



**Minutes of the Government Records Council
February 21, 2017 Public Meeting – Open Session**

I. Public Session:

- **Call to Order**

The meeting was called to order at 1:38 p.m. by Ms. Robin Tabakin at the Department of Community Affairs, Conference Room 129, Trenton, New Jersey.

- **Pledge of Allegiance**

All stood and recited the pledge of allegiance in salute to the American flag.

- **Meeting Notice**

Ms. Tabakin read the following Open Public Meetings Act statement:

“This meeting was called pursuant to the provisions of the Open Public Meeting Act. Notices of this meeting were faxed to the Newark Star Ledger (fax number out of service), Trenton Times, Courier-Post (Cherry Hill), and the Secretary of State on February 16, 2017.”

Ms. Tabakin read the fire emergency procedure.

- **Roll Call**

Ms. Bordzoe called the roll:

Present: Robin Tabakin, Esq. (Chairwoman), Christopher Huber, Esq. (designee of Department of Education Commissioner David C. Hespe), Jason Martucci, Esq. (designee of Department of Community Affairs Commissioner Charles A. Richman), and Steven Ritardi, Esq. (Public Member).

GRC Staff in Attendance: Joseph Glover (Executive Director), Rosemond Bordzoe (Secretary), Frank F. Caruso (Communications Specialist/Resource Manager), John Stewart (Mediator), Samuel Rosado (Staff Attorney), Husna Kazmir (Staff Attorney), and Deputy Attorney General Debra Allen

Ms. Tabakin informed the public that copies of the agenda are available by the conference room door.

II. Executive Director's Report:

Current Statistics

- Since OPRA's inception in calendar year 2002, the GRC has received 4,555 Denial of Access Complaints. That averages about 311 complaints per approximately 14 2/3 program years.
- In the current program year, the GRC has so far received 185 Denial of Access Complaints.
- 478 of the 4,555 complaints remain open and active. Of those open cases,
 - 16 complaints are on appeal with the Appellate Division (3.1%);
 - 18 complaints are currently in mediation (3.3%);
 - 45 complaints await adjudication by the Office of Administrative Law (8.8%);
 - 85 complaints are tentatively scheduled for adjudication at an upcoming GRC meeting, which includes the February 2017 meeting (24%); and,
 - 308 complaints are work in progress (60%).
- Since 2004, the GRC has received 26,315 total inquiries. That is an average of about 1,925 inquiries per a bit under 13 2/3 tracked program years. So far in the current program year, the GRC has received 1,169 inquiries.

III. Closed Session:

Ms. Tabakin read the Closed Session Resolution to go into closed session pursuant to N.J.S.A. 10:4-12(b)(7) to receive legal advice in the following matters:

- Dudley Burdge v. NJ Office of Information Technology (2014-179)
- Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2014-218) (**JM Recusal**)
- Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2014-219) (**JM Recusal Consolidated**)
- Law Offices of Walter Luers, LLC (o/b/o C.C.) v. Eastern Camden County Regional School District (2015-15)
- Susan Barker v. Borough of Lakehurst (Ocean) (2015-26)

Ms. Tabakin called for a motion to remove Susan Barker v. Borough of Lakehurst (Ocean) (2015-26) from the closed session agenda. Mr. Huber made a motion, and Mr. Ritardi seconded the motion. The motion passed by a unanimous vote.

Ms. Tabakin called for a motion to go into closed session. Mr. Martucci made a motion, and Mr. Ritardi seconded the motion. The Council adopted the motion by a unanimous vote.

The Council met in closed session from 1:41 p.m. until 1:59 p.m.

Ms. Tabakin called for a motion to end the closed session. Mr. Ritardi made a motion, which was seconded by Mr. Martucci. The Council adopted the motion by a unanimous vote. Open Session reconvened at 2:01 p.m., and Ms. Bordzoe called roll.

Present: Ms. Tabakin, Mr. Huber, Mr. Martucci and Mr. Ritardi.

IV. Approval of Minutes of Previous Meetings:

- **January 31, 2017 Open Session Meeting Minutes**

Ms. Tabakin called for a motion to approve the open session minutes of the January 31, 2017 meeting. Mr. Huber made a motion, seconded by Mr. Martucci. The Council adopted the motion by a unanimous vote.

V. New Business – Cases Scheduled for Adjudication

Ms. Tabakin stated that an “Administrative Complaint Disposition” means a decision by the Council as to whether to accept or reject the Executive Director’s recommendation of dismissal based on jurisdictional, procedural, or other defects of the complaint. The reason for the Administrative Disposition is under each complaint below:

A. Administrative Disposition Adjudications with Recusals (Consent Agenda): None.

B. Administrative Disposition Adjudications with no Recusals (Consent Agenda):

1. **Keith Werner v. NJ State Parole Board (2015-240)**
 - No correspondence was received by the Custodian.
2. **Willie Dishone Jarvis v. Middlesex County Prosecutor’s Office (2015-254)**
 - No correspondence was received by the Custodian.
3. **James M. Fader, Jr. v. Cape May County (2015-354)**
 - The request was not a valid OPRA request.
4. **Olajuwon Herbert v. NJ Office of the Public Defender (2015-408)**
 - The request was not a valid OPRA request.
5. **Annette L. Steinhardt v. Bernardsville Police Department (Somerset) (2015-415)**
 - The request was not a valid OPRA request.
6. **James L. Baxter v. NJ Department of Law and Public Safety (2016-171)**
 - No correspondence was received by the Custodian.
7. **Clinton C. Barlow, III v. City of Trenton (Mercer) (2016-238)**
 - The parties settled the matter through mediation.

8. **Brian Keith Bragg v. Mercer County Correctional Center (2016-247)**
 - The parties settled the matter through mediation.
9. **Kerry W. Hartington, Esq. v. NJ State Police (2016-281)**
 - The parties settled the matter through mediation.
10. **Kevin Jackson v. NJ Office of the Attorney General (2016-303)**
 - The parties settled the matter through mediation.

Ms. Tabakin called for a motion to accept the recommendations as written in all of the above Administrative Complaint Dispositions. Mr. Huber made a motion, which was seconded by Mr. Ritardi. The motion passed by a unanimous vote.

C. Administrative Disposition of Uncontested, Voluntary Withdrawals by Complainant (No Adjudication of the Council is Required):

1. **Libertarians for Transparent Government v. Pennsauken Board of Education (Camden) (2016-174)**
2. **Ben Curtis, Esq. o/b/o Road Commission for Oakland County, Michigan v. NJ Department of Treasury (2016-176)**
3. **Libertarians for Transparent Government v. Bound Brook Board of Education (Somerset) (2017-7)**

VI. New Business – Cases Scheduled for Individual Complaint Adjudication

A. Individual Complaint Adjudications with Recusals:

A summary of the Executive Director’s recommended action is under each complaint:

1. **Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2014-218) (JM Recusal)**
2. **Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2014-219) (JM Recusal) Consolidated**
 - The Custodian did not fully comply with the Interim Order because he failed to provide nine (9) copies of the redacted records.
 - The *in camera* examination reveals that the Custodian lawfully denied access to redacted portions of the records listed in the document index.
 - There is no knowing and willful violation.
 - The Complainant is a prevailing party and is eligible for an award of reasonable attorney’s fees.
 - Ms. Tabakin called for any discussion on the Executive Director’s findings and recommendations. Mr. Caruso noted that the prevailing party language on page 11 had been amended to reflect a new process for handling same. Mr. Caruso read the new conclusion to the Council. Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as amended. Mr. Ritardi

made a motion, and Mr. Huber seconded the motion. The motion passed by a majority vote; Mr. Martucci recused.

3. **Laurie Rupp (o/b/o Society Hill at Lawrenceville – Board of Trustees) v. Mercer County Prosecutor’s Office (2016-12) (JM Recusal)**

- Ms. Robeson’s response was insufficient because she failed to state definitively that no responsive records existed. However, no disclosure is warranted because the record shows that no records exist.
- There is no knowing and willful violation.
- Ms. Tabakin called for any discussion on the Executive Director’s findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. Mr. Huber made a motion, and Mr. Ritardi seconded the motion. The motion passed by a majority vote; Mr. Martucci recused.

4. **Richard Smith v. Irvington Police Department (Essex) (2015-287) (SR Recusal)**

- The Custodian lawfully denied access because the requested documents are exempt as criminal investigatory records.
- Ms. Tabakin called for any discussion on the Executive Director’s findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. Mr. Martucci made a motion, and Mr. Huber seconded the motion. The motion passed by a majority vote; Mr. Ritardi recused.

5. **Rashon Barkley v. Newark Police Department (Essex) (2016-23) (SR Recusal)**

- There is no unlawful denial of access because the Custodian certified that no responsive records exist, and the Complainant provided no competent, credible evidence to refute the Custodian’s certification.
- Ms. Tabakin called for any discussion on the Executive Director’s findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. Mr. Huber made a motion, and Mr. Martucci seconded the motion. The motion passed by a majority vote; Mr. Ritardi recused.

B. Individual Complaint Adjudications with no Recusals:

1. **Dudley Burdge v. NJ Office of Information Technology (2014-179)**

- The original custodian failed to comply with the Interim Order.
- The Custodian must comply with the findings of the *in camera* examination.
- The knowing and willful and prevailing party analyses are deferred, pending the Custodian’s compliance.
- Ms. Tabakin called for any discussion on the Executive Director’s findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. Mr. Martucci made a motion, and Mr. Ritardi seconded the motion. The motion passed by a unanimous vote.

2. Law Offices of Walter Luers, LLC (o/b/o C.C.) v. Eastern Camden County Regional School District (2015-15)

- The Custodian complied with the Interim Order.
- The findings of the *in camera* examination show that the Custodian lawfully denied access.
- There is no knowing and willful violation.
- The Complainant is not a prevailing party and is not eligible for an award of reasonable attorney's fees.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Huber made a motion, and Mr. Ritardi seconded the motion. The motion passed by a unanimous vote.

3. Susan Barker v. Borough of Lakehurst (Ocean) (2015-26)

- The Council tabled the item because legal counsel requested more time to review the matter.
- Ms. Tabakin called for a motion to table this matter. Mr. Huber made a motion and Mr. Ritardi seconded the motion. The motion passed by a unanimous vote.

4. Gavin C. Rozzi v. Lacey Township Board of Education (Ocean) (2015-224)

- The current Custodian complied with the Interim Order.
- There is no knowing and willful violation.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Ritardi made a motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

5. Isaac Fajerman v. Franklin Township (Somerset) (2015-247)

- The Custodian properly requested extensions of time and those extensions were reasonable.
- The Complainant's cause of action was not ripe at the time of the filing of the Denial of Access Complaint, and the Council should therefore dismiss the Complaint.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Huber made a motion, and Mr. Ritardi seconded the motion. The motion passed by a unanimous vote.

6. Antoin Anderson v. NJ Department of Corrections (2015-270)

- The Custodian lawfully denied access because he certified that no responsive records exist, and the Complainant provided no competent, credible evidence to refute the Custodian's certification.

- Ms. Tabakin called for any discussion on the Executive Director’s findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. Mr. Ritardi made a motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

7. Carl Culley v. Mercer County Community College (2015-315)

- The original Custodian’s response, although timely issued, did not comply with OPRA because he incorrectly advised the Complainant of the status of the requested record and did not cite the correct basis for denial.
- There is no need to order disclosure because the Custodian provided the record to the Complainant, who did not advance evidence to the contrary.
- There is no knowing and willful violation.
- Ms. Tabakin called for any discussion on the Executive Director’s findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. Mr. Huber made a motion, and Mr. Ritardi seconded the motion. The motion passed by a unanimous vote.

8. Sean Vandy v. Newfield Police Department (Gloucester) (2015-356)

- There is no unlawful denial of access because the request was invalid under OPRA.
- Ms. Tabakin called for any discussion on the Executive Director’s findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. Mr. Martucci made a motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

9. Alphonso Brunson v. NJ Department of Corrections (2015-357)

- The Custodian lawfully denied access. The requested records are exempt from disclosure because they contain “information relating to medical, psychiatric, or psychological history, diagnosis, treatment or evaluation.”
- Ms. Tabakin called for any discussion on the Executive Director’s findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. Mr. Huber made a motion, and Mr. Ritardi seconded the motion. The motion passed by a unanimous vote.

10. John Paff v. Port Authority of New York and New Jersey (2015-365)

- The Custodian complied with the Interim Order.
- There is no knowing and willful violation.
- The Complainant is a prevailing party and is eligible for an award of reasonable attorney’s fees
- Ms. Tabakin called for any discussion on the Executive Director’s findings and recommendations. Mr. Caruso noted that the prevailing party language on page 6 had been amended to reflect a new process for handling same. Mr. Caruso read

the new conclusion to the Council. Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as amended. Mr. Ritardi made a motion, and Mr. Martucci seconded the motion. The motion passed by a unanimous vote.

11. Annette L. Steinhardt v. Bernardsville Police Department (Somerset) (2015-375)

- The Custodian did not unlawfully deny access. The request is invalid because it seeks a broad range of documents instead of specifically identifiable government records.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made a motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

12. Salvatore J. Moretti v. Bergen County Prosecutor's Office (2015-390)

- The Complainant failed to establish valid grounds for reconsideration.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Ritardi made a motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

13. Joshua Graham v. NJ Department of Corrections (2016-21)

- The Custodian lawfully denied access to the responsive disciplinary documents because the records are exempt under N.J.A.C. 10A:22-2.3(b).
- The Custodian lawfully denied access to the requested SID investigative report because the records consist of security measures and surveillance techniques, which, if disclosed, would create a risk to the safety of persons or property.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Mr. Ritardi made a motion, and Mr. Martucci seconded the motion. The motion passed by a unanimous vote.

14. John Paff (o/b/o Libertarians for Transparent Government) v. Town of Kearny (2016-94)

- The Custodian complied with the Interim Order.
- There is no knowing and willful violation.
- The Complainant is a prevailing party and is eligible for an award of reasonable attorney's fees.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations. Mr. Stewart noted that the prevailing party language on page 6 had been amended to reflect a new process for handling same. Mr. Stewart read the new conclusion to the Council. Ms. Tabakin asked how the genesis of the new language. Mr. Stewart answered her question. Ms. Tabakin called for a motion to

accept the Executive Director's findings and recommendations as amended. Mr. Martucci made a motion, and Mr. Ritardi seconded the motion. The motion passed by a unanimous vote.

15. William A. Goode, Jr. v. Little Ferry Board of Education (Bergen) (2017-20)

- The Custodian's response was insufficient because he failed to respond in writing to each item individually.
- The Custodian failed to respond immediately to immediate access documents, thus resulting in a "deemed" denial.
- The Custodian did not unlawfully deny access because he certified that no responsive records exist, and the Complainant failed to advance any competent, credible evidence to refute the Custodian's certification.
- There is no knowing and willful violation.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made a motion, and Mr. Ritardi seconded the motion. The motion passed by a unanimous vote.

VII. Court Decisions of GRC Complaints on Appeal:

- Scheeler v. NJ Dep't of Educ., 2017 N.J. Super. Unpub. LEXIS 119 (App. Div. 2017): Here, the Appellate Division affirmed the trial court's holding requiring disclosure of third-party OPRA requests and that dicta present in Gannett N.J. Partners, LP v. Cnty. of Middlesex, 379 N.J. Super. 205 (App. Div. 2005) did not authorize a blanket denial to those records.

The decision features a rather long background, which included a consolidation with a similar cases filed by John Paff and Heather Greico. Ultimately, the Court addressed all three (3) trial court decisions in its appeal. In affirming those decisions, the Court reasoned that:

[A] citizen submitting an OPRA request ordinarily would not have a reasonable expectation that the request will not be disclosed to others. As noted, OPRA requests are "government records" and there is no OPRA exemption, legislative resolution, executive order or court rule that precludes their disclosure.

Even so, there may be individual cases in which a citizen may have a reasonable expectation of privacy regarding that citizen's OPRA request. However, the agency may deny the public access to the OPRA request only after it has considered and applied the *Burnett* balancing test. Nevertheless, there is no justification for denying the public access to all third-party OPRA requests merely because of the possibility that a requestor might have an interest in preserving the confidentiality of a particular request.

Finally, we note that under OPRA, the records custodian has the burden to show that the denial of access was authorized by law. [*Citation omitted*] Here, defendants did not deny access on the basis of any exemption in OPRA. Instead, as previously noted, defendants relied exclusively on the dicta in Gannett. Thus, defendants did not carry their burden to show that the denials were based on any exemptions in OPRA.

Id. at 17-18

The November 2014 amendment to N.J.S.A. 47:1A-1.1 (exempting access to third-party OPRA requests submitted by victims seeking access to records regarding their victimization) was not addressed as part of the decision.

There is no word on whether defendants will seek review from the Supreme Court.

VIII. Complaints Adjudicated in NJ Superior Court & NJ Supreme Court:

- Stern v. Lakewood Volunteer Fire Dep't, 2016 N.J. Super. Unpub. LEXIS 2612 (App. Div. 2016): Here, the Appellate Division upheld the trial court's decision holding in favor of defendants on one count and required disclosure of minutes with redactions consistent with the holding in another count. The Council was previously briefed on the Law Division's decision of this case in its October 27, 2014 Lexis Alerts.

IX. Public Comment:

- Sharon Young, West Windsor Township Clerk representing the New Jersey Municipal Clerk's Association: Ms. Young noted that two of the agenda items involved prevailing party attorney's fees. She asked general questions regarding how those fees are authorized. Mr. Glover stated that N.J.S.A. 47:1A-6 allows prevailing complainants to receive reasonable attorney's fees in most instances.

X. Adjournment:

Ms. Tabakin called for a motion to end the Council meeting. Mr. Martucci made a motion, which was seconded by Mr. Huber. The motion passed unanimously.

The meeting adjourned at 2:24 p.m.

Respectfully submitted,

Robin Berg Tabakin, Esq., Chair

Date Approved: March 28, 2017