



**State of New Jersey**  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

CHARLES A. RICHMAN  
*Commissioner*

**FINAL DECISION**

**November 17, 2015 Government Records Council Meeting**

Deborah Post  
Complainant

Complaint No. 2014-317

v.

NJ Highlands Water Protection and Planning Council  
Custodian of Record

At the November 17, 2015 public meeting, the Government Records Council (“Council”) considered the November 10, 2015 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 the draft versions of the Highlands Council’s document describing the Regional Master Plan revision process contain “opinions, recommendations, or advice about agency policies.” Thus it qualifies as advisory, consultative, and/or deliberative material and is exempt from disclosure. N.J.S.A. 47:1A-1.1; In re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000). Accordingly, the Custodian has borne her burden of proving that she lawfully denied access to both requested items. N.J.S.A. 47:1A-1.1; O’Shea v. W. Milford Bd. of Educ. GRC Complaint No. 2004-93 (October 2004). Further, the list of stakeholders as of November 20, 2014, and e-mail invites to stakeholder groups sent in October-November 2014 requested in Item No. 1 did not exist at the time of the August 26, 2014 request. Therefore, the Custodian had no obligation to disclose those once created. As such, there was no unlawful denial of access. Scheeler v. Woodbine Bd. of Educ. (Cape May), GRC Complaint No. 2014-58 (January 2015).

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 17<sup>th</sup> Day of November, 2015

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: November 19, 2015**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 17, 2015 Council Meeting**

**Deborah Post<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-317**

**v.**

**NJ Highlands Water Protection and Planning Council<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:<sup>3</sup>**

1. “All documents identifying the ten stakeholder groups...regarding the RMPMP,<sup>4</sup> and all documents listing the organizations institutions or parties who are members of/participants in each of the ten stakeholder groups.”
2. “All documents identifying the twenty technical advisory committees . . . regarding the RMPMP, and all documents listing the organizations/institutions or parties who are members are of/participants in each of the twenty technical advisory committees.”<sup>5</sup>

**Custodian of Record:** Kim Ball Kaiser

**Request Received by Custodian:** August 26, 2014

**Response Made by Custodian:** September 3, 2014

**GRC Complaint Received:** September 9, 2014

**Background<sup>6</sup>**

**Request and Response:**

On August 26, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On September 3 2014, the Custodian responded in writing by denying access to requested Items # 1 and # 2, because the lists were incomplete, or not yet finalized, also privileged as advisory, consultative and deliberative (“ACD”) materials.

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

<sup>2</sup> Represented by Deputy Attorney General Matthew Kelly.

<sup>3</sup> The Complainant had sought a third category of records concerning outside consultants, but withdrew that portion of her complaint in a letter to the GRC received on January 21, 2015.

<sup>4</sup> The Complainant attached a Resolution of the NJ Highlands Water Protection & Planning Council (“Highlands Council”), which states that “RMP” stands for Regional Master Plan, suggesting that “RMPPR” is a typographical error. The GRC herein uses “RMP” for the Regional Master Plan.

<sup>5</sup> The Complainant added that, for both items, “[a] responsive listing is acceptable in lieu of documents.”

<sup>6</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Deborah Post v. NJ Highlands Water Protection and Planning Council, 2014-317 – Findings and Recommendations of the Executive Director

### Denial of Access Complaint:

On September 9, 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the requested lists of stakeholders and technical advisory groups existed, but were being withheld to “keep the landowners shut out [of the process] long enough so that their input [and] sincere participation [would] not [be] possible from a practical standpoint.”

### Statement of Information:

On October 16, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on August 26, 2014. The Custodian certified that she responded to the Complainant in writing on September 3, 2014, by regular mail to the Complainant, advising her that request Item #1, a list of stakeholders, and request Item #2, a list of technical advisory committee members, had not been completed. Also, for both requested items, the Custodian advised the Complainant that since the lists were not finalized, all requested records were privileged as advisory, consultative, and deliberative materials. Counsel for the Custodian attached a brief to the SOI. He noted that the RMP was only recently adopted in 2008. He stated that state law requires that the RMP be revised and updated every six years. He further stated that as part of that update, stakeholder groups and technical advisory committees were to be consulted. But, as of the date of the OPRA request, the Highlands Council was still seeking input from the public about stakeholder groups which would be included in the process. Accordingly, no final list of such groups existed. Further, he stated that the only responsive record was an internal memorandum, of which there were eleven (11) different working draft versions “describe[ing] the [Highland Council’s] approach to the RMP revision process.” These drafts dated between July 31, 2014, and August 20, 2014, were, he argued, privileged as constituting inter-agency advisory, consultative, and deliberative material. *Citing Educ. Law Ctr. v. NJ Dep’t of Educ.*, 198 N.J. 274 (2009)

### Additional Submissions:

On November 24, 2014, the Custodian advised the Complainant by certified letter that “stakeholder group names and members have been compiled” and attached a list of those members and organizations they represent, “[a]s of 11/20/14.” The letter stated that, at their October 16, 2014 meeting, the Highlands Council reported that as of September 17, 2014, the Regional Master Plan Update Committee was still working on finalizing the list of stakeholders. The letter further stated that since that time thirteen stakeholder groups had been sent invitations for their group’s first round of meetings.

On January 21, 2015, the Complainant responded to the Custodian’s letter and list. She argued that documents identifying the ten stakeholder groups existed prior to the October 22, October 29, and November 13, 2014 meetings of those groups. The Complainant stated that she obtained records of e-mail invites to meetings, sent to identified-stakeholder groups during October and November, 2014, as a result of a response to her November 25 OPRA request. She stated that the purpose of her August 26, 2014 OPRA request was to identify the Council-

deemed “ten stakeholder groups.” She also stated that documents received as a result of her November 25, 2014 request proved that the Highlands Council had responsive documents in existence before the list was disclosed to her. Therefore, she claimed, the Custodian deliberately violated OPRA by not providing those e-mails to her in a timely fashion. Further, she objected to the disclosed list, claiming it appeared to be “fabricated.”<sup>7</sup>

## Analysis

### Unlawful Denial of Access

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.

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. W. Milford Bd. of Educ., GRC Complaint No. 2004-93 (October 2004) the Council provided that:

[N]either 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 Liquidation of Integrity Ins. Co., 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. N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132 (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 the decision-making process *and* its disclosure would reveal deliberations that occurred during that process. Educ. Law Ctr. v. N.J. Dep’t of Educ., 198 N.J. 274 (2009) (emphasis added). This long-recognized privilege is rooted in the concept that the sovereign has an interest in protecting the integrity of its deliberations. Id. at 286. The earliest federal case adopting the privilege is Kaiser

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<sup>7</sup> The Complainant’s August 26, 2014 OPRA request specifically permitted a “responsive listing in lieu of records.” Deborah Post v. NJ Highlands Water Protection and Planning Council, 2014-317 – Findings and Recommendations of the Executive Director

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 Integrity, 165 N.J. at 81. 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. The Court adopted a qualified deliberative process privilege based upon the holding of McClain v. Coll. Hosp., 99 N.J. 346 (1985). Integrity, 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.

Id. at 84-85 (citations omitted).

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

The 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.

Integrity, 165 N.J. at 88 (citing McClain, 99 N.J. at 361-62).

Here, the Custodian certified that she timely denied access by advising the Complainant that the lists of stakeholders and technical advisory committees were not finalized, and thus were privileged as deliberative material. As explained by Custodian’s Counsel, at the time of the OPRA request, the Highlands Council was still seeking input from the public about stakeholder groups which they believed should be included in the process. Therefore, no final list of such groups existed at the time of the request. Further, the only responsive record was a draft internal memorandum, of which there were eleven (11) versions, describing “the [Council’s] approach to

the RMP revision process,” which was deliberative in nature and thus privileged.

The Complainant does not argue against the claimed exemption. Rather, she contends that certain records existed well before the Custodian provided them. However, the only evidence she provides are e-mails from October 9, 2014 or later which showed invitations to groups of proposed stakeholder meetings. The OPRA request was made on September 5, 2014. Clearly, these documents did not exist at the time of the request. On November 24, 2014, the Custodian released a list, which may have been created to satisfy the Complainant, of the Stakeholder groups and members “as of 11/20/2014.” The record demonstrates that the list did not exist at on the August 26, 2014 request date. The Council has previously determined that a custodian is not required to provide records that came into existence after the submission of an OPRA request. Paff v. City of Union City (Hudson), GRC Complaint No. 2012-262 (August 2013). Further, OPRA does not contemplate on-going requests for records. See Paff v. Neptune Twp. Hous. Auth. (Monmouth), GRC Complaint No. 2010-307 (Interim Order dated April 25, 2012). See also, Scheeler v. Woodbine Bd. of Educ. (Cape May), GRC Complaint No. 2014-58 (January 2015).

The GRC concludes that the draft versions of the Highlands Council’s document describing the RMP revision process contain “opinions, recommendations, or advice about agency policies.” Thus it qualifies as ACD material and is exempt from disclosure. N.J.S.A. 47:1A-1.1; Integrity, 165 N.J. at 84-85. Accordingly, the Custodian has borne her burden of proving that she lawfully denied access to both requested items. N.J.S.A. 47:1A-1.1; O’Shea, GRC 2004-93. Further, the list of stakeholders as of November 20, 2014 and e-mail invites to stakeholder groups sent in October-November 2014 requested in Item No. 1 did not exist at the time of the August 26, 2014 request. Therefore, the Custodian had no obligation to disclose them once created. As such, there was no unlawful denial of access. Scheeler, GRC 2014-58.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the draft versions of the Highlands Council’s document describing the Regional Master Plan revision process contain “opinions, recommendations, or advice about agency policies.” Thus it qualifies as advisory, consultative, and/or deliberative material and is exempt from disclosure. N.J.S.A. 47:1A-1.1; In re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000). Accordingly, the Custodian has borne her burden of proving that she lawfully denied access to both requested items. N.J.S.A. 47:1A-1.1; O’Shea v. W. Milford Bd. of Educ. GRC Complaint No. 2004-93 (October 2004). Further, the list of stakeholders as of November 20, 2014, and e-mail invites to stakeholder groups sent in October-November 2014 requested in Item No. 1 did not exist at the time of the August 26, 2014 request. Therefore, the Custodian had no obligation to disclose those once created. As such, there was no unlawful denial of access. Scheeler v. Woodbine Bd. of Educ. (Cape May), GRC Complaint No. 2014-58 (January 2015).

Prepared By: Ernest Bongiovanni  
Staff Attorney

Reviewed By: Dawn R. SanFilippo  
Deputy Executive Director

November 10, 2015