

# **DRAFT MINUTES OF THE GOVERNMENT RECORDS COUNCIL**

June 12, 2003

The meeting was called to order at 9:30 a.m. at the Department of Community Affairs, Room 235A, Trenton, New Jersey. The Open Public Meeting Act statement was read.

Mr. Pfeiffer called the roll:

Present: Chair Vincent Maltese, Matthew U. Watkins (designee of Commissioner Susan Bass Levin, Department of Community Affairs), Virginia Hook and Bernard Spigner.

Absent: Dr. Dwight Pfennig, Deputy Commissioner, (designee of Commissioner William Librera, Department of Education).

Mr. Maltese read a resolution to convene in closed session to receive legal advice concerning the complaints scheduled for adjudication that day. Ms. Hook moved to adopt the resolution, which was seconded by Mr. Watkins. All members present approved the motion. The Council conducted a closed session between 9:35 a.m. and 10:35 a.m.

The Council reconvened in open session at 10:50 a.m. in Room 129 of the Department of Community Affairs, Trenton, New Jersey. The Open Public Meeting Act statement was read and attendees recited the Pledge of Allegiance.

Mr. Pfeiffer called the roll:

Present: Chair Vincent Maltese, Virginia Hook, Bernard Spigner and Matthew U. Watkins

Absent: Dr. Dwight Pfennig

Also Present: Deputy Attorney General Barbara Conklin, Deputy Attorney General Juliet Wyne, Acting Executive Director Marc Pfeiffer, Assistant Executive Director Paul Dice and Division of Local Government Staff Member Lori Buckelew.

Mr. Maltese called for adoption of Minutes from the Public meeting of April 10, 2003. Mr. Spigner moved to adopt the minutes as prepared with a second by Ms. Hook. The motion was adopted by roll call:

Ayes: Ms. Hook, Mr. Spigner and Mr. Maltese.

Nays: None

Abstain: Mr. Watkins

Mr. Maltese called for adoption of the closed session minutes from the April 10, 2003 meeting. Ms. Hook moved to adopt the minutes as prepared with a second by Mr. Spigner. The motion was adopted by roll call:

Ayes: Ms. Hook, Mr. Spigner and Mr. Maltese.

Nays: None.

Abstain: Mr. Watkins

Mr. Maltese opened the floor to Public Comment. No comments were made.

Mr. Pfeiffer provided the Council a copy of the Executive Director's report, and provided copies for public inspection. Mr. Pfeiffer stated that a copy of the Executive Director's report will be posted on the GRC website. Mr. Watkins moved to accept the Executive Director's report with a second by Ms. Hook. The motion was adopted by roll call:

Ayes: Ms. Hook, Mr. Spigner, Mr. Watkins and Mr. Maltese.

Mr. Maltese noted that the Council has received from the Attorney General's office advice on the award of attorney fees to a requestor who prevails in a proceeding under OPRA. Ms. Conklin explained that in general, a party will not be considered a "prevailing party" entitled to recoup reasonable attorney's fees under OPRA unless the Council adjudicates the requestor's Complaint and awards the requestor access to some or all of the records sought. Additional discussion on the matter appears in the Executive Director's Findings and Recommendations in cases 2002-08, 2002-35, 2002-36 scheduled for adjudication today.

Mr. Maltese called for any Unfinished Business.

• **Complaint 2002-34, L.E. Fisher v. Township of Cedar Grove**

Mr. Pfeiffer indicated that the custodian provided access to portions of the invoice describing work performed by outside counsel which appeared in the voucher and recommended that the Council find that the remaining redactions on the invoice were lawful under OPRA because they contained privileged material reflecting deliberative changes and consultative communications between counsel and client. Mr. Pfeiffer recommended that the complaint be dismissed and the requestor's application for attorney fees denied. Ms. Conklin noted that the attorney client privilege belongs to the client and can only be waived by the client. Mr. Maltese stated he disagreed with the Executive Director's recommendation because the reasons given by the custodian for the redaction were insufficient. Mr. Maltese stated that the specific nature of the redactions must be explained not just described as being "Attorney Client privileged". Mr. Watkins moved to accept the Executive Director's June 12<sup>th</sup> Findings and Recommendations with a second by Ms Hook. The motion was called by roll call:

Ayes: Mr. Watkins and Ms. Hook

Nays: Mr. Spigner and Mr. Maltese

The motion was defeated as a result of the tie.

The Chair entertained discussion on how the Council should proceed with the matter. In response to questions, Ms. Conklin advised that when the Council next met to consider the Complaint, it would be obligated to adjudicate: (1) whether the redaction was lawful, (2) the timeliness of the custodian's response, and (3) whether the requestor was a prevailing party under OPRA. Mr. Watkins suggested that a special meeting be held in July to resolve this complaint. Mr. Maltese directed Mr. Pfeiffer to schedule a special meeting in July.

• **Complaint 2002-35, L.E. Fisher v. New Jersey Institute of Technology**

In a June 12, 2003 F&R supplementing his earlier F&R of March 13, 2003, Mr. Pfeiffer recommended that the Council find that the material redacted from the invoice is attorney client privileged, that the custodian has not waived the privilege by providing access to other portions of the invoice and that, therefore, the redactions were lawful under OPRA. Mr. Pfeiffer further recommended that the application for attorney fees be denied because the requester was not a "prevailing party" under OPRA because she did not obtain a final decision from the Council granting access to the record. Mr. Pfeiffer further recommended that the Council dismiss the complaint. Mr. Watkins moved to accept the Executive Director's Findings and Recommendations with a second by Mr. Spigner. The motion was called by roll call:

Ayes: Ms. Hook, Mr. Spigner and Mr. Watkins

Nays: Mr. Maltese

The motion was approved by a 3-1 vote and the complaint was dismissed.

• **Complaint 2002-36, L.E. Fisher v. Passaic County Community College**

In a Supplemental F&R dated June 12, 2003, Mr. Pfeiffer recommended that the Council find that the requester is not a "prevailing party" under OPRA because the custodian provided the unredacted record (an invoice from outside counsel) voluntarily and, consequently, the Council need not adjudicate whether the record was accessible under OPRA. Mr. Pfeiffer further recommended that the Council decline to find that the Custodian knowingly and willfully violated OPRA or acted unreasonably under the totality of the circumstances based upon the requester's claim that the custodian failed to provide adequate written justification for withholding access in the initial response to the OPRA request. Mr. Pfeiffer observed that the occasions on which the custodian had explained the basis for the redactions were set forth in his March 13, 2003 F&R attached to the June 12th Supplement. Mr. Spigner moved to accept the Executive Director's Findings and Recommendations in the matter with a second by Ms. Hook. The motion was called by roll call:

Ayes: Ms. Hook, Mr. Spigner, Mr. Watkins and Mr. Maltese.

Nays: None

The motion was approved and the complaint was dismissed.

- **Complaint 2002-45 and 55, L.E. Fisher v. Krisberg v. City of Paterson**

Mr. Pfeiffer noted that the parties' submissions on the amount of attorney fees claimed by the requestor are undergoing legal review.

- **Complaint 2002-58, Reda v. Township of West Milford**

Mr. Pfeiffer noted that the staff is communicating with the parties to ascertain the status of the complaint given the documents that have been submitted. A recommendation will be forthcoming.

- **Complaint 2002-6 and 2002-15, Teeters v. DYFS**

Mr. Pfeiffer noted the submissions from DYFS have been received and are continuing to be reviewed. It is anticipated that a recommendation will be forthcoming at the July meeting.

- **Complaint 2002-47, Blue v. Township of Wall**

Mr. Pfeiffer noted that advice on the matter from the Division of Law is anticipated in the next few weeks.

- **Complaint 2002-39, L.E. Fisher v. Township of Fairfield (Essex)**

Mr. Pfeiffer noted that the custodian's certification explaining the redactions from the legal voucher and the requestor response thereto are under legal review.

Mr. Maltese requested that Mr. Pfeiffer resolve as many of the pending cases as possible at the Council's July meeting.

- **Inquiry and Complaint Procedure**

Mr. Pfeiffer observed that amendments to the Council's Inquiry and Complaint Policy had been proposed at the Council's April meeting. After further internal review and consideration of public comment, several additional changes were being recommended. Mr. Pfeiffer recommended that the revised amendments be placed on the GRC website and the public comment period be extended. Mr. Maltese stated that the comment period will be extended to June 30<sup>th</sup>.

- **Complaint 2002-8, L.E. Fisher v. Essex County Sheriff's Department**

Mr. Pfeiffer explained that the custodian had only recently, based upon advice from the Division of Criminal Justice, released a copy of the Sheriff's daily activity blotter. Mr. Pfeiffer recommended that the Council reject the requestor's claim for attorney fees since there was no need for the Council to adjudicate the question of access to the record. Mr. Pfeiffer recommended that the Council find that the custodian did not knowingly and willfully violate the

provisions of OPRA since its initial decision to withhold access and its subsequent decision to provide access was the result of conflicting legal advice regarding the confidentiality of the record requested. Mr. Spigner moved to accept the Executive Director's Findings and Recommendation dated June 12, 2003 with a second by Mr. Watkins. The motion was called by roll call:

Ayes: Ms. Hook, Mr. Spigner, Mr. Watkins and Mr. Maltese.

Nays: None

The motion was approved and the complaint was dismissed.

- **Complaint 2002-83, Wisniewski/Bukowski v. Union County Surrogate**

Mr. Pfeiffer explained that the Division of Law advised that the Council lacked jurisdiction over the complaint because OPRA does not apply to the judiciary and the Surrogate and the Surrogate's office are part of the State's judiciary. Mr. Pfeiffer observed that after he issued his June 12, 2003 Findings and Recommendations, the requestors asked for additional time to comment on the issue of Council jurisdiction. Ms. Conklin advised that further submissions from the requestors would not change the Division's legal advice to the Council. Mr. Watkins stated that there was no reason for the Council to wait for further comment from a requestor when the Council had no jurisdiction over the Complaint. Mr. Watkins moved to accept the Findings and Recommendations of the Executive Director dated June 12, and dismiss the complaint for lack of jurisdiction, with a second by Ms. Hook. The motion was called by roll call:

Ayes: Ms. Hook, Mr. Spigner, Mr. Watkins and Mr. Maltese.

Nays: None

The motion was approved and the complaint was dismissed.

- **By-Laws Amendment**

Mr. Pfeiffer reviewed the proposed By-Law Amendments and recommends that the order of business be changed so that "case adjudication" will follow "communications", which would be followed by new business and old business. Mr. Pfeiffer also recommended the Council eliminate the public comment period currently scheduled to occur prior to Council adjudication of cases but retain the public comment period currently held at the end of the agenda. These amendments will be placed on the GRC website. Mr. Maltese requested that adoption of the amendments be placed on the agenda at the Council's special meeting in July.

Mr. Maltese opened the floor to Public Comment.

Albin Wagner, from the State's Division of Archives and Records Management, commented that the Council should consider a censure process for those custodians that do not comply with the

seven-day response period in OPRA. Mr. Wagner further commented that OPRA reinforces DARM's emphasis on the need for good record keeping.

Hearing no further comment, Mr. Maltese closed the public comment period.

Mr. Watkins moved to adjourn the meeting, with a second Ms. Hook. The motion was adopted by roll call:

Ayes: Ms. Hook, Mr. Spigner, Mr. Watkins and Mr. Maltese.

Mr. Maltese adjourned the meeting 12:13 p.m.

Respectfully submitted,

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/s/ Virginia Hook, Secretary

Dated: \_\_\_\_\_