



**Minutes of the Government Records Council
August 29, 2017 Public Meeting – Open Session**

I. Public Session:

- **Call to Order**

The meeting was called to order at 1:36 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, Trenton Times, Courier-Post (Cherry Hill), and the Secretary of State on August 24, 2017.”

Ms. Tabakin read the fire emergency procedure.

- **Roll Call**

Ms. Bordzoe called the roll:

Present: Robin Tabakin, Esq. (Chairwoman) (participated telephonically), Jennifer Simons, Esq. (designee of Department of Education Acting Commissioner Kimberley Harrington), Jason Martucci, Esq. (designee of Department of Community Affairs Commissioner Charles A. Richman).

Absent: 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), and Deputy Attorney General Debra Allen.

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

II. Executive Director's Report:

Annual OPRA Seminar

- The GRC hosted its 11th annual OPRA seminar on Thursday, August 10. To complement the Executive Director's discussion of OPRA in the morning, a representative from the Bloustein School at Rutgers University spoke during the afternoon session about cyber hygiene and how people can avoid becoming victims of malware, phishing, and ransomware attacks. Approximately 300 people registered to attend the event, most of whom earned either CEU or CLE credits. Two more outreaches are tentatively scheduled to occur in 2017, one in October and one in November. Since January 2015, the GRC has participated in over 30 outreaches.

Current Statistics

- Since OPRA's inception in calendar year 2002, the GRC has received 4,694 Denial of Access Complaints. That averages about 309 annual complaints per a bit over 15 program years.
- In the current program year, the GRC has so far received 31 Denial of Access Complaints.
- 496 of the 4,694 complaints remain open and active. Of those open cases,
 - 27 complaints are on appeal with the Appellate Division (5.4%);
 - 26 complaints are currently in mediation (4.4%);
 - 34 complaints await adjudication by the Office of Administrative Law (7.3%);
 - 74 complaints are tentatively scheduled for adjudication at an upcoming GRC meeting, which includes the current meeting (14%); and,
 - 325 complaints are work in progress (71%).
- Since 2004, the GRC has received 27,395 total inquiries. That is an average of about 1,929 annual inquiries per a bit over 14 tracked program years. So far in the current program year, the GRC has received 300 inquiries.

III. Approval of Minutes of Previous Meetings:

• July 25, 2017 Open Session Meeting Minutes

Ms. Tabakin called for a motion to approve the draft open session minutes of the July 25, 2017 meeting. Ms. Simons noted that she confirmed the accuracy of the draft minutes with Mr. Huber. Mr. Martucci made a motion, which was seconded by Ms. Simons. The motion passed by a unanimous vote.

- **July 25, 2017 Closed Session Meeting Minutes**

Ms. Tabakin called for a motion to approve the draft closed session minutes of the July 25, 2017 meeting. Ms. Simons noted that she confirmed the accuracy of the draft minutes with Mr. Huber. Mr. Martucci made a motion, which was seconded by Ms. Simons. The motion passed by a unanimous vote.

IV. 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):

1. **Richard L. Smith v. Irvington Police Department (Essex) (2016-90) (SR Recusal)**
 - The Custodian did not receive a records request from the Complainant.
2. **Anthony Hernandez v. Essex County Correctional Facility (2017-151) (SR Recusal)**
 - The OPRA request was invalid.

Ms. Tabakin called for a motion to accept the recommendations as written in all of the above Administrative Complaint Dispositions. Mr. Martucci made a motion, which was seconded by Ms. Simons. The motion passed by a unanimous vote. Mr. Ritardi was not present.

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

1. **Carmen Parish v. Trenton Municipal Court (2017-152)**
 - The GRC has no authority over records requests made to the Judicial Branch.
2. **Brian Keith Bragg v. NJ Office of the Public Defender (2017-166)**
 - The OPRA request was invalid.

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

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

1. **Michael I. Inzelbuch, Esq. v. Lakewood Board of Education (Ocean) (2016-200)**
 - The Complainant voluntarily withdrew the Complaint.
2. **Brendan J. Kavanagh, Esq. v. City of Millville (Cumberland) (2017-43)**
 - The Complainant voluntarily withdrew the Complaint.

- Mr. Stewart noted that this complaint was moved from Section VI(B) because it was recently withdrawn.
3. **Serges Demefack (o/b/o American Friends Service Committee, Newark Office) v. Bergen County (2017-44)**
 - The Complainant voluntarily withdrew the Complaint.
 4. **Caroline Yu v. Township of Millburn (Essex) (2017-78)**
 - The Complainant voluntarily withdrew the Complaint.
 5. **Lane R. Jubb, Jr., Esq. v. NJ Transit (2017-84) (SR Recusal)**
 - The parties settled the matter through mediation.
 6. **Thomas R. Lawrence, IV v. Gloucester County Prosecutor's Office (2017-87)**
 - The parties settled the matter through mediation.
 7. **Alec Ferretti v. NJ Department of Health, Office of Population Health (2017-123)**
 - The Complainant voluntarily withdrew the Complaint.
 8. **Kevin Alexander v. NJ Department of Corrections (2017-126)**
 - The parties settled the matter through mediation.
 9. **Cynthia A. McBride v. Borough of Stanhope (Sussex) (2017-149)**
 - The Complainant voluntarily withdrew the Complaint.
 10. **Patricia D. Force v. Flemington-Raritan Regional School District (Hunterdon) (2017-150)**
 - The Complainant voluntarily withdrew the Complaint.
 11. **Casey Murphy v. Kean University (2017-159)**
 - The Complainant voluntarily withdrew the Complaint.
 12. **Christopher Williams v. County of Salem (2017-160)**
 - The Complainant voluntarily withdrew the Complaint.

VI. New Business – Cases Scheduled for Individual Complaint Adjudication

A. Individual Complaint Adjudications with Recusals: None

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

B. Individual Complaint Adjudications with no Recusals:

1. **Shawn G. Hopkins v. Township of Aberdeen (Monmouth) (2014-04)**
 - Mr. Kineavy complied with the Interim Order.
 - There is no knowing and willful violation.
 - The Complainant is a prevailing party, who is entitled to an award of reasonable attorney's fees.
 - The parties shall confer in an effort to decide the amount of reasonable attorney's fees and promptly notify the GRC in writing if a fee agreement is reached. Otherwise, Complainant's Counsel shall submit a fee application in accordance with N.J.A.C. 5:105-2.13.
 - 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 Ms. Simmons seconded the motion. The motion passed by a unanimous vote.

2. **Shawn G. Hopkins v. Borough of Allentown (Monmouth) (2014-05)**

- The current Custodian did not fully comply with the Interim Order because she did not provide certified confirmation of compliance to the GRC.
- There is no knowing and willful violation.
- The Complainant is a prevailing party, who is entitled to an award of reasonable attorney's fees.
- The parties shall confer in an effort to decide the amount of reasonable attorney's fees and promptly notify the GRC in writing if a fee agreement is reached. Otherwise, Complainant's Counsel shall submit a fee application in accordance with N.J.A.C. 5:105-2.13.
- 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 Ms. Simons seconded the motion. The motion passed by a unanimous vote.

3. **Shawn G. Hopkins v. Borough of Atlantic Highlands (Monmouth) (2014-06)**

- The current Custodian did not fully comply with the Interim Order because she failed to provide certified confirmation of compliance to the GRC.
- There is no knowing and willful violation.
- The Complainant is a prevailing party, who is entitled to an award of reasonable attorney's fees.
- The parties shall confer in an effort to decide the amount of reasonable attorney's fees and promptly notify the GRC in writing if a fee agreement is reached. Otherwise, Complainant's Counsel shall submit a fee application in accordance with N.J.A.C. 5:105-2.13.
- 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 Ms. Simons seconded the motion. The motion passed by a unanimous vote.

4. **Shawn G. Hopkins v. Borough of Farmingdale (Monmouth) (2014-25)**

- The Custodian complied with the Interim Order.
- There is no knowing and willful violation.
- The Complainant is a prevailing party, who is entitled to an award of reasonable attorney's fees.
- The parties shall confer in an effort to decide the amount of reasonable attorney's fees and promptly notify the GRC in writing if a fee agreement is reached. Otherwise, Complainant's Counsel shall submit a fee application in accordance with N.J.A.C. 5:105-2.13.
- 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 Ms. Simons seconded the motion. The motion passed by a unanimous vote.

5. **Shawn G. Hopkins v. Borough of Freehold (Monmouth) (2014-26)**

- The Custodian complied with the Interim Order.
- There is no knowing and willful violation.
- The Complainant is a prevailing party, who is entitled to an award of reasonable attorney's fees.
- The parties shall confer in an effort to decide the amount of reasonable attorney's fees and promptly notify the GRC in writing if a fee agreement is reached. Otherwise, Complainant's Counsel shall submit a fee application in accordance with N.J.A.C. 5:105-2.13.
- 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 Ms. Simons seconded the motion. The motion passed by a unanimous vote.

6. **Shawn G. Hopkins v. Borough of Spring Lake Heights (Monmouth) (2014-51)**

- 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. Martucci made a motion, and Ms. Simons seconded the motion. The motion passed by a unanimous vote.

7. **Regina Discenza v. Lacey Township Board of Education (Ocean) (2015-223)**

- 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. Martucci made a motion, and Ms. Simons seconded the motion. The motion passed by a unanimous vote.

8. **James Keenan v. NJ Department of Labor and Workforce, Division of Disability Determination Services (2015-388)**

- The Custodian did not fully comply with the Interim Order because he did not provide certified confirmation of compliance to the GRC.
- 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 Ms. Simons seconded the motion. The motion passed by a unanimous vote.

9. **Richard E. Wenger, Esq. (o/b/o David Pereira) v. Voorhees Fire District No. 3 (Camden) (2016-80)**

- Based on inadequate evidence, the GRC is unable to determine whether or not a special services charge is warranted and whether the Custodian unlawfully denied access to the requested records.
- Therefore, the matter is a contested case that should be referred to the Office of Administrative Law for a hearing to resolve the facts.
- The knowing and willful and prevailing party analyses should be deferred, pending the OAL's disposition of the matter.
- 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 Ms. Simons seconded the motion. The motion passed by a unanimous vote.

10. **Lisa A. Tilton (d/b/a Galloway Township News) v. City of Cape May (Cape May) (2016-97)**

- The Council should dismiss the matter because the parties have agreed to a prevailing party fee amount, thereby negating the need for a fee application. No further adjudication is required.
- 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 Ms. Simons seconded the motion. The motion passed by a unanimous vote.

11. **Luis F. Rodriguez v. Kean University (2016-129)**

- The 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. Martucci made a motion, and Ms. Simons seconded the motion. The motion passed by a unanimous vote.

12. **Ranjeet Singh v. Borough of Carteret (Middlesex) (2017-148)**

- The Custodian's response was insufficient because she failed to respond in writing to each requested item individually.
- The Custodian's failure to respond in writing within seven (7) business days results in a "deemed" denial.
- The Custodian must therefore disclose to the Complainant the requested pictures. If no records are responsive, the Custodian must so certify.

- The knowing and willful analysis is 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 Ms. Simons seconded the motion. The motion passed by a unanimous vote.

VII. Court Decisions of GRC Complaints on Appeal:

- Verry v. Franklin Fire Dist. No. 1, 2017 N.J. LEXIS 829 (2017): As a brief refresher, the Council originally determined that the Millstone Valley Fire Department (“MVFD”) was a “public agency” for purposes of OPRA due to its membership inclusion into the Franklin Fire District No. 1 (“FFD”). Further, the Council ordered, through FFD, that MVFD to supply its bylaws and constitution to the complainant. The FFD appealed, joined by MVFD, but the Appellate Division affirmed for the reasons stated by the Council. Thereafter, FFD/MVFD sought review at the Supreme Court. The Court granted the motion for leave and “directly certified the entire matter . . .” Id. at 18

The Court affirmed the Council’s decision as it pertained to the disclosability of MVFD’s bylaws and constitution. More broadly, the Court tasked fire districts with an obligation to disclose those “basic documents relating to the internal organization and functioning of volunteer squads working with districts.” Id. at 34.

However, the Court modified the portion of the decision finding that the MVFD was a “public agency” for purposes of OPRA. Specifically, the majority Court disapproved of the analysis reaching this conclusion, reasoning that the Legislature only designated fire districts as “a body corporate” in N.J.S.A. 40A:14-70. Based on the omission of “political subdivision” from the statute, the Court concluded that the Legislature did not intend to identify fire districts (like FFD) as political subdivisions, and determined them to be merely instrumentalities. The effect of this reasoning is that the majority Court viewed member fire companies (like MVFD) as an “instrumentality of an instrumentality” which OPRA does not define as a “public agency.” Id. at 30. The majority Court further noted that the contract between the FFD and MVFD established under N.J.S.A. 40A:14-70.1(b) did not establish a relationship falling within the “public agency” definition.

The GRC must note that FN. 3 bears some attention. Therein, the Court states that (contrary to the Council’s decision in Carrow, GRC 2012-111) volunteer fire companies contracting directly with municipalities would be considered instrumentalities of a political subdivision. Thus, the Court stated those companies would be defined as “public agencies” under OPRA according to the rationale in this decision.

In his dissent, Justice Albin concurred with the holding on disclosure, but dissented to the holding that MVFD was not a “public agency.” He reasoned that the FFD was a “political subdivision” and that the absence of this term in N.J.S.A. 40A:14-70 made no difference. Justice Albin essentially argued that the term “political subdivision . . . has a somewhat elastic meaning.” Id. at 36. Justice Albin henceforth argued that FFD was a political

subdivision by its very nature and that MVFD is an obvious instrumentality of that subdivision.

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

- Carter v. Doe (In Re: N.J. Firemen’s Ass’n Obligation), 2017 N.J. LEXIS 823 (2017): Here, the Supreme Court held reversed the Appellate Division’s decision that a custodian agency definitively had no right to institute a Declaratory Judgement Act proceeding under OPRA. Further, the Court also reversed the Appellate Division’s decision ordering disclosure of responsive records.

Regarding the Declaratory Judgement Act (“DJA”) issue, the Court determined that Firemen’s Association had no authority to file a DJA after it had officially denied access to Carter’s OPRA request. The Court reasoned that the denial “extinguished the controversy” necessary for a successful DJA filing. However, the Court did not close the door on DJA actions, stating that it did not “reach the question of whether a public entity may file a [DJA] action when confronted with an unsettled question that has not been litigated before and that implicates *OPRA*’s privacy prong . . .” Id. at 27 (emphasis in original).

Regarding the disclosure of the responsive financial records, and “in the interest of judicial economy,” the Court conducted a balancing test and determined that a lawful denial of access occurred. The Court reasoned that “all factors weigh[ed] in favor of non-disclosure . . .” Id. at 30. It should be noted that the Court also rejected disclosure under the common law.

In a bit of an interesting turn, Justice Albin filed a separate, concurring opinion. Therein, he strongly stated his belief that OPRA does not allow for an agency to initiate a DJA action against a requestor in any instance, whether during the pendency of an OPRA request or otherwise. Justice Albin reasoned that allowing for such an action would chill citizens from submitting requests for fear of being “dragged into Superior Court against [their] will . . .” Id. at 36.

For those interested, the Appellate Division decision was reported on in the January 25, 2016 Lexis Alert.

- North Jersey Media Grp. v. State Office of the Governor, 2017 N.J. Super. LEXIS 118 (App. Div. 2017)(Approved for Publication): Here, the Appellate Division overturned the trial court’s denial of plaintiff’s motion for relief in aid to litigants rights regarding defendants failure to comply with an Order to submit individual certifications regarding the search conducted to locate responsive records. More importantly, the Appellate Division also reversed the trial court’s holding that the New Jersey courts did not have the authority to impose civil penalties for knowing and willful (“K&W”) violations. The Appellate Division thus vacated the dismissal of plaintiff’s complaints and remanded to the trial court for further proceedings.

The issue regarding search certifications was pretty specific to the trial court's order and plaintiff's allegation that defendants failed to follow that order. It does make mention of an agency's obligation to submit a certification consistent with the requirements of Paff v. N.J. Dep't of Labor, 392 N.J. Super. 334 (App. Div. 2007) after a complaint has been filed.

In reaching its conclusion on the K&W issue in this consolidated complaint, the Appellate Division rejected the trial court's reasoning that OPRA did not provide the courts express authority to impose K&W penalties. The Appellate Division went on to reason that N.J.S.A. 47:1A-11 neither provides the GRC sole authority nor prohibits the courts from imposing a civil penalty. The Appellate Division further noted that the Legislature allowed for two (2) forums to challenge alleged denials of access, but did not take the steps to limit either venue's authority to impose a civil penalty. The Appellate Division similarly rejected all of defendants arguments on the issue.

This decision is significant in that it overturns a long-held idea that OPRA only provided the GRC with the power to impose civil penalties.

- Bay Head-Mantoloking Land Co. v. Borough of Mantoloking, 2017 N.J. Super. Unpub. LEXIS 2070 (App. Div. 2017): Here, the Appellate Division affirmed the trial court's decision upholding a denial of access to draft appraisals submitted to defendants in connection with anticipated eminent domain actions.

The draft appraisals originated as part of the State's post-Sandy program dedicated to constructing a system of engineered beaches and dunes to better protect the coast from major storm damage. The Appellate Division agreed that the work-product and deliberate process privileges applied to the draft appraisals. The Appellate Division did note that defendants agreed to, in response to a new OPRA request, disclose four (4) appraisals due to the fact that the author was no longer contracting with defendants and that they would not rely on his appraisals going forward.

IX. Public Comment: None

X. Adjournment:

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

The meeting adjourned at 1:58 p.m.

Respectfully submitted,

Robin Berg Tabakin, Esq., Chair

Date Approved: September 26, 2017