevant to the complaint was not disclosed to the Complainant because it constituted ACD material, which is one of twenty-four (24) OPRA exceptions to disclosure. The Custodian further certified that the record “...contains confidential calls/complaints from residents, neighbors and taxpayers with regard to fire, zoning, property maintenance and other issues in the municipality,” and “[a]llowing the release of this sensitive ‘whistle blower’ information will deter others from calling-in their complaints on what could be serious ‘safety’ and ‘quality of life’ issues.” The Custodian also certified that “[v]arious departments from the City of Wildwood contribute information to said report, and/or refer to said report when complaints are logged...[which] further illustrates that the

documents (sic) are ‘inter-agency or intra-agency advisories.’” In addition, the Custodian certified that the “...report could be made available to the Requestor (sic), minus the names/addresses/phone numbers of the persons who lodged complaints...” The Custodian went on to certify, however, that a redacted copy of the record was not acceptable to the Complainant. The GRC determined that an *in camera* examination of the record was necessary to determine the validity of the assertion by the Custodian that the record was withheld from disclosure because it constituted ACD material.

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.

The GRC conducted an *in camera* examination on the submitted record pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005).

The record is a two-sided 8 ½ x 11 inch computer-generated report titled *City of Wildwood Office of Code Enforcement Violation Report*. It contains the Complainant's name and address as the property owner. There are no other addresses and no phone numbers contained within the report. The report includes a brief remark that the complaint was “called into William Davenport” by a neighbor (anonymous).⁵ The report also contains the name of the issuing officer along with a list of eight (8) building code and ordinance violations.

In camera examination of the submitted record revealed that, contrary to the Custodian's certification, the record did **not** contain:

- Confidential calls and/or complaints from residents, neighbors and taxpayers with regard to fire, zoning, property maintenance or any other issue in the municipality

⁵ The Denial of Access Complaint names William Davenport as a municipal official holding the title of “Commissioner.”

- Sensitive “whistle blower” information that could deter others from calling-in their complaints on what could be serious ‘safety’ and ‘quality of life’ issues
- Any names, addresses and phone numbers of persons who lodged complaints
- Information contributed from any department from the City of Wildwood to said report

Every violation contained in the report includes a brief description of the infraction, as well as the building code or ordinance provision that was allegedly violated. The record contains only the allegations of code violations and factual material such as the date, property identification, condition, owner, issuing officer and similar information. The record does not contain opinions, recommendations and/or advice about agency policies. Moreover, there is nothing in the report to indicate the record was used in the agency's efforts to reason through to a decision, much less that the record's disclosure would reveal the nature of such deliberations. Accordingly, the *in camera* examination of the submitted record revealed the record does not constitute ACD material pursuant to N.J.S.A. 47:1A-1.1.; therefore it is a government record subject to disclosure.

Although the Custodian never asserted in his Statement of Information that the record was also exempt from disclosure under N.J.S.A. 47:1A-3.a., because the Custodian did raise this exemption in his certification dated March 2, 2010, the Custodian now alleges the record pertained to an investigation in progress and is therefore exempt from disclosure.

In Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373, (App. Div. 2003), the Superior Court determined that N.J.S.A. 47:1A-3.a. permits the non-disclosure of records where the records pertain to an investigation in progress and where release would be inimical to the public interest. In Courier News, the newspaper sought access under OPRA to tape recordings of 911 calls in the custody of the Hunterdon County Prosecutor's Office. The Prosecutor's Office denied access to the records arguing that they were exempt from disclosure under the provisions of N.J.S.A. 47:1A-3.a. because they are part of an ongoing criminal investigation and their release to the media would be inimical to the public interest because such release would make selecting an impartial jury more difficult and likely cause juror confusion. The trial court denied the newspaper's application for access to the records. In reversing the decision of the trial court, the Appellate Division noted:

“...[u]nder OPRA, a public agency seeking to restrict the public's right of access to government records must produce *specific reliable evidence* sufficient to meet a statutorily recognized basis for confidentiality. Absent such a showing, a citizen's right of access is unfettered...” *Id.* at 382, 383. (Emphases added.)

The Custodian certified the record is exempt because it pertains to an ongoing investigation; however, he failed to offer any evidence that the record, if disclosed, would be inimical to the public interest. As such, the Custodian has failed to meet his burden of proof under N.J.S.A. 47:1A-6. that the record is exempt from disclosure pursuant to N.J.S.A. 47:1A-3.a.

Accordingly, because the *in camera* examination of the Emergency Software Products inspection report for 439 Tacony Road revealed the Custodian unlawfully denied the Complainant access to said record pursuant to N.J.S.A. 47:1A-6., the Custodian must disclose the unredacted record to the Complainant within five (5) business days of the Council's Interim Order.

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

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

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to provide the Council with a document or redaction index and failed to certify that the document provided was the document requested by the Council for *in camera* inspection, the Custodian has failed to comply with the terms of the Council's February 23, 2010 Interim Order.
2. Because the *in camera* examination of the Emergency Software Products inspection report for 439 Tacony Road revealed the Custodian unlawfully denied the Complainant access to said record pursuant to N.J.S.A. 47:1A-6., the Custodian must disclose the unredacted record to the Complainant within five (5) business days of the Council's Interim Order.
3. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in paragraph 2 above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

May 20, 2010



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

INTERIM ORDER

February 23, 2010 Government Records Council Meeting

Guy DeMarzo
Complainant

Complaint No. 2009-61

v.

City of Wildwood (Cape May)
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. 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 Emergency Software Products inspection report for 439 Tacony Road to determine the validity of the assertion by the Custodian that the record was not disclosed because it constitutes intra-agency advisory, consultative or deliberative material.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted Emergency Software Products inspection report for 439 Tacony Road, a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

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."



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**

**Guy S. DeMarzo¹
Complainant**

GRC Complaint No. 2009-61

v.

**City of Wildwood (Cape May)²
Custodian of Records**

Record Relevant to Complaint:³ Copy of an Emergency Software Products (“ESP”) inspection report for 439 Tacony Road in Wildwood.

Request Made: December 4, 2008

Response Made: December 15, 2008

Custodian: Christopher H. Wood, Clerk

GRC Complaint Filed: February 26, 2009⁴

Background

December 4, 2008

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the record relevant to this complaint listed above on an official OPRA request form.

December 15, 2008

Custodian’s response to the OPRA request.⁵ The Custodian responds in writing to the Complainant’s OPRA request on the seventh (7th) business day following receipt of such request. The Custodian advises the Complainant that only two (2) of the five (5) city officials from whom the Complainant requested records acknowledged that they had records responsive to the Complainant’s request. The Custodian discloses fifteen (15) pages of records to the Complainant.

February 26, 2009

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

- Complainant’s OPRA request dated December 4, 2008
- Custodian’s response to the OPRA request dated December 15, 2008

¹ No legal representation listed on record.

² Represented by Marcus Karvan, Esq. (Wildwood, NJ).

³ There were other records requested that are not relevant to this complaint.

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

⁵ The response was signed by Hope Pinto, a secretary in the City Clerk’s Office.

The Complainant states that he is a Commissioner with the City of Wildwood and that he believes the denial of the requested record was politically motivated. The Complainant further states that all of the records encompassed by his request are public documents and that there is no reason he should have been denied the ESP inspection report.

The Complainant agrees to mediate this complaint.

March 10, 2009

Offer of Mediation sent to the Custodian.

March 11, 2009

The Custodian declines mediation.

March 12, 2009

E-mail from the Complainant to the GRC. The Complainant states that the Denial of Access Complaint that was appended to the Offer of Mediation sent from the GRC to the Custodian is the proper complaint but has the wrong supporting documents.

March 12, 2009

E-mail from the GRC to the Complainant. The GRC informs the Complainant that the complaint with supporting documents that was sent to the Custodian is the complaint with supporting documents that was filed with the GRC. The GRC informs the Complainant that if the complaint is not accurate in all respects, the Complainant should file an Amended Denial of Access Complaint.

March 23, 2009

E-mail from the Complainant to the GRC. The Complainant submits an Amended Denial of Access Complaint to the GRC.⁶ The amended complaint adds the following documents as attachments to the complaint:

- City of Wildwood *Inter-Agency Request Form* dated November 25, 2008
- City of Wildwood Construction Office *Notice of Unsafe Structure* dated November 26, 2008
- City of Wildwood Construction Office *Enforcement Attachment* dated November 26, 2008
- City of Wildwood Construction Office *Application to Construction Board of Appeals* dated November 26, 2008
- Land assessment for 439 W. Tacony Road, Wildwood, NJ, containing a deed refresh date of November 5, 2008, copied from website <http://www.vitalgov.net> dated November 26, 2008
- City of Wildwood Construction Office Violation No. 20080296/0 dated December 4, 2008
- Fax report from Hope Pinto to Eileen Casey dated December 4, 2008

⁶ After the Complainant amended his Denial of Access Complaint, a copy of the amended complaint and another offer to mediate was sent from the GRC to the Custodian by e-mail dated March 23, 2009. The Custodian again declined mediation by e-mail dated March 27, 2009.

- Photocopy of N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-2 from West Publishing Company *New Jersey Statutes Annotated* book, undated⁷

April 2, 2009

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

April 9, 2009⁸

Custodian’s SOI attaching a list of twenty-four (24) OPRA exceptions. The Custodian certifies that the Complainant submitted his OPRA request to the Custodian on December 4, 2008. The Custodian further certifies that he responded to the OPRA request on December 15, 2008 by informing the Complainant that the requested records were ready to be picked up at the Custodian’s office.

The Custodian acknowledges that the record relevant to this complaint is a record that was responsive to the Complainant’s request; however, the Custodian states that it was not disclosed to the Complainant because it is encompassed within the list of twenty-four (24) OPRA exceptions, viz., it constitutes intra-agency advisory, consultative or deliberative (“ACD”) material. The Custodian certifies that the requested record is used by municipal officials as a tool to resolve property code issues and contains confidential calls and complaints from residents and/or taxpayers with regard to fire, zoning, property maintenance and other similar issues. The Custodian also certifies that various departments from the municipality add information to the report, as well. The Custodian avers that if the report was disclosed, the release of whistle blower information would deter future complainants from reporting serious safety and quality of life issues.

The Custodian certifies that the City Solicitor agreed with the Custodian that the requested record is ACD material and therefore it is exempt from disclosure. The Custodian certifies that the record was offered to the Complainant with the names, addresses and phone numbers of the complaining parties redacted from the report; however, the Custodian avers that the Complainant refused to accept a redacted copy of the record because the subject of the ESP inspection report is property owned by the Complainant and the Complainant wants to know the names of the persons who registered complaints about the condition of his property.

The Custodian did not certify as to the last date upon which the records responsive to the request may have been destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

Analysis

Whether the Custodian unlawfully denied access to the requested record?

OPRA provides that:

⁷ These photocopied statutes are from the Right to Know Law circa 1991. N.J.S.A. 47:1A-1 was amended in 2001 and N.J.S.A. 47:1A-2 was repealed in 2001.

⁸ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

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

Additionally, OPRA defines a government record as:

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

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

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

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

In the instant complaint, there is no dispute between the parties that that the Complainant submitted his OPRA request to the Custodian on December 4, 2008 and that the Custodian responded to the OPRA request on December 15, 2008. Although the evidence of record reveals the Custodian disclosed several of the records responsive to the Complainant’s request, the Custodian certified that the record relevant to the complaint was not disclosed because it constitutes intra-agency ACD material.

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 GRC⁹ 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:

⁹ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).
Guy DeMarzo v. City of Wildwood (Cape May), 2009-61 – Findings and Recommendations of the Executive Director

“[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 ESP inspection report for 439 Tacony Road to determine the validity of the assertion by the Custodian that the record was not disclosed because it constitutes intra-agency ACD material.

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 Emergency Software Products inspection report for 439 Tacony Road to determine the validity of the assertion by the Custodian that the record was not disclosed because it constitutes intra-agency advisory, consultative or deliberative material.
2. **The Custodian must deliver¹⁰ to the Council in a sealed envelope nine (9) copies of the requested unredacted Emergency Software Products inspection report for 439 Tacony Road, a document or redaction index¹¹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹² that the documents provided are the documents**

¹⁰ 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.

¹¹ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹² "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."

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.

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

February 16, 2010