



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Acting Commissioner

**FINAL DECISION**

**January 31, 2012 Government Records Council Meeting**

Jeffrey J. Farneski  
Complainant

Complaint No. 2010-20

v.

Hunterdon County Prosecutor's Office  
Custodian of Record

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

1. The Custodian has complied with the Council's October 25, 2011 Interim Order by providing the Council with all records set forth in Paragraph 4 of the Order as well as a document or redaction index and a legal certification within five (5) business days of receiving the Council's Order.
2. The *in camera* examination set forth in the table below reveals the Custodian has lawfully denied the Complainant access to the requested record because said record is exempt from disclosure in its entirety as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. N.J.S.A. 47:1A-6.
3. Because the results of the *in camera* examination revealed that the Custodian lawfully denied access to the requested record as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1, the Custodian did not knowingly and willfully violate OPRA and unreasonably deny access under the totality of the circumstances.



Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination <sup>1</sup>
1	Independent investigation report titled "Complaint of Detective Sergeant Michael Nugent" prepared by Cynthia M. Jacob, Esq., of Fisher & Phillips LLP, dated February 17, 2009.	The report is twenty-eight (28) pages in length and contains an additional ninety-nine (99) pages of exhibits. It was prepared by Cynthia M. Jacob, Esq., for the Hunterdon County Counsel and examines allegations made by Detective Sergeant Michael Nugent against the Hunterdon County Prosecutor's Office.	The record is exempt from disclosure under OPRA as as advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1</u>	The report contains recommendations and advice and, as such, is exempt from disclosure in its entirety as advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1</u> .

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

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

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 31<sup>st</sup> Day of January, 2012

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: February 6, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Jeffrey J. Farneski<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2010-20**

v.

**Hunterdon County Prosecutor's Office<sup>2</sup>**  
**Custodian of Records**

**Record Relevant to Complaint:** Copy of independent investigation report paid for by Hunterdon County to look into the allegations made by Michael Nugent.

**Request Made:** January 21, 2010

**Response Made:** January 28, 2010

**Custodian:** Assistant Prosecutor Bennett A. Barlyn<sup>3</sup>

**GRC Complaint Filed:** February 1, 2010<sup>4</sup>

**Records Submitted for *In Camera* Examination:** A copy of an independent investigation into allegations made by Michael Nugent.

**Background**

**October 25, 2011**

Government Records Council's Interim Order. At the October 25, 2011 public meeting, the Government Records Council ("Council") considered the October 18, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the requested record is a document that was received in the course of the Hunterdon County Prosecutor's Office's official business, it is a government record pursuant to N.J.S.A. 47:1A-1.1. and James v. Holmdel Township Board of Education (Monmouth), GRC Complaint No. 2007-242 (November 2009).
2. Because the purpose of the record relevant to the complaint was not primarily to prepare for litigation or provide legal advice, but rather to advise the

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

<sup>2</sup> Represented by Gaetano M. DeSapio, Esq. (Frenchtown, NJ); however, there are no submissions on file from the Custodian's Counsel to the GRC.

<sup>3</sup> Assistant Prosecutor Anthony M. Anastasio replaced Mr. Barlyn as the agency's custodian of records on or about September 15, 2010.

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

County Counsel and Prosecutor on those steps necessary to remediate any further deviations from appropriate workplace behavior, the record is not exempt from disclosure as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1. and Payton v. NJ Turnpike Authority, 148 N.J. 524 (1997).

3. Because the word “grievance” as it appears in OPRA is a term of art and not the word as it is commonly understood, and because the Complainant asserted that no grievance was filed by or against an individual and there is nothing in the evidence of record to dispute the Complainant’s assertion, the record is not exempt from disclosure as “...information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual...” pursuant to N.J.S.A. 47:1A-1.1. and Asbury Park Press v. County of Monmouth and Carol Melnick, 406 N.J. Super. 1 (App. Div. 2009).
4. 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* examination of the requested copy of an independent investigation into the allegations made by Michael Nugent to determine the validity of the Custodian’s assertion that the record constitutes advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-1.1.
5. **The Custodian must deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted record identified in paragraph 4 above, a document or redaction index, as well as a legal certification in accordance with N.J. Court Rule 1:4-4, that the record provided is the document 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.**
6. 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.

#### **October 28, 2011**

Council’s Interim Order (“Order”) distributed to the parties.

#### **November 4, 2011**

Certification of the Custodian in response to the Council’s Interim Order with the following attachments:

- Redaction index
- Nine (9) copies of the independent investigation conducted by Cynthia Jacob, Esq., into the allegations of Michael Nugent dated February 17, 2009

The Custodian certifies that he replaced Bennett Barlyn as the Custodian of Records for the Hunterdon County Prosecutor's Office ("HCPO") on or about September 15, 2010. The Custodian further certifies that the Council's Interim Order requires an *in camera* examination of the requested record by the GRC to determine if the record is exempt from disclosure as advisory, consultative, or deliberative ("ACD") material pursuant to N.J.S.A. 47:1A-1.1. The Custodian certifies that the record is exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1, and it is further exempt from disclosure pursuant to the arguments against disclosure that Ms. Jacob set forth in her correspondence to Mr. DeSapio dated June 24, 2009, which were submitted to the GRC as an attachment to the Custodian's Statement of Information ("SOI"). The Custodian certifies that the record delivered to the GRC for the *in camera* examination is a true, complete and unredacted copy of the requested record.

### **November 10, 2011**

Letter from the Custodian to the GRC. The Custodian asserts that Detective Sergeant Michael Nugent filed a Notice of Claim against the HCPO on November 26, 2008 in order to preserve his right to file a subsequent civil action against Hunterdon County ("County"). The Custodian further asserts that on or about December 17, 2008, County Counsel Gaetano DeSapio retained the services of labor attorney Cynthia Jacob, Esq., to conduct an independent investigation into Mr. Nugent's allegations and to prepare a report containing her findings and recommendations. The Custodian states that the purpose of the report was to advise the County regarding remediation of any potential inappropriate or illegal workplace conduct or conditions. The Custodian states that Mr. DeSapio and Ms. Jacob were in agreement that the report would be maintained under the strictest conditions of confidentiality.

The Custodian contends that the requested record is exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1. The Custodian cites to In Re Liquidation of Integrity Insurance Co., 165 N.J. 75, 83 (2000), wherein the court developed a two part test for the application of the deliberative process exemption. The Custodian states that the court found that first the document must be pre-decisional, meaning that it was generated before the adoption of an agency's policy or decision and second, that the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies.

The Custodian argues that under the first prong of Integrity, the requested record was pre-decisional because the record, which contains specific and detailed recommendations, was created prior to any decision made by the County with regard to the Nugent allegations. The Custodian also argues that under the second prong of Integrity the record is deliberative as defined by the court in Education Law Center v. NJ Department of Education, 198 N.J. 274 (2009) because the requested record was part of a process in which the County could consider the recommendations and decide whether or not to implement them. Further, the Custodian argues that a detailed factual investigation was required by Ms. Jacob and that those facts are tied to the analysis and recommendations of the report.

The Custodian contends that for the aforementioned reasons the requested record in its entirety is exempt from disclosure under OPRA as ACD material.

## Analysis

### **Whether the Custodian complied with the Council's October 25, 2011 Interim Order?**

At its October 25, 2011 public meeting, the Council determined that because the Custodian asserted that the requested record was lawfully denied pursuant to N.J.S.A. 47:1A-1.1 as ACD material, the Council must determine whether the legal conclusion asserted by the Custodian is properly applied to the record at issue pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005).<sup>5</sup> Therefore, the GRC must conduct an *in camera* review of the requested record to determine the validity of the Custodian's assertion that the requested record was properly denied.

The Council ordered the Custodian to deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted record, 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 record provided is the record requested by the Council for the *in camera* examination. Such delivery was to be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

The Custodian provided the GRC with a legal certification, a redaction index and nine (9) copies of the unredacted record requested for the *in camera* examination on November 4, 2011, which was the fourth (4<sup>th</sup>) business day following the Custodian's receipt of the Order. Therefore, the Custodian complied in a timely manner with the Council's October 25, 2011 Interim Order.

Accordingly, the Custodian has complied with the Council's October 25, 2011 Interim Order by providing the Council with all records set forth in Paragraph 4 of the Order as well as a document or redaction index and a legal certification within five (5) business days of receiving the Council's Order.

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

The Custodian asserts in the Statement of Information and the certification submitted in compliance with the Council's October 25, 2011 Interim Order that he lawfully denied the Complainant access to the requested record because said record is exempt from disclosure under OPRA as ACD material pursuant to N.J.S.A. 47:1A-1.1, because the report contains specific and detailed recommendations. Conversely, the Complainant asserts that he was unlawfully denied access to the requested report.

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

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<sup>5</sup> The Custodian asserted additional grounds for denying the Complainant access to the record which were addressed by the Council in its October 25, 2011 Interim Order.  
Jeffrey Farnesi v. Hunterdon County Prosecutor's Office, 2010-20 – *In Camera* Findings and Recommendations of the Executive Director

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, 492 A.2d 991.

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

<b>Record or Redaction Number</b>	<b>Record Name/Date</b>	<b>Description of Record or Redaction</b>	<b>Custodian's Explanation/ Citation for Non-disclosure or Redactions</b>	<b>Findings of the <i>In Camera</i> Examination<sup>6</sup></b>
1	Independent investigation report titled "Complaint of Detective Sergeant	The report is twenty-eight (28) pages in length and contains an additional	The record is exempt from disclosure under OPRA as as advisory, consultative or	The report contains recommendations and advice and, as such, is exempt from disclosure in

<sup>6</sup> **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requestor.

	Michael Nugent” prepared by Cynthia M. Jacob, Esq., of Fisher & Phillips LLP, dated February 17, 2009.	ninety-nine (99) pages of exhibits. It was prepared by Cynthia M. Jacob, Esq., for the Hunterdon County Counsel and examines allegations made by Detective Sergeant Michael Nugent against the Hunterdon County Prosecutor’s Office.	deliberative material pursuant to <u>N.J.S.A.</u> 47:1A-1.1	its entirety as advisory, consultative or deliberative material pursuant to <u>N.J.S.A.</u> 47:1A-1.1.
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The *in camera* examination set forth in the above table reveals the Custodian lawfully denied the Complainant access to the requested record because said record is exempt from disclosure in its entirety as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. N.J.S.A. 47:1A-6.

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

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)).

Because the results of the *in camera* examination revealed that the Custodian lawfully denied access to the requested record as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1, the Custodian did not knowingly and willfully violate OPRA and unreasonably deny access under the totality of the circumstances.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council's October 25, 2011 Interim Order by providing the Council with all records set forth in Paragraph 4 of the Order as well as a document or redaction index and a legal certification within five (5) business days of receiving the Council's Order.
2. The *in camera* examination set forth in the above table reveals the Custodian has lawfully denied the Complainant access to the requested record because said record is exempt from disclosure in its entirety as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. N.J.S.A. 47:1A-6.
3. Because the results of the *in camera* examination revealed that the Custodian lawfully denied access to the requested record as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1, the Custodian did not knowingly and willfully violate OPRA and unreasonably deny access under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.  
Executive Director

January 24, 2012



## State of New Jersey

GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET

PO BOX 819

TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

LORI GRIFA  
Commissioner

### INTERIM ORDER

#### October 25, 2011 Government Records Council Meeting

Jeffrey J. Farneski  
Complainant

Complaint No. 2010-20

v.

Hunterdon County Prosecutor's Office  
Custodian of Record

At the October 25, 2011 public meeting, the Government Records Council ("Council") considered the October 18, 2011 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the requested record is a document that was received in the course of the Hunterdon County Prosecutor's Office's official business, it is a government record pursuant to N.J.S.A. 47:1A-1.1. and James v. Holmdel Township Board of Education (Monmouth), GRC Complaint No. 2007-242 (November 2009).
2. Because the purpose of the record relevant to the complaint was not primarily to prepare for litigation or provide legal advice, but rather to advise the County Counsel and Prosecutor on those steps necessary to remediate any further deviations from appropriate workplace behavior, the record is not exempt from disclosure as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1. and Payton v. NJ Turnpike Authority, 148 N.J. 524 (1997).
3. Because the word "grievance" as it appears in OPRA is a term of art and not the word as it is commonly understood, and because the Complainant asserted that no grievance was filed by or against an individual and there is nothing in the evidence of record to dispute the Complainant's assertion, the record is not exempt from disclosure as "...information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual..." pursuant to N.J.S.A. 47:1A-1.1. and Asbury Park Press v. County of Monmouth and Carol Melnick, 406 N.J. Super. 1 (App. Div. 2009).
4. 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* examination of the requested copy of an independent investigation into the allegations made by Michael Nugent to determine the validity of the Custodian's assertion that the record constitutes advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-1.1.



5. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record identified in paragraph 4 above, a document or redaction index<sup>2</sup>, as well as a legal certification in accordance with N.J. Court Rule 1:4-4<sup>3</sup>, that the record provided is the document 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.**
6. 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 25<sup>th</sup> Day of October, 2011

Robin Berg Tabakin, Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: October 28, 2011**

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

<sup>2</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial. Because there are often numerous radio codes on any one record, it is important that the Custodian address each and every radio code separately on the document or redaction index.

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

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
October 25, 2011 Council Meeting**

**Jeffrey J. Farneski<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2010-20**

v.

**Hunterdon County Prosecutor's Office<sup>2</sup>**  
**Custodian of Records**

**Record Relevant to Complaint:** Copy of independent investigation report paid for by Hunterdon County to look into the allegations made by Michael Nugent.

**Request Made:** January 21, 2010

**Response Made:** January 28, 2010

**Custodian:** A/Pros. Bennett A. Barlyn

**GRC Complaint Filed:** February 1, 2010<sup>3</sup>

**Background**

**November 26, 2008**

Letter from Patrick Toscano, Esq., to Gaetano DeSapio, Esq. Mr. Toscano forwards a Notice of Claim on behalf of Detective Sergeant Michael Nugent to Hunterdon County Counsel Gaetano DeSapio.

**June 18, 2009**

Memorandum from Gaetano DeSapio, Esq., to First Assistant Prosecutor Charles Ouslander. Mr. DeSapio forwards to Mr. Ouslander a copy of an unfiled complaint captioned "Nugent v. County of Hunterdon and Office of the Hunterdon County Prosecutor."<sup>4</sup>

**June 24, 2009**

Letter from Cynthia Jacob, Esq., to Gaetano DeSapio, Esq. In response to a request from Mr. DeSapio that Ms. Jacob deliver to Honorable Edward Coleman, J.S.C., a copy of an investigative report she prepared regarding the harassment complaint of Detective Sergeant Michael Nugent, Ms. Jacob refuses and elaborates on the very confidential nature of the report as justification for her refusal. Ms. Jacob further states

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

<sup>2</sup> Represented by Gaetano M. DeSapio, Esq. (Frenchtown, NJ); however, there are no submissions on file from the Custodian's Counsel to the GRC.

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

<sup>4</sup> The complaint is in the United States District Court for the District of New Jersey but does not have a file stamp or a docket number.

that the report should not be disseminated beyond the recipients, Mr. DeSapio and Hunterdon County Prosecutor, J. Patrick Barnes.

**September 17, 2009**

Complaint captioned “Farneski v. County of Hunterdon, et. als.,” electronically filed in the United States District Court for the District of New Jersey.

**January 21, 2010**

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.

**January 28, 2010**

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the fifth (5<sup>th</sup>) business day following receipt of such request. The Custodian states that access to the requested record is denied because the requested record is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, et seq. The Custodian states the record is inter-agency or intra-agency advisory communications (“ACD”) and grievance information with a public employer.

**February 1, 2010**

Denial of Access Complaint filed with the Government Records Council (“GRC”) attaching the Custodian’s response to the OPRA request dated January 28, 2010.

The Complainant states that Detective Sergeant Michael Nugent of the Hunterdon County Prosecutor’s Office (“HCPO”) filed a tort claim notice with the County of Hunterdon. The Complainant contends that after the tort claim notice was filed, the County of Hunterdon paid an outside law firm approximately \$25,000.00 to investigate the circumstances giving rise to the alleged tort and to prepare a report.<sup>5</sup> The Complainant states that he knows the report was prepared in anticipation of a civil proceeding against the county and a grievance.

The Complainant contends that he was denied the report because it contains information regarding a grievance; however, the Complainant states that no grievance was ever filed. The Complainant also contends that he was denied the report because it is ACD material. The Complainant states that this is a catch-all category for all public records. The Complainant states that taxpayer money was used to pay for the requested record, and it is therefore a public record subject to disclosure.

The Complainant does not agree to mediate this complaint.

**February 22, 2010**

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

**February 25, 2010**

E-mail from the Custodian to the GRC. The Custodian requests a five (5) business day extension of time to complete and submit the SOI.

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<sup>5</sup> The report is the record relevant to this complaint.

**February 25, 2010**

E-mail from the GRC to the Custodian. The GRC grants the Custodian a five (5) business day extension of time to complete and submit the SOI.

**March 1, 2010**

Letter from the Custodian. The Custodian submits a letter brief to the GRC as the Custodian's SOI.

**March 4, 2010**

E-mail from the GRC to the Custodian. The GRC informs the Custodian that the GRC will accept the Custodian's letter brief dated March 1, 2010 as the Custodian's legal argument. The GRC further informs the Custodian that the GRC needs the SOI form completed and returned to the GRC.

**March 5, 2010**

Custodian's SOI with the following attachments:

- Letter from Patrick Toscano, Esq., to Gaetano DeSapio, Esq. dated November 26, 2008
- Memorandum from Gaetano DeSapio, Esq., to First Assistant Prosecutor Charles Ouslander dated June 18, 2009
- Letter from Cynthia Jacob, Esq., to Gaetano DeSapio, Esq. dated June 24, 2009
- Complaint captioned "Farneski v. County of Hunterdon, et. als. dated September 17, 2009
- Complainant's OPRA request dated January 21, 2010
- Custodian's response to the OPRA request dated January 28, 2010

The Custodian does not certify as to whether he did or did not conduct a search for the requested records. The Custodian also does not certify as to the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certifies that Detective Sergeant Michael Nugent filed a Notice of Claim against the HCPO on November 26, 2008 which alleged a violation of the New Jersey Law Against Discrimination. The Custodian further certifies that shortly after the notice was filed, County Counsel Gaetano DeSapio retained the services of labor attorney Cynthia Jacob to prepare an investigative report regarding Nugent's harassment allegations. The Custodian certifies that Mr. DeSapio and Ms. Jacob were in agreement that the report would be maintained under the strictest conditions of confidentiality. The Custodian further certifies that in a letter from Ms. Jacob to Mr. DeSapio, Ms. Jacob stated, "[t]his confidential report should in no way be subjected to public scrutiny." The Custodian certifies that Mr. DeSapio and Hunterdon County Prosecutor J. Patrick Barnes were the only two recipients of the report. The Custodian certifies that the report prepared by Ms. Jacob is the record requested by the Complainant.



The Custodian certifies that the requested record is not a government record. The Custodian defines a government record as "...a record in any form or medium, that has been made, maintained, or kept on file in the course of his/hers or its official business by any State, local or regionally funded agency." The Custodian certifies that the requested record was not prepared by, or intended to be relied upon by HCPO personnel in the course of their official duties or business because the official business of the HCPO is to detect and prosecute violations of the criminal law that occur within Hunterdon County.

The Custodian certifies that, if the requested record can somehow be construed as a government record, it is exempt from disclosure for several reasons. First, the Custodian certifies that the record is exempt under the attorney-client privilege pursuant to N.J.S.A. 47:1A-1.1. The Custodian cites to Payton v. New Jersey Turnpike Authority, 148 N.J. 524 (1997). The Custodian certifies that in Payton, the plaintiff female employee brought suit against her employer and two supervisors for sexual harassment, claiming the employer's response to her initial report of the harassment was inadequate. Subsequently, the plaintiff sought discovery of an internal investigative report. The Custodian certifies that the court determined that the report was relevant but that there was a need for confidentiality with respect to investigations of workplace misconduct. The Custodian also certifies that the Payton court remanded the matter back to the trial court to develop a factual record relating to the defendant's claim that the attorney-client privilege protected the entire investigatory process. The Custodian certifies that Payton, therefore, affords no support for arguments in favor of disclosure. The Custodian also certifies that because the report was prepared in direct response to Nugent's intention to commence legal proceedings against Hunterdon County it implicates the litigation privilege. The Custodian cites to Loigman v. Twp. Comm. Of Middletown, 185 N.J. 566 (2006), and certifies that the litigation privilege also exempts disclosure of the requested record.

The Custodian certifies that the requested record is also exempt from disclosure as ACD material pursuant to N.J.S.A. 47:1A-1.1. In support of this contention, the Custodian certifies that Ms. Jacob stated in her correspondence to Mr. DeSapio that the purpose of the investigation giving rise to the report was to determine if the allegations of misconduct were true, and if so, to advise Mr. DeSapio and the Prosecutor as to the steps necessary to remediate any further deviations from appropriate workplace behavior. The requested record would therefore be advisory in nature and as such exempt from disclosure as ACD material.

Finally, the Custodian certifies that the requested record is exempt from disclosure because it constitutes:

"...information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual or in connection with collective negotiations, including documents and statements of strategy or negotiating position." N.J.S.A. 47:1A-1.1.

The Custodian certifies that, contrary to the Complainant's assertion, the reference to the word "grievance" in the statute is a reference to the word as it is

commonly understood; to wit, a cause of distress. The Custodian certified that Nugent's Notice of Claim seeking a million dollars in damages constitutes a grievance as it is commonly understood.

The Custodian certifies that for all of the reasons he set forth, the Complainant was properly denied access to the requested record.

### Analysis

#### **Whether the requested record is a government record?**

OPRA provides that:

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

Additionally, OPRA defines a government record as:

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

OPRA also provides that:

"A government record shall not include...*any record within the attorney-client privilege.* This paragraph shall not be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege..." N.J.S.A. 47:1A-1.1. (Emphasis added.)

OPRA further provides that:

"...information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual or in connection with collective negotiations, including documents and statements of strategy or negotiating position..." 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, both the Complainant and the Custodian agreed that the Complainant’s OPRA request was submitted to the Custodian on January 21, 2010, and that the Custodian responded to the request in writing on January 28, 2010.

The Custodian first argued that the requested record is not a government record and is therefore not subject to disclosure. The Custodian based his argument upon his definition of a government record as “...a record in any form or medium, that has been made, maintained, or kept on file in the course of his/hers or its official business by any State, local or regionally funded agency.” The Custodian argued that the HCPO engages in official business that is inconsistent with the making, maintaining or filing of the requested record; therefore the Custodian said that the record is not a government record vis-à-vis the HCPO.

The Custodian’s argument is flawed in the first instance because he has misinterpreted the definition of a “government record” under OPRA. The definition of a government record under OPRA is any of a number of records “...that has been made, maintained or kept on file ... or *that has been received* in the course of his or its official business...” N.J.S.A. 47:1A-1.1. (Emphasis added.) Secondly, the Custodian certified that the requested record was received by Hunterdon County Prosecutor Barnes. The Custodian, however, advances the argument that even if the record was received by the Prosecutor, it was not received in the course of his official business because his official business is to detect and prosecute violations of the criminal law that occur within Hunterdon County. This may be the operational mission statement of the organization, but to say that the official business of the organization is limited to that function is to disavow any other business conducted by the HCPO, which would include such ancillary functions as financial management, information technology, human resources, training, etc. Certainly, the investigation and remediation of internal complaints, both formal and informal, would be considered as official business by the HCPO.

In James v. Holmdel Township Board of Education (Monmouth), GRC Complaint No. 2007-242 (November 2009), a lawsuit was filed against the Board and its former superintendent. The original record was sent to the Board’s insurance carrier and a copy of the record was maintained by the Board. The complainant subsequently filed an OPRA request seeking a copy of the lawsuit but was denied access by the custodian because the custodian argued that the record was not a government record subject to OPRA because it was not generated by the agency.

The Council found that the custodian's assertion that the requested record was not a government record as defined in OPRA was incorrect. The Council stated that OPRA defines a government record as "any paper, written or printed book, document ... 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 ... N.J.S.A. 47:1A-1.1. (Emphasis added.)" Therefore, the Council decided that because the Board received the record in the ordinary course of business and maintained a copy of the record, the record is a government record pursuant to N.J.S.A. 47:1A-1.1 and the custodian must disclose the requested record to the complainant.

Similarly here, because the requested record is a document that was received in the course of the HCPO's official business, it is a government record pursuant to N.J.S.A. 47:1A-1.1 and James, supra.

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

The Custodian next set forth several reasons why the requested record, if deemed to be a government record, is exempt from disclosure. The Custodian's first argument is that the Complainant was denied access to the record because it is attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1.

OPRA excludes from the definition of a government record any record within the attorney client privilege. N.J.S.A. 47:1A-1.1. In New Jersey, protecting confidentiality within the attorney-client relationship has long been recognized by the courts. *See, e.g. Matter of Grand Jury Subpoenas*, 241 N.J. Super. 18 (App. Div. 1989). In general, the attorney-client privilege renders as confidential communications between a lawyer and a client made in the course of that professional relationship. *See N.J.S.A. 2A: 84A-20 and Fellerman v. Bradley*, 99 N.J. 493, 498-99 (1985). Rule 504 (1) of the New Jersey Rules of Evidence provides that communications between a lawyer and client, "in the course of that relationship and in professional confidence, are privileged...." Such communications as discussion of litigation strategy, evaluation of liability, potential monetary exposure and settlement recommendations are considered privileged. The Press of Atlantic City v. Ocean County Joint Insurance Fund, 337 N.J. Super. 480, 487 (Law Div. 2000). Also confidential are mental impressions, legal conclusions, and opinions or theories of attorneys. In Re Environmental Ins. Actions, 259 N.J. Super. 308, 317 (App. Div. 1992).

The attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends and that the confidentiality of communications between client and attorney constitutes an indispensable ingredient of our legal system." Matter of Grand Jury Subpoenas, 241 N.J. Super. 18, 27-8 (App.Div.1989). The attorney-client privilege protects communications between a lawyer and the client made in the course of that professional relationship, and particularly protects information which, if disclosed, would jeopardize the legal position of the client. N.J.S.A. 2A:84A-20; RPC 1.6. Moreover, "[t]he privilege extends to communications between a public body and the attorney retained to represent it." Matter of Grand Jury, supra, at 28. The New Jersey Supreme Court has observed that RPC 1.6 "expands the scope of protected information to include all information relating to the representation, regardless of the source or whether the

client has requested it be kept confidential or whether disclosure of the information would be embarrassing or detrimental to the client.” In re Advisory Opinion No. 544 of N.J. Sup. Court, 103 N.J. 399, 406 (1986).

Redaction of otherwise public documents is appropriate where protection of privileged or confidential subject matter is a concern. South Jersey Publishing Co., Inc. v. N. J. Expressway Authority, 124 N.J. 478, 488-9 (1991). Moreover, whether the matter contained in the requested documents pertains to pending or closed cases is important, because the need for confidentiality is greater in pending matters. Keddie v. Rutgers, State University, 148 N.J. 36, 54 (1997). Nevertheless, “[e]ven in closed cases...attorney work-product and documents containing legal strategies may be entitled to protection from disclosure.” *Id.*

The Custodian cites to Payton v. NJ Turnpike Authority, 148 N.J. 524 (1997) in support of his argument that the requested record is attorney-client privileged material; however, the Custodian glosses over the dictum in Payton which addressed an attorney’s performance of nonlegal duties. A point which the Payton court elaborated upon as follows:

“a fine line exists between an attorney who provides legal services or advice to an organization and one who performs essentially nonlegal duties. An attorney who is not performing legal services or providing legal advice in some form does not qualify as a “lawyer” for purposes of the privilege. Thus, when an attorney conducts an investigation not for the purpose of preparing for litigation or providing legal advice, but rather for some other purpose, the privilege is inapplicable...[t]hat result obtains even where litigation may eventually arise from the subject of the attorney's activities. United Jersey Bank v. Wolosoff, 196 N.J. Super. 553, 563, 483 A.2d 821 (App.Div.1984)...

The key issue regarding the applicability of the privilege in this case is the purpose of the various components of the investigation that defendant initiated into plaintiff's allegations of sexual harassment. If the purpose was to provide legal advice or to prepare for litigation, then the privilege applies. **However, if the purpose was simply to enforce defendant's anti-harassment policy or to comply with its legal duty to investigate and to remedy the allegations, then the privilege does not apply.**

Although, given the state of the record and the trial court's failure to conduct an *in camera* review of the documents at issue, we are unable to draw conclusions regarding specific documents, we do not perceive the investigation that defendant performed as being one that generally is covered by the privilege. Defendant allegedly initiated the investigation months before plaintiff brought suit against it. The timetable thus suggests that defendant began to investigate in order to comply with its internal policies and to fulfill its legal duty under [Lehmann v. Toys ‘R’ Us, Inc., 132 N.J. 587, 626 A.2d. 445 (1993)]. Although any internal sexual-harassment complaint has the potential to balloon into a lawsuit, effective

internal remediation is independently necessary and may prevent such an eventuality. Thus, it is unclear, and perhaps unlikely, that the attorneys involved in the investigation were truly or primarily acting in their legal capacities. We agree with the statement that “[i]f all activities of a lawyer are to be classified as warranting the bar of discovery proceedings because of the attorney-client privilege, then it would be appropriate for clients to retain lawyers as investigators, custodians of records and the like, thereby turning the shield of the privilege into the sword of injustice.” Metalsalts Corp. v. Weiss, 76 N.J. Super. 291, 299, 184 A.2d 435 (Ch.Div.1962).]

A substantial number of sexual-harassment lawsuits raise the issue of the employer's response to the employee's internal complaint. If the attorney-client privilege were to apply broadly to any internal investigation of this type undertaken by an attorney, regardless of the pendency of litigation or the provision of legal advice, then all employers would commission attorneys as investigators, thus defeating the paramount public interest in eradicating discrimination as expressed in the LAD and as interpreted in Lehmann and [Dixon v. Rutgers Univ., 110 N.J. 432, 446-47, 541 A.2d 1046 (1988)]. The Appellate Division expressed this point: "We deem it unlikely that . . . Lehmann, having defined a cause of action against an employer based in part on the employer's response to a harassment complaint, [may be read] to permit an employer to immunize its response from inquiry by assigning a lawyer to investigate the complaint." 292 N.J. Super. at 50, 678 A.2d 279." Payton at 550-552 [Emphasis added].

Similarly, in Cooper Hospital/University Med. Ctr. v. Sullivan, 183 F.R.D. 119 (D.N.J. 1998), the court held that “[i]n order to receive the protection of the work-product doctrine, a document must have been prepared primarily in anticipation of litigation. The anticipated litigation need not be imminent, as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation.” The court also held that “Cooper's Mission Statement/Charge made it clear that, even though one of the Committee's duties was to make recommendations as to possible future legal action, the primary motivation for drafting the report was not in anticipation of litigation. Litigation was merely one of many stated goals which prompted the creation of the Committee and the drafting of the Report.”

Both the Complainant in his Denial of Access Complaint and the Custodian in his SOI acknowledged that the requested record was prepared by an attorney retained by Hunterdon County in anticipation of civil action against the county. However, the purpose for drafting the report was not in anticipation of litigation but rather “...the very purpose of the investigation underlying her report was, initially, to ascertain whether Nugent’s allegations were true and, if so, to advise Mr. DeSapio and Prosecutor Barnes on those steps necessary to remediate any further deviations from appropriate workplace behavior.”<sup>6</sup> As in Payton, *supra*, if the purpose was to enforce defendant's anti-harassment policy or to comply with its legal duty to investigate and to remedy the allegations, then the attorney-client privilege does not apply.

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<sup>6</sup> Quoted from page 6 of the Custodian’s legal argument in the SOI.

Accordingly, because the purpose of the record relevant to the complaint was not primarily to prepare for litigation or provide legal advice, but rather to advise the County Counsel and Prosecutor on those steps necessary to remediate any further deviations from appropriate workplace behavior, the record is not exempt from disclosure as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1. and Payton, *supra*.

The Custodian also argued that the requested record was exempt from disclosure because, pursuant to N.J.S.A. 47:1A-1.1., it constituted:

“...information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual or in connection with collective negotiations, including documents and statements of strategy or negotiating position...”

No complaint had been filed at the time of the Complainant’s OPRA request and, contrary to the Custodian’s argument that the reference to the word “grievance” in OPRA is a reference to the word as it is commonly understood; the Complainant asserted that no grievance was ever filed.

The Council rejects the Custodian’s assertion that the word “grievance” in OPRA is a reference to the word as it is commonly understood. The Superior Court has found that the word “grievance” has a specific meaning. In Asbury Park Press v. County of Monmouth and Carol Melnick, 406 N.J. Super. 1 (App. Div. 2009), the court determined that “[t]he word ‘grievance’ has a known meaning in the context of employer-employee relationships, especially when it is placed next to the words ‘collective negotiations.’” The Council has determined that the meaning the Asbury Park Press court attributed to the word “grievance” is the same meaning that should be attributed to the word as it appears in N.J.S.A. 47:1A-1.1.

Therefore, because the word “grievance” as it appears in OPRA is a term of art and not the word as it is commonly understood, and because the Complainant asserted that no grievance was filed by or against an individual and there is nothing in the evidence of record to dispute the Complainant’s assertion, the record is not exempt from disclosure as “...information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual...” pursuant to N.J.S.A. 47:1A-1.1. and Asbury Park Press, *supra*.

Finally, the Custodian argued that the requested record was exempt from disclosure because it constituted ACD material pursuant to N.J.S.A. 47:1A-1.1. The Custodian certified that the purpose of the record was to advise the County Counsel and Prosecutor regarding the steps necessary to remediate any further deviations from appropriate workplace behavior. Because the record is advisory in nature, the Custodian certified that it constitutes 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 GRC<sup>7</sup> in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The court stated that:

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

The court also stated that:

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

Further, the court stated that:

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

Therefore, pursuant to Paff, supra, the GRC must conduct an *in camera* review of the requested copy of an independent investigation into the allegations made by Michael Nugent to determine the validity of the Custodian’s assertion that the record constitutes ACD material pursuant to N.J.S.A. 47:1A-1.1.

**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?**

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

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<sup>7</sup> Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).  
Jeffrey Farneski v. Hunterdon County Prosecutor’s Office, 2010-20 – Findings and Recommendations of the Executive Director



## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the requested record is a document that was received in the course of the Hunterdon County Prosecutor's Office's official business, it is a government record pursuant to N.J.S.A. 47:1A-1.1. and James v. Holmdel Township Board of Education (Monmouth), GRC Complaint No. 2007-242 (November 2009).
2. Because the purpose of the record relevant to the complaint was not primarily to prepare for litigation or provide legal advice, but rather to advise the County Counsel and Prosecutor on those steps necessary to remediate any further deviations from appropriate workplace behavior, the record is not exempt from disclosure as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1. and Payton v. NJ Turnpike Authority, 148 N.J. 524 (1997).
3. Because the word "grievance" as it appears in OPRA is a term of art and not the word as it is commonly understood, and because the Complainant asserted that no grievance was filed by or against an individual and there is nothing in the evidence of record to dispute the Complainant's assertion, the record is not exempt from disclosure as "...information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual..." pursuant to N.J.S.A. 47:1A-1.1. and Asbury Park Press v. County of Monmouth and Carol Melnick, 406 N.J. Super. 1 (App. Div. 2009).
4. 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* examination of the requested copy of an independent investigation into the allegations made by Michael Nugent to determine the validity of the Custodian's assertion that the record constitutes advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-1.1.
5. **The Custodian must deliver<sup>8</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted record identified in paragraph 4 above, a document or redaction index<sup>9</sup>, as well as a legal certification in accordance with N.J. Court Rule 1:4-4<sup>10</sup>, that the record provided is the document requested by the Council for the *in camera* inspection. Such**

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<sup>8</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>9</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial. Because there are often numerous radio codes on any one record, it is important that the Custodian address each and every radio code separately on the document or redaction index.

<sup>10</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

6. 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, Esq.

Approved By: Catherine Starghill, Esq.  
Executive Director

October 18, 2011