



Minutes of the Government Records Council November 18, 2009 Public Meeting – Open Session

The meeting was called to order at 10:37 a.m. at the Department of Community Affairs, Conference Room 126, Trenton, New Jersey. The Open Public Meetings Act statement was read.

The pledge of allegiance was recited while standing by all.

The meeting notice and fire emergency procedure was read by Ms. Tabakin.

Ms. Hairston called the roll:

Present: Robin Berg Tabakin, Chairwoman, Harlynne Lack (designee of Department of Community Affairs Acting Commissioner Charles Richman), and Kathryn Forsyth (designee of Department of Education Commissioner Lucille Davy).

GRC Staff In Attendance: Executive Director Catherine Starghill, In-House Counsel Karyn Gordon, GRC Secretary Brigitte Hairston, Case Managers: Dara Lownie, Frank Caruso, John Stewart, Sherin Keys, and Designated Outside Counsel Gina Orosz.

The November 4, 2009 open and closed session minutes could not be approved for a lack of quorum, however Ms. Forsyth pointed out edits required for the closed session minutes. Such edits will be made for review at the December 22, 2009 meeting.

Council Adjudication:

The following complaints were presented to the Council for summary administrative adjudication:

1. Joseph W Coiro v. Hudson County Improvement Authority (2008-28)
2. Peter Perry Belfiore v. City of Hoboken (Hudson) (2009-75)
3. William Schulte v. City of Newark (Essex) (2008-218)
4. Steve Gorbe v. Monroe Fire District No.3 (Middlesex) (2009-250)
5. Greg Byrnes v. Township of West Orange (Essex) (2009-291)
6. Richard Rivera v. New Brunswick Police Department (Middlesex) (2009-299)

Ms. Tabakin called for a motion to accept the Executive Director's recommendations as written in all of the above Administrative Complaint Dispositions. A motion was made by Ms. Forsyth and seconded by Ms. Lack. The motion passed unanimously.

The following complaints requiring individual adjudication were not put to a vote due to the lack of quorum:

1. James D'Andrea v. NJ Department of Community Affairs, Division of Local Government Services (2007-64)
2. William Gettler v. Wantage Regional Schools, Board of Education (Sussex) (2007-105)
3. Joyce Blay v. Jackson Board of Education (Ocean) (2007-177)
4. John Paff v. Borough of Lavallette (Ocean) (2007-209)
5. David Hinchcliffe v. NJ Department of Community Affairs, Division of Local Government Services (2007-306)
6. John Bentz v. Borough of Paramus (Bergen) (2008-89)
7. J.C. v. NJ Department of Education, Deputy Commissioner's Office (2008-91)
8. Robert Verry v. Borough of South Bound Brook (Somerset) (2008-161)
9. Gertrude Casselle v. NJ Department of Community Affairs, Division of Community Resources (2008-248)
10. Ursula Cargill v. NJ Department of Education (2009-9)
11. Ursula Cargill v. State Ethics Commission (2009-10)
12. James Sage v. County of Monmouth Board of Chosen Freeholders (2009-43)

The following complaints were presented to the Council for individual adjudication:

Randolph Young v. NJ Civil Service Commission (formerly NJ Dept of Personnel) (2007-210)

Ms. Lownie reviewed the GRC's analysis and issues in the case as set forth in the Supplemental Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. Because the current Custodian provided the Complainant with a copy of the requested record in redacted form as ordered by the Council, and provided certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of the Council's Order, the current Custodian has complied with the Council's Interim Order dated September 30, 2009.
2. Although the original Custodian's claimed exemption of advisory, consultative, or deliberative material did not apply to the entirety of the requested record, the majority of said record is exempt from disclosure as a personnel record pursuant to N.J.S.A. 47:1A-10. Additionally, both the original and current Custodians complied with the Council's Interim Orders which either directed the Custodian to provide the requested record to the Council for an *in camera* review, or directed the Custodian to disclose the record to the Complainant with appropriate redactions. Therefore, it is concluded that neither the original nor the current Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the original Custodian's "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Lack. The motion passed unanimously.

David Dalesky v. Borough of Raritan (Somerset) (2008-61)

Mr. Stewart reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Stewart presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. Because N.J.S.A. 40A:14-118 provides for the creation and establishment of a police force, and because nothing contained within that statute prevents the appointment by the governing body of committees or commissions to conduct investigations of the operation of the police force, and because the Borough of Raritan's citizen police committee was appointed by the governing body to conduct an investigation of the operations of the Borough Police Department, the citizen police committee is a duly formed agency of the Borough and is subject to the provisions of OPRA pursuant to N.J.S.A. 47:1A-1.1.
2. Because the Special Police Committee Report requested by the Complainant in his request dated July 10, 2007 is still a draft document, and because draft documents in their entirety comprise advisory, consultative or deliberative material, the Custodian has lawfully denied the Complainant access to the Special Police Committee Report pursuant to N.J.S.A. 47:1A-1.1., N.J.S.A. 47:1A-6, and the courts' decisions in In re Readoption with Amendments of Death Penalty Regulations, 182 N.J. 149 (App. Div. 2004) and Jennifer Beck and Sean T. Kean v. Barbara O'Hare, Superior Court of New Jersey, Law Division – Mercer County, Docket No. MER-L-2411-07 (November 26, 2007).
3. Because Item #1 of the Complainant's January 3, 2008 request is not a request for identifiable government records, and because the Custodian is not required to conduct research in response to a request, the request is invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
4. Because the Custodian certified that there were no records responsive to the Complainant's January 3, 2008 request for Item #2, Item #3 and Item #4, and because there is no credible evidence to refute the Custodian's certifications in the record, the Custodian did not unlawfully deny the Complainant access to the requested records pursuant to N.J.S.A. 47:1A-1.1. See Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Gayle Livecchia v. Borough of Mount Arlington (Morris) (2008-80)

Ms. Keys reviewed the GRC's analysis and issues in the case as set forth in the Supplemental Findings and Recommendations of the Executive Director. Ms. Keys presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. Because no privacy issues can be implicated by the disclosure of a generic city and state without any personal identifiers such as a telephone number, the Custodian's redaction of the city and state of the location of cell phone calls from the requested cell phone bills violated N.J.S.A. 47:1A-5.g.
2. **The Custodian must disclose to the Complainant copies of the requested cell phone bills with the city and state of the location of the cell phone calls unredacted, and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005),¹ to the Executive Director, within five (5) business days of receipt of the Council's Interim Order.**
3. Because the Complainant's request would require the Custodian to conduct research, the request is invalid pursuant to MAG Entertainment LLC. v. Div. of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007), and Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009).
4. Pursuant to N.J.S.A. 47:1A-5.b and Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Custodian must charge the actual cost of duplicating the audiotapes. As such, the Custodian's charge of \$5.00 each for two audio recordings of the requested meeting minutes is unreasonable and in violation of N.J.S.A. 47:1A-5.b. The Custodian must therefore charge the actual cost of the audiotapes and shall not include the cost of labor or other overhead expenses associated with making the copy; to the extent that the actual cost of duplication of such audiotapes is less than the \$5.00 per tape charged by the Custodian, the Custodian must refund the difference.
5. **The Custodian must provide to the Council a certification of the actual costs associated with duplication of an audiotape, excluding labor or other overhead expenses associated with making the copy, and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director, within five (5) business days of receipt of the Council's Interim Order.**

¹ "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."

6. Based on the Appellate Division's decision in Windish v. Mount Arlington Board of Education, 2007 N.J. Super. Unpub. Lexis 228, the Custodian in the matter before the Council properly charged the Complainant the enumerated copying rates set forth at N.J.S.A. 47:1A-5.b.
7. It is reasonable for a custodian to charge a requestor the actual postage cost associated with delivering records by mail. The Custodian in the matter before the Council must charge *actual* postage cost not anticipated postage cost associated with delivery by mail of the requested records. The Custodian must also provide the GRC a certified confirmation of the actual postage cost.
8. **The Custodian must provide to the Council a certification of the actual postage costs associated with delivery by mail of the request records, and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director, within five (5) business days of receipt of the Council's Interim Order.**
9. 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.
10. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 pending the Custodian's compliance with the Council's Interim Order.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Joe Ungaro v. Town of Dover (Morris) (2008-115)

Ms. Lownie reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. Because the Custodian provided the Complainant with a copy of the requested record without redactions, and provided certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of the Council's Order, the Custodian has complied with the Council's Interim Order dated September 30, 2009.
2. Although the Custodian unlawfully denied access to the requested settlement agreement, there is no evidence in the record that suggests the Custodian's actions were more than negligent conduct, had a positive element of conscious wrongdoing, or intentional and deliberate, with knowledge of their wrongfulness. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA. However, the Custodian's unlawful

denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Leonard Lucente v. City of Union City (Hudson) (2008-119)

Ms. Lownie reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council found that although the Custodian provided a response to the Council's September 30, 2009 Interim Order, the Council need not address whether the Custodian has complied with said Order because the Complainant withdrew his complaint on October 15, 2009. Therefore, no further adjudication of this complaint is required.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Lack. The motion passed unanimously.

David Matthews v. Englewood Public School, Board of Education (Bergen) (2008-134)

Mr. Caruso reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Caruso presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. Because the Custodian provided the Complainant with the requested check, as well as because the Custodian provided certified confirmation of compliance to the GRC's Executive Director within the five (5) business days as ordered by the Council, the Custodian has complied with the Council's September 30, 2009 Interim Order
2. Although the Custodian's failure to respond in writing within the statutorily mandated seven (7) business days resulted in a "deemed" denial of the Complainant's request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and the Custodian failed to bear his burden of proving a lawful denial of access to the requested check, because the Custodian complied with the Council's September 30, 2009 Interim Order, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Ronald Bonadies v. Borough of Kenilworth (Union) (2008-153)

Ms. Lownie reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that:

1. Under the state of the law at the time of the Complainant's requests, the Complainant's records requests dated April 22, 2008 and May 1, 2008 are not valid OPRA requests because the Complainant failed to submit said requests on the Borough's official OPRA request form, and as such, there is no unlawful denial of access under OPRA pursuant to N.J.S.A. 47:1A-5.g., MAG Entertainment LLC v. Div. of ABC, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Twp. of Stafford Police Dept., 381 N.J. Super. 30 (App. Div. 2005), and Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005).
2. Because the Complainant's records requests are not valid OPRA requests, and because the Tax Collector did not unlawfully deny access to records under OPRA, it is concluded that the Tax Collector did not knowingly and willfully violate OPRA.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Lack and seconded by Mr. Forsyth. The motion passed unanimously.

Frank Amoresano v. Rowan University (2008-169)

Mr. Caruso reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Caruso presented the following recommendations to the Council with amendments:

The Executive Director respectfully recommends the Council find that because the Complainant's OPRA request seeks information rather than a specifically identifiable government record, the request items are invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005).

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Lack. The motion passed unanimously.

Frank Amoresano v. Rowan University (2009-170)

Mr. Caruso reviewed the GRC's analysis and issues in the case as set forth in the *In Camera* Findings and Recommendations of the Executive Director. Mr. Caruso presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that because the Complainant's OPRA request seeks information rather than specific identifiable government records, the request items are invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005).

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Frank Amoresano v. Rowan University (2008-177)

Mr. Caruso reviewed the GRC's analysis and issues in the case as set forth in the Supplemental Findings and Recommendations of the Executive Director. Mr. Caruso presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that because the Complainant's OPRA request seeks information rather than specific identifiable government records, the request is invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005).

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Lack and seconded by Mr. Forsyth. The motion passed unanimously.

Robert Edwards v. Housing Authority of Plainfield (Union) (2008-183)

Ms. Keys reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Keys presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that because evidence exists which contradicts the asserted basis for the denial of access, and because the Custodian has failed to provide the requested Statement of Information in the instant matter, the GRC is unable to determine whether the Custodian unlawfully denied the Complainant access to the records responsive to his request. Thus, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts to determine whether the Custodian unlawfully denied the Complainant access to the records requested, and if so, for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Albert Pyle v. Township of Neptune (Monmouth) (2008-199)

Ms. Keys reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Keys presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. Because the Custodian responded timely and in writing to the Complainant's October 15, 2007 request, granting access to some of the records requested, denying access to others, and providing a specific reason for the denial of access, and later certified to the GRC that he provided all the records responsive to the Complainant's request and no further records were available, the Custodian has met his burden of proving that all records responsive to the request were provided to the Complainant pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005). Consequently, the Custodian has not unlawfully denied the Complainant access to the records requested.
2. The Custodian's failure to respond in writing to the Complainant's October 22, 2007 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
3. Because the Custodian has certified that there were no records responsive to the Complainant's October 22, 2007 OPRA request and there is no credible evidence in the record to refute this certification, the Custodian has not unlawfully denied the Complainant access to the records requested pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian's failure to respond in writing to the Complainant's October 22, 2007 OPRA request resulted in a "deemed" denial, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances because no records responsive to the Complainant's October 22, 2007 OPRA request exist. However, the Custodian's "deemed" denial of access, appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Regina Okafor v. Township of Irvington (Essex) (2008-214)

Mr. Stewart reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Stewart presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that based on the inadequate evidence presented in this matter, the GRC is unable to determine whether or

not the Custodian unlawfully denied access to the records responsive to the Complainant's request. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts to determine whether the Custodian unlawfully denied access, and if so, for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

John Paff v. High Bridge Board of Education (Hunterdon) (2008-218)

Ms. Lownie reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that because of the generic definition of the word "present," and because the Board of Education's OPRA request form does not contain any additional language that restricts OPRA request submissions to hand-delivery only, as well as because custodians may restrict OPRA request submissions to the agency's normal business hours pursuant to N.J.S.A. 47:1A-5.a., the Board of Education's OPRA request form which was in use at the time of the Complainant's request does not provide misinformation regarding the accessibility of government records as the Council held in O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008). As such, the Custodian has not violated OPRA.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Tom Coulter v. Township of Bridgewater (Somerset) (2008-220)

Mr. Caruso reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Caruso presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that:

1. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian's charge of \$5.00 per CD of the requested CD of the audio recording of the public meeting dated February 4, 2008 is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. See also O'Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185. Further, the Custodian failed to bear her burden of proving that the charge was actual cost pursuant to N.J.S.A. 47:1A-6.

2. Pursuant to Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (January 2008), the Custodian shall refund to the Complainant the difference between the \$5.00 fee and the “actual cost” of \$0.96 (or \$4.04).
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council’s Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4², 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.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Lack. The motion passed unanimously.

Martin O’Shea v. Township of West Milford (Passaic) (2008-224)

Ms. Lownie reviewed the GRC’s analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendations to the Council:

- The Executive Director respectfully recommends the Council find:
1. Because Items no. 2-3 of the Complainant’s OPRA request do not identify with reasonable clarity the records sought, and because a custodian is not required to conduct research in response to an OPRA request, said items of the Complainant’s OPRA request are invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), and Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).
 2. Because Items no. 2-3 of the Complainant’s OPRA request require research to fulfill and the Custodian chose to conduct such research, the approximate 6½ hours between the time the Complainant submitted his OPRA request and the time the Custodian provided a written response to said request, an hour and a half of which the Custodian was at lunch, is not unreasonable, nor is such time a violation of N.J.S.A. 47:1A-5.e.
 3. Because the Custodian provided the Complainant with a written response in which the Custodian indicated that the only record responsive to the Complainant’s OPRA request had been provided to him earlier in the day and that there are no other records

² "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."

responsive to his OPRA request, the Custodian properly responded to said request pursuant to N.J.S.A. 47:1A-5.g., even though said response was not on the OPRA request form.

4. Because the Custodian did not violate OPRA at N.J.S.A. 47:1A-5.e. or N.J.S.A. 47:1A-5.g. and properly responded to the Complainant's OPRA request, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
5. Because the Custodian's behavior did not change as a result of this Denial of Access Complaint, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Martin O'Shea v. Township of Little Falls (Passaic) (2008-225)

Mr. Caruso reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Caruso presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. Because the Custodian failed to specifically address the reason why the records responsive to the Complainant's OPRA request could not be provided by the preferred method of delivery, even though the Custodian had the means to do so, the Custodian's response is insufficient pursuant to N.J.S.A. 47:1A-5.g. and O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251(February 2008).
2. The Custodian shall disclose the requested records as e-mail attachments per the Complainant's preferred method of delivery.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4³, 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.

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."

5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Jesse Wolosky v. Township of Sparta (Sussex) (2008-236)

Ms. Lownie reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian provided two (2) written responses to the Complainant's OPRA request in which the Custodian indicated that she needed time beyond the statutorily mandated seven (7) business days to fulfill the Complainant's OPRA request, said responses are inadequate pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because they fail to provide an anticipated deadline date upon which the requested records will be provided.
2. Because the Custodian denied access to eight (8) sets of meeting minutes and three (3) memos that do not exist in her written response dated October 2, 2008, the sixth (6th) business day following receipt of the Complainant's OPRA request, said portion of the Custodian's October 2, 2008 response was proper pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
3. Because the Custodian provided the Complainant with a subsequent response on the seventh (7th) business day in which the Custodian provided a date certain as to when she would either make the records available or provide a further response to the Complainant's OPRA request, even though such extension was initiated by the Complainant's Counsel, the Custodian's written response dated October 3, 2008 properly requests an extension of time pursuant to N.J.S.A. 47:1A-5.i. As such, said response negates the Custodian's prior insufficient responses dated September 24, 2008 and October 2, 2008 pursuant to O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237 (December 2008) (holding that although the Custodian's initial written response to the Complainant's OPRA request did not make the requested records available in the medium requested, because the Custodian made the requested records available to the Complainant in the medium requested in her subsequent written response to the Complainant, which was within the statutorily mandated seven (7) business day time period to respond pursuant to N.J.S.A. 47:1A-5.i., the Custodian did not violate OPRA).
4. Because the Custodian provided the Complainant with a written response within the extended deadline, and provided the Complainant with another date certain on which the Custodian would make the requested records available to the Complainant, the Custodian's written response dated October 10, 2008 is proper pursuant to N.J.S.A.

47:1A-5.i. Additionally, the Custodian made the requested records available to the Complainant on October 17, 2008, the extended deadline date.

5. Although the Custodian's initial written responses to the Complainant's OPRA request were insufficient because the Custodian failed to provide an anticipated deadline date on which she would make the requested records available to the Complainant, the Custodian ultimately provided such a response on the seventh (7th) business day following receipt of the Complainant's request which negates her prior insufficient responses. Additionally, the Custodian properly provided subsequent responses to the Complainant by responding within the extended deadline dates and either providing another date certain on which she would further respond or ultimately releasing the requested records. Therefore, the Custodian has not unlawfully delayed access to the requested records.
6. Although the Custodian's initial written responses to the Complainant's OPRA request were insufficient, the Custodian ultimately did not violate OPRA and provided the requested records to the Complainant by the extended deadline date of October 17, 2008. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
7. Because the Custodian's behavior did not change as a result of this Denial of Access Complaint, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations with amendments. A motion was made by Ms. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Gertrude Casselle v. NJ Department of Human Services, Division of Family Development (2008-247)

Mr. Caruso reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Caruso presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-85 (June 2009).
2. Although the Custodian provided a written response to the Complainant's amended request within the statutorily mandated seven (7) business days, said response is

insufficient pursuant to OPRA because it does not grant access, deny access, seek clarification, or request an extension of time. Thus, amended request Items No. 1 through No. 4 are “deemed” denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Bart v. City of Paterson Housing Authority, GRC Complaint No 2005-145 (May 2007).

3. While the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. when he failed to respond to the Complainant’s request in writing within the statutorily-mandated seven (7) business days and provided an insufficient response to the Complainant’s amended request items on October 2, 2008, the Custodian did not unlawfully deny access to the records responsive to request Items No. 1 through No. 4 pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
4. Because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Complainant’s amended OPRA request Items No. 5 and No. 7 are invalid under OPRA and the Custodian had no legal duty to research his records to locate records potentially responsive to the Complainant’s request items pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). See Feiler-Jampel v. Somerset County Prosecutor’s Office, GRC Complaint No. 2007-190 (March 2008). See also: Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).
5. Although the Custodian failed to respond in writing to the Complainant’s OPRA request within the statutorily mandated time frame, the Custodian did respond in writing to the Complainant’s amended OPRA request on October 2, 2008 stating that New Jersey Division of Family Development is not the custodial agency for Equal Employment Opportunity complaint files, and subsequently certified on October 2, 2009 that no records responsive to the Complainant’s amended request item exist and there is no credible evidence in the record to refute the Custodian’s certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., he did not unlawfully deny access to the Equal Employment Opportunity complaint report and findings pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
6. Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business day time frame resulted in a “deemed” denial and although the Custodian provided an insufficient response to the Complainant’s amended request Items No. 1 through No. 4 on October 2, 2008, because the Custodian certified that he provided all records responsive to the Complainant’s amended request Items No. 1 through No. 4 on October 28, 2008 and certified that no records responsive to amended request Item No. 6 exist, and because amended request Items No. 5 and No. 7 are invalid under OPRA, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s unlawful “deemed” denial of

access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Harun Shahid v. Essex County Prosecutor's Office (2008-251)

Ms. Keys reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Keys presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. Request Items No. 1 and 2 are invalid under OPRA because they would require the Custodian to conduct research to identify the records responsive to the request. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009) and Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007). Therefore, the Custodian has not unlawfully denied the Complainant access to the records requested in Request Items No. 1 and 2.
2. Because the Custodian has certified that no records responsive to Request Item No. 3 exist and there is no credible evidence in the record to refute the Custodian's certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to the records requested in Request Item No. 3.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Pat Walsh v. Township of Middletown (Monmouth) (2008-266)

Mr. Caruso reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Caruso presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. Based on the language of N.J.S.A. 40A:9-22.6(b), N.J.S.A. 40A:9-22.6(c) and the court's note in Kenny v. Byrne, 144 N.J. Super. 243, 252 (App. Div. 1976), the Custodian has unlawfully redacted addresses of real property owned by public officials. Additionally, the Custodian has failed to bear her burden of proof that said redactions were authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian shall release the requested financial disclosure statements without redactions for real property owned.
2. **The Custodian shall comply with Item No. 1 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide**

certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁴, to the Executive Director.

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Jesse Wolosky v. Township of Sparta (Sussex) (2008-277)

Ms. Keys reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Keys presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant has requested records in a medium not routinely maintained by the Custodian and given the volume, extraordinary expenditure of time and effort and the extensive use of information technology necessary to fulfill the Complainant's first (1st) and second (2nd) OPRA requests dated April 7, 2008, a special service charge is warranted pursuant to N.J.S.A. 47:1A-5.c., N.J.S.A. 47:1A-5.d. and Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002).
2. The portion of the special service charge assessed based upon the hourly rate of the Director of Technology is unreasonable pursuant to N.J.S.A. 47:1A-5.c., Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191, 204 (Law Div. 2002), Renna v. County of Union, GRC Complaint No. 2004-134 (January 2005), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007). The Custodian must, therefore, disclose the records responsive to the Complainant's first (1st) and second (2nd) OPRA requests dated April 7, 2008 in the medium requested, using the hourly rate of the lowest paid qualified employee to calculate the labor portion of the special service charge pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d.
3. **The Custodian shall recalculate the appropriate rate in accordance with item #2 above and shall make available to the Complainant the requested records at this rate within five (5) business days from receipt of the Council's Interim Order**

⁴ "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."

and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁵, to the Executive Director.

4. Because the Complainant has requested audio recordings in a medium not routinely maintained by the Custodian, and because fulfilling the Complainant's OPRA requests dated April 3, 2009, April 9, 2009 and the third (3rd) and fourth (4th) OPRA requests dated April 7, 2009, would require an extraordinary expenditure of time and effort and an extensive use of information technology, a special service charge is warranted pursuant to Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002) and N.J.S.A. 47:1A-5.c.
5. The special service charge assessed by the Custodian is reasonable pursuant to N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.d. because the Custodian has certified that the Director of Technology is the only Township employee capable of converting the records requested into the medium requested and that the fee assessed was based solely on the Director of Technology's base salary. Renna v. County of Union, GRC Complaint No. 2004-134 (January 2005), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Janney v. Estell Manor City (Atlantic), GRC Complaint No. 2006-205 (December 2007), Courier Post v. Lenape Regional High School District, 360 N.J. Super. 191, 204 (Law Div. 2002).
6. Because the Council has determined that the special service charge assessed by the Custodian for the Complainant's OPRA requests dated April 3, 2009, April 9, 2009 and the third (3rd) and fourth (4th) OPRA requests dated April 7, 2009, is valid and reasonable, the audio recordings of the March 25, 2008, April 8, 2008, November 27, 2007, and December 27, 2007 Township Council meetings shall not be disclosed to the Complainant until the Complainant pays the appropriate special service charge. The special service charge shall consist of the \$67.00 per hour labor cost initially assessed by the Custodian multiplied by the total number of hours of labor required to convert the audio recordings into the Windows WAV format plus the cost of materials pursuant to Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002) and N.J.S.A. 47:1A-5.c.
7. **The Custodian shall calculate the appropriate fee in accordance with item #6 above and shall make the exact amount of the fee available to the Complainant within three (3) business days from receipt of the Council's Interim Order. The Complainant shall comply with item # 6 above within five (5) business days from receipt of the Council's Interim Order by delivering to the Custodian (a) payment of a special service charge, or (b) a statement declining to purchase the records. The Complainant's failure to take any action within the five (5) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. Within seven (7) business days from receipt of the Council's Interim Order, the Custodian shall provide to the Executive Director a statement with regards to the Complainant's willingness or refusal to purchase the requested records, the amount of the special service charge, the total number of hours required to**

⁵ "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."

perform the medium conversion and confirmation that the records were so provided to the Complainant, if applicable. The Custodian's statement shall be in the form of a certification in accordance with N.J. Court Rule 1:4-4.⁶

8. 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.
9. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Lack. The motion passed unanimously.

Martin O'Shea v. Township of West Milford (Passaic) (2008-283)

Ms. Lownie reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendations to the Council:

- The Executive Director respectfully recommends the Council find:
1. The Custodian's written response dated November 26, 2008 is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Morris v. Trenton Police Department, GRC Complaint No. 2007-160 (May 2008), because the Custodian failed to provide the Complainant with the specific legal basis for the redactions at the time of the denial.
 2. Because the itemized deductions contained on the payroll check register relate to an individual's finances and are exempt from disclosure pursuant to Executive Order No. 26 (McGreevey 2002), and because said deductions are not included in the definition of a payroll record under *N.J.A.C. 12: 16-2.1*, said itemized deductions do not constitute a payroll record subject to disclosure under OPRA. As such, the Custodian has not unlawfully denied access to said deductions. However, the Custodian ultimately disclosed an unredacted copy of the requested records one (1) day prior to the filing of this Denial of Access Complaint.
 3. Although the Custodian violated OPRA at N.J.S.A. 47:1A-5.g. by failing to provide the Complainant with the specific lawful basis for the redactions at the time of the denial, the Custodian did not unlawfully deny access to the redacted portions of the requested record. Additionally, although the evidence of record indicates that the Custodian was made aware of her failure to comply with N.J.S.A. 47:1A-5.g. by the Complainant via e-mail dated November 29, 2008, there is no evidence in the record that suggests that the Custodian's failure to provide the specific lawful basis for the redactions was intentional or deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's insufficient response to the Complainant's OPRA request

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

and violation of N.J.S.A. 47:1A-5.g. appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

4. Although the Custodian's change in behavior (providing a specific legal basis for the redactions made to the requested record) occurred after the filing of this Denial of Access Complaint, the redactions and the legal basis for said redactions became a moot issue one (1) day prior to the filing of this complaint because the Custodian released the unredacted record to the Complainant. Thus, the Custodian's change in behavior is moot and the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Lack. The motion passed unanimously.

Tucker Kelley v. Township of Rockaway (Morris) (2009-19)

Mr. Caruso reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Caruso presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Complainant's request is overly broad under OPRA, the Custodian in this complaint properly requested clarification pursuant to Leibel v. Manalapan Englishtown Regional Board of Education, GRC Complaint No. 2004-51 (September 2004), although she did so beyond the statutorily mandated seven (7) business day response period. Moreover, because the Complainant failed to clarify the request, the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008), and Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-70 and 2008-71 (February 2009).

3. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the extended time frame resulted in a "deemed" denial, because the Complainant's OPRA request is invalid under OPRA, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Steven Fenichel v. City of Ocean City (Cape May) (2009-71)

Ms. Keys reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Keys presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that because the requested record is a confidential internal investigation of employee conduct, it is exempt from disclosure as a personnel record pursuant to N.J.S.A. 47:1A-10, Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004), Allen v. County of Warren, GRC Complaint No. 2003-155 (March 2004), and Serrao v. Borough of Fair Lawn, GRC Complaint No. 2007-134 (October 2007).

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Steven Fenichel v. Cape May County Prosecutor's Office (2009-72)

Ms. Keys reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Keys presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Complainant's records request seeks access to information and fails to identify the specific government records sought, the request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

3. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Complainant's records request was invalid, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Robert Diaz v. Township of South Harrison (Gloucester) (2009-171)

Mr. Stewart reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Stewart presented the following recommendations to the Council:

- The Executive Director respectfully recommends the Council find that:
1. Because the Custodian failed to submit to the GRC the unredacted documents, a document index and a certification that the documents provided are the documents requested by the Council for the *in camera* examination within the time period directed by the Council, as extended, the Custodian did not comply with the Council's August 11, 2009 Interim Order.
 2. Because the Custodian repeatedly attempted to obtain a copy of the requested record from the holder of the record, Mayor Robert Campbell, in order to respond to the Complainant's OPRA request, and because the Custodian could not exercise independent judgment regarding the applicability of OPRA to the requested record because Mayor Campbell refused to deliver said record to the Custodian, and because the Custodian then acted on advice of Counsel in denying the Complainant access to the requested record, the Custodian has neither acted in a negligent and heedless manner nor, *a fortiori*, did the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
 3. Because Mayor Robert Campbell failed to provide for the safekeeping of the record responsive to the Complainant's request which resulted in the record not being delivered to the GRC for an *in camera* inspection, and consequently, may have resulted in the Complainant's denial of access to the redacted or unredacted record, it is possible that Mayor Campbell'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 Mayor Campbell knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Lack. The motion passed unanimously.

Robert Edwards v. Plainfield Housing Authority (Union) (2009-259)

Ms. Keys reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Keys presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. Although the Custodian's Counsel has alleged that the Custodian did not receive the Complainant's August 20, 2009 OPRA request, there is no evidence in the record to support this assertion. Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. The Complainant's request is invalid under OPRA because it fails to identify specific government records sought. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Morgan v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2008), Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (March 2008). Accordingly, the Custodian has not unlawfully denied the Complainant access to the records requested.
3. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Complainant's OPRA request was invalid under OPRA as broad and unclear according to the prior Court and GRC decisions, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Lack. The motion passed unanimously.

Complaints on Appeal: None.

Complaints Adjudicated on NJ Superior Court & NJ Supreme Court:

1. Martin O'Shea v. Township of West Milford, 2009 WL 3712001 (N.J.Super.A.D.) – Use of Force Reports are disclosable under OPRA.

Executive Director's Report and New Business: The Executive Director discussed with Council members Ms. Lack's assumption of the Secretary position from Ms. Kovach (the previous designee of the Commissioner of the Department of Community Affairs. Additionally, the Executive Director asked the Council members to confirm that the proposed 2010 meeting dates are acceptable. The Council members did so confirm. Lastly, the Executive Director informed the Council members that she would be participating in an OPRA forum at the NJ League of Municipalities Annual Conference in Atlantic City on November 19, 2009.

Public Comment: Public comments were made by Andrew Mayer.

A motion to end the Council's meeting was made by Ms. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Meeting adjourned at 11:26 a.m.

Respectfully submitted,

Harlynne Lack, Secretary

Date Approved: