



## **Minutes of the Government Records Council February 28, 2007 Public Meeting – Open Session**

The meeting was called to order at 9:40 a.m. at the Department of Community Affairs, Conference Room 126, Trenton, New Jersey. The Open Public Meetings Act statement was read.

Ms. Hairston called the roll:

Present: Vincent Maltese, Chairman, Robin Berg Tabakin, David Fleisher and Kathryn Forsyth (designee of Department of Education Commissioner Lucille Davy).

GRC Staff: Executive Director Catherine Starghill, Brigitte Hairston, Karyn Gordon, Jyothi Pamidimukkala, Dara Lownie, Tiffany Mayers, Rebecca Steese, Frank Caruso, Designated Outside Counsel Meagan Tuohey-Kay, and Deputy Attorney General Debra Allen.

Mr. Maltese read the Resolution for Closed Session (Resolution Number 2007-02-28) to go into closed session pursuant to N.J.S.A. 10:4-12.b(7) to discuss anticipated litigation in which the public body may become a party and to conduct an *in camera* review:

1. Cynthia Teeters v. NJ Department of Children & Families, Division of Youth & Family Services (2002-2)
2. Cynthia Teeters v. NJ Department of Children & Families, Division of Youth & Family Services (2002-15)
3. John McCormack v. NJ Department of Treasury (2005-102) - *In Camera* Review
4. John McCormack v. NJ Department of Treasury (2005-160)
5. John McCormack v. NJ Department of Treasury (2005-164)
6. Martin O'Shea v. West Milford Municipal Utilities Authority (2006-138)
7. John Paff v. Borough of South Bound Brook (2006-158)

A motion was made by Ms. Berg Tabakin and seconded by Mr. Fleisher to go into closed session. The motion was adopted by a unanimous vote. A motion was made by Mr. Fleisher and seconded by Ms. Forsyth to end the closed session. The motion was adopted by a unanimous vote. The Council met in closed session from 9:43 a.m. until 10:32 a.m.

A motion was made by Ms. Berg Tabakin and seconded by Ms. Forsyth to go into closed session again. The motion was adopted by a unanimous vote. A motion was made by Mr. Fleisher and seconded by Ms. Berg Tabakin to end the closed session. The motion was adopted by a unanimous vote. The Council met in closed session from 10:39 a.m. until 10:58 a.m.

Open Session reconvened at 11:06 a.m. and Ms. Hairston called the roll.

In attendance:

Mr. Maltese, Ms. Berg Tabakin, Mr. Fleisher and Ms. Forsyth.

The pledge of allegiance was recited.

Mr. Maltese called for a motion to approve the open and closed session minutes of December 14, 2006. The motion with amendments to the minutes was made by Ms. Berg Tabakin and seconded by Mr. Fleisher. There was not a quorum to approve the open and closed session minutes of January 31, 2007 (because Ms. Forsyth and Mr. Fleisher were not in attendance at that meeting), therefore Mr. Maltese did not call for a motion to approve these minutes.

**Council Summary Administrative Adjudication:**

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

GRC Complaint Case and Number	Disposition
1. Elaine Chu v. Little Ferry Borough (2005-100)	Complaint Withdrawn
2. James Donato v. Hackensack Police Department (2006-52)	Settled in Mediation
3. John Paff v. City of Englewood (2006-159)	Settled in Mediation
4. Vincent Mangini v. Borough of South Bound Brook (2006-181)	Complaint Withdrawn
5. Tyrone Jamison v. Franklin Township Police Department (2006-197)	Settled in Mediation
6. Paul Porreca v. City of Millville (2006-216)	Settled in Mediation
7. Steven Kossup v. City of Newark (2007-19)	Complaint Withdrawn
8. Jerry Mantone v. Borough of Madison (Morris) (2007-52)	Complaint Withdrawn
9. Cherron Roundtree v. Borough of Roselle (Union) (2007-55)	Complaint Withdrawn
10. Charles Savoca v. Washington Township (Mercer) (2006-193)	Complaint Withdrawn
11. Ali S. Morgano v. Essex County Prosecutor (2007-70)	Not a Valid OPRA Request

Mr. Maltese 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. Berg Tabakin and seconded by Ms. Forsyth. The motion passed by a unanimous vote.

**Council Adjudication of Individual Complaints:**

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

**John McCormack v. NJ Department of Treasury (2005-102)**

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

The Executive Director respectfully recommends the Council find that regarding the Monthly Activity Reports and NJ Division of Taxation Technical Services Activity Report:

1. **May 2004 Monthly Activity Report (TRE 006-TRE 0012):** The Custodian has not provided a lawful basis for denial of access for the entire May 2004 “Monthly Activity Report.” In fact, a majority of the information contained in the report is not advisory, consultative and deliberative (“ACD material”) material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in above section.
2. **NJ Division of Taxation Memorandum – Technical Services Activity Report – May, 2004 (TRE 0013-TRE 0016):** The Custodian has not provided a lawful basis for denial of access for the entire “Technical Services Activity Report – May, 2004.” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in above section.
3. **June 2004 Monthly Activity Report (TRE 0017-TRE 0022):** The Custodian has not provided a lawful basis for denial of access for the entire June 2004 “Monthly Activity Report.” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in above section.
4. **NJ Division of Taxation Memorandum – Technical Services Activity Report – June, 2004 (TRE 0023-TRE 0026):** The Custodian has not provided a lawful basis for denial of access for the entire “Technical Services Activity Report – June, 2004.” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in above section.
5. **July 2004 Monthly Activity Report (TRE 0027-TRE 0032):** The Custodian has not provided a lawful basis for denial of access for the entire July 2004 “Monthly Activity Report.” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in the above section. These portions of the report are indicated in above section.

6. **NJ Division of Taxation Memorandum – Technical Services Activity Report – July, 2004 (TRE 0033-TRE 0038):** The Custodian has not provided a lawful basis for denial of access for the entire “Technical Services Activity Report – July, 2004.” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in above section.
7. **August 2004 Monthly Activity Report (TRE 0039-TRE 0044):** The Custodian has not provided a lawful basis for denial of access for the entire August 2004 “Monthly Activity Report.” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in above section.
8. **NJ Division of Taxation Memorandum – Technical Services Activity Report – August, 2004 (TRE 0045-TRE 0048):** The Custodian has not provided a lawful basis for denial of access for the entire “Technical Services Activity Report – August, 2004.” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in above section.
9. **September 2004 Monthly Activity Report (TRE 0049-TRE 0054):** The Custodian has not provided a lawful basis for denial of access for the entire September 2004 “Monthly Activity Report.” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in above section.
10. **NJ Division of Taxation Memorandum – Technical Services Activity Report – September, 2004 (TRE 0055-TRE 0058):** The Custodian has not provided a lawful basis for denial of access for the entire “Technical Services Activity Report – September, 2004.” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in above section.
11. **October 2004 Monthly Activity Report (TRE 0059-TRE 0065):** The Custodian has not provided a lawful basis for denial of access for the entire October 2004 “Monthly Activity Report.” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure

pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in above section.

12. **NJ Division of Taxation Memorandum – Technical Services Activity Report – October, 2004 (TRE 0066-TRE 0072):** The Custodian has not provided a lawful basis for denial of access for the entire “Technical Services Activity Report – October, 2004.” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in above section.
13. **November 2004 Monthly Activity Report (TRE 0073-TRE 0079):** The Custodian has not provided a lawful basis for denial of access for the entire November 2004 “Monthly Activity Report.” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in above section.
14. **NJ Division of Taxation Memorandum – Technical Services Activity Report – November, 2004 (TRE 0080-TRE 0082):** The Custodian has not provided a lawful basis for denial of access for the entire “Technical Services Activity Report – November, 2004.” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in above section.
15. **December 2004 Monthly Activity Report (TRE 0083-TRE 0090):** The Custodian has not provided a lawful basis for denial of access for the entire December 2004 “Monthly Activity Report.” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in above section.
16. **NJ Division of Taxation Memorandum – Technical Services Activity Report – December, 2004 (TRE 0091-TRE 0093):** The Custodian has not provided a lawful basis for denial of access for the entire “Technical Services Activity Report – December, 2004.” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in above section.

17. **January 2005 Monthly Activity Report, Field and Outreach (TRE 0094-TRE 0097):** The Custodian has not provided a lawful basis for denial of access for the entire January 2005 “Monthly Activity Report, Field and Outreach” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in above section.
  
18. **January 2005 Monthly Activity Report (TRE 0098-TRE 00105):** The Custodian has not provided a lawful basis for denial of access for the entire January 2005 “Monthly Activity Report.” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in above section.
  
19. **NJ Division of Taxation Memorandum – Technical Services Activity Report – January, 2005 (TRE 00106-TRE 00108):** The Custodian has not provided a lawful basis for denial of access for the entire “Technical Services Activity Report – January, 2005.” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in above section.
  
20. **February 2005 Monthly Activity Report, Field and Outreach (TRE 00109-TRE 00112):** The Custodian has not provided a lawful basis for denial of access for the entire February 2005 “Monthly Activity Report, Field and Outreach” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in above section.
  
21. **February 2005 Monthly Activity Report (TRE 00113-TRE 00120):** The Custodian has not provided a lawful basis for denial of access for the entire February 2005 “Monthly Activity Report.” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in above section.

22. **NJ Division of Taxation Memorandum – Technical Services Activity Report – February, 2005 (TRE 00121-TRE 00123):** The Custodian has not provided a lawful basis for denial of access for the entire “Technical Services Activity Report – February, 2005.” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in above section.
  
23. **March 2005 Monthly Activity Report, Field and Outreach (TRE 00124-TRE 00136):** The Custodian has not provided a lawful basis for denial of access for the entire March 2005 “Monthly Activity Report, Field and Outreach” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in above section.
  
24. **March 2005 Monthly Activity Report (TRE 00137-TRE 00143):** The Custodian has not provided a lawful basis for denial of access for the entire March 2005 “Monthly Activity Report.” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in above section.
  
25. **NJ Division of Taxation Memorandum – Technical Services Activity Report – March, 2005 (TRE 00144-TRE 00151):** The Custodian has not provided a lawful basis for denial of access for the entire “Technical Services Activity Report – March, 2005.” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in above section.
  
26. **April 2005 Monthly Activity Report, Field and Outreach (TRE 00152-TRE 00155):** The Custodian has not provided a lawful basis for denial of access for the entire April 2005 “Monthly Activity Report, Field and Outreach” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in above section.

27. **April 2005 Monthly Activity Report (TRE 00156-TRE 00159):** The Custodian has not provided a lawful basis for denial of access for the entire April 2005 “Monthly Activity Report.” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in the above section.
28. **NJ Division of Taxation Memorandum – Technical Services Activity Report – April, 2005 (TRE 00160-TRE 00165):** The Custodian has not provided a lawful basis for denial of access for the entire “Technical Services Activity Report – April, 2005.” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in the above section.
29. **May 2004 Monthly Activity Report (TRE 00166-TRE 00172):** The Custodian has not provided a lawful basis for denial of access for the entire May, 2004 “Monthly Activity Report.” In fact, a majority of the information contained in the report is not ACD material, which is exempt from disclosure pursuant to the definition of a government record in N.J.S.A. 47:1A-1.1. That being said, portions of the report are exempt from disclosures as ACD material. These portions of the report are indicated in the above section.
30. **The Custodian shall comply with “1. - 29.” within five (5) business days from receipt of this decision on the basis of the Council’s above determination and provide certified confirmation , in accordance with N.J. Court Rule 1:4-4, to the Executive Director that the Custodian has complied with the Council’s decision.**

Ms. Berg Tabakin called for a motion to accept the Executive Director’s *in camera* findings and recommendations as amended. A motion was made by Mr. Fleisher and seconded by Ms. Forsyth. The motion passed by a majority vote. Mr. Maltese recused himself from the vote in this matter.

#### **James Donato v. Township of Union (2005-182)**

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

The Executive Director respectfully recommends the Council find that pursuant to the Custodian’s February 20, 2007 certification, the Custodian has complied with the Council’s January 31, 2007 Interim Order within the required time frame.

Ms. Berg Tabakin called for a motion to accept the Executive Director's supplemental findings and recommendations as written. A motion was made by Mr. Fleisher and seconded by Ms. Forsyth. The motion passed by a majority vote. Mr. Maltese recused himself from the vote in this matter.

**John Paff v. City of Plainsfield (2006-103)**

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

The Executive Director respectfully recommends the Council find that based on the Custodian's January 12, 2007 certification, the Custodian has complied with the Council's December 14, 2006 Interim Order by releasing the minutes.

Ms. Berg Tabakin called for a motion to accept the Executive Director's supplemental findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Mr. Fleisher. The motion passed by a majority vote. Mr. Maltese recused himself from the vote in this matter.

**Elizabeth Wulster v. Old Bridge Township (2006-143)**

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

The Executive Director respectfully recommends the Council find that:

1. Since the Custodian's basis for denial is Executive Order No. 21's exemption from disclosure of home addresses (Paragraph 3) which was rescinded by Executive Order No. 26, the Custodian has not borne his burden of proving that the denial of access is authorized by law pursuant to N.J.S.A. 47:1A-6.
2. Based on the Complainant's stated need and use of the voter registration list as provided in her responses to the balancing test questions, the Custodian is legally precluded from disclosing the requested records. Specifically, the Complainant's intended charitable solicitation of the voters listed on the voter registration list is explicitly prohibited by law pursuant to N.J.S.A. 19:31-18.1.c.

Ms. Berg 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 Mr. Fleisher. The motion passed by a majority vote. Mr. Maltese recused himself from a vote in this matter.

**Diomedes Valenzuela v. Township of Irvington (2006-182)**

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. As the Custodian certifies that all records responsive have been provided to the Complainant with the exception of the 118 log sheet for Unit 105 which does not exist, the Custodian would not have unlawfully denied access to the requested records. However, because the Custodian did not provide the Complainant with a written response to his OPRA requests until the twenty second (22<sup>nd</sup>) business day following the date such requests were received, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., resulting in a "deemed denial."
2. As the Custodian has not yet provided the requested reports created by the Complainant on November 27, 2001 on the basis that Sergeant Sandberg is still searching the archives for such records, the Custodian has unlawfully denied access to the requested reports. The Custodian shall release the requested reports to the Complainant with appropriate redactions, if any, and a legal justification for any redacted part thereof. Such a delay for retrieving records from archives (now over five (5) months) is not justifiable.
3. The Custodian shall comply with # 2 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, pursuant to *N.J. Court Rules, 1969 R. 1:4-4* (2005), to the Executive Director.
4. The Custodian's assertion that staff has not yet located the requested reports in the archives, approximately five (5) months following the date the Custodian received the Complainant's request, is not justifiable. Therefore, it is possible that the Custodian'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 the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested reports under the totality of the circumstances.

Ms. Berg Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Mr. Fleisher and seconded by Ms. Forsyth. The motion passed by a majority vote. Mr. Maltese recused himself from a vote in this matter.

### **Cynthia Teethers v. NJ Department of Children & Family, DYFS (2002-6 & 15)**

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

The Executive Director respectfully recommends the Council refer this matter to the Office of Administrative Law for a determination of the amount of reasonable attorney's fees to be awarded to the Complainant's Counsel pursuant to N.J.S.A. 47:1A-6 and the Complainant's objection to the Council making such determination due to the perceived conflict of interest of the Attorney General advising the Council as adjudicator and the litigant DYFS as defendant in this matter.

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

**David Mann v. Borough of Woodcliff Lake (2005-69)**

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

The Executive Director respectfully recommends the Council find that:

1. The Custodian has not unlawfully denied access to the requested because the requested draft, unapproved closed session meeting minutes are exempt from disclosure as advisory, consultative or deliberative material pursuant to Jane Cowley v. Township of Kingwood, GRC Complaint No. 2006-45, (November 2006) and O'Shea v. West Milford Board of Education, GRC Complaint 2004-93 (April, 2006).
2. The Custodian has gone beyond the mandates of OPRA by continuing to provide disclosure of the records responsive to this request as the closed session matters are resolved. Therefore, 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.

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

**Vincent Donato v. Emerson Borough (2005-125)**

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 recommendations to the Council as amended:

The Executive Director respectfully recommends the Council find that:

1. In response to the Complainant's May 4, 2005 OPRA request, the Custodian has not unlawfully denied access to the requested records as the Custodian certifies that she provided the Complainant with all responsive records as maintained on file with the Borough.
2. Regarding the Complainant's May 17, 2005 request, the Custodian did provide a written response within the statutorily mandated seven (7) business days required to respond to requests. However, the Custodian's initial response was not appropriate pursuant to OPRA as the Custodian never explicitly granted or denied access to the specific requested records. As such, the Custodian violated N.J.S.A. 47:1A-5.i.
3. The Custodian has unlawfully denied access to the requested July 13, 2004 and August 3, 2004 meeting minutes as the Complainant contends he never received such records and it appears the Custodian did not state a lawful basis for such denial pursuant to N.J.S.A. 47:1-6. As such, the Custodian shall release said records to the Complainant with appropriate redactions, if any, and a legal justification for any redacted part thereof.

4. The Custodian shall comply with # 3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, pursuant to *N.J. Court Rules, 1969 R. 1:4-4* (2005), to the Executive Director.
5. Based on the decision in Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super 534 (March 2005) and James Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007), the Custodian was obligated to fulfill the records request which requires that she search her files for the requested identifiable government records.
6. As the Complainant requested the estimated cost for specific meeting minutes, pursuant to N.J.S.A. 47:1A-5.b., the Custodian should have provided the exact copying costs for the actual amount of pages and not her best guess estimate.
7. The Custodian's \$40.00 an hour charge for labor is not likely warranted pursuant to the GRC's decision in James Donato v. Jersey City Police Department, GRC Complaint No. 2005-251 (December 2006).
8. Although the Custodian certifies that several of the requested meeting minutes did not exist at the time of the Complainant's request, the Custodian also certifies in the Borough's Statement of Information that the Borough maintained the same meeting minutes on audio tape. The Custodian's failure to offer the requested meeting minutes in another meaningful medium (audio tape) at the time of the request, is a violation of N.J.S.A. 47:1A-5.d.
9. At the time of the Complainant's May 17, 2005 request, the requested meeting minutes did not exist. The Custodian is not obligated any further than to either grant or deny access at the time of the request. The Custodian denied the Complainant's request on the basis that the meeting minutes did not exist. If the Complainant wants to receive a copy of said meeting minutes once they become available as approved, he must submit a new OPRA request pursuant to Robert Blau v. Union County, GRC Complaint No. 2003-75 (January 2005).
10. Because the unapproved, draft meeting minutes of the Borough Council's meetings constitutes inter-agency or intra-agency advisory, consultative, or deliberative material, they are not government records pursuant to the definition of same in N.J.S.A. 47:1A-1.1 and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Dina Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). As such, the Custodian has borne her burden of proving a lawful denial of access to the draft minutes pursuant to N.J.S.A. 47:1A-6 as she certifies that the requested draft minutes which had not been provided to the Complainant had not been approved at the time of the request.
11. The matter of whether the meeting minutes should have been prepared and maintained in the Borough's official minute books does not fall under the authority of the Government Records Council and is not governed by OPRA pursuant to N.J.S.A. 47:1A-7.b. and Thomas Allegretta v. Borough of Fairview, GRC Complaint No. 2005-132 (December 2006).
12. Although the Custodian eventually waived the deposit in favor of a complete payment, the deposit was indeed warranted as the total charge did exceed \$25 with a total of \$32.25, pursuant to the Handbook for Records

Custodians, Santos v. New Jersey State Parole Board, GRC Complaint No. 2004-74 (August, 2004), and Cuba v. Northern State Prison, GRC Complaint No. 2004-146 (February, 2005).

13. While the Custodian did fail to offer the existing audio tapes for the dates in which the meeting minutes did not exist at the time of the request, such failure appears merely negligent, heedless, or unintentional. Nevertheless, the Custodian did release the records responsive to the request that existed at the time of the request, except for the July 13, 2004 and August 3, 2004 meeting minutes. Therefore, 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.

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

#### **John McCormack v. NJ Department of Treasury (2005-160)**

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

The Executive Director respectfully recommends the Council re-transmit this complaint to the Office of Administrative Law since the Complainant asserts not having received notice of a scheduled proceeding and the matter was dismissed for failure by the Complainant to appear. The Complainant's explanation for his failure to appear is acceptable and warrants re-transmission of the complaint to the Office of Administrative Law.

Ms. Berg Tabakin called for a motion to accept the Executive Director's supplemental findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Mr. Fleisher. The motion passed by a majority vote. Mr. Maltese recused himself from a vote in this matter.

#### **John McCormack v. NJ Department of Treasury (2005-164)**

Ms. Starghill 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 re-transmit this complaint to the Office of Administrative Law since the Complainant asserts not having received notice of a scheduled proceeding and the matter was dismissed for failure by the Complainant to appear. The Complainant's explanation for his failure to appear is acceptable and warrants re-transmission of the complaint to the Office of Administrative Law.

Ms. Berg Tabakin called for a motion to accept the Executive Director's supplemental findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Mr. Fleisher. The motion passed by a majority vote. Mr. Maltese recused himself from a vote in this matter.

### **Bernard Laufgas v. City of Paterson (2006-23)**

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

The Executive Director respectfully recommends the Council find that:

1. As OPRA did not become effective until 2002, the Complainant's June 9, 1999 request does not constitute a valid OPRA request. Therefore, the Council does not have the authority to adjudicate this portion of the complaint, and as such, this portion of the Complaint should be dismissed.
2. As the Custodian stated specific reasons for the denial of access and offered alternatives that would clarify the request, the Custodian has met the burden of proving that the denial of access was proper under OPRA pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super 534, 546 (March 2005), Bent v. Stafford Police Department, 381 N.J. Super 30, 37 (October 2005)<sup>1</sup>, New Jersey Builders Association v. New Jersey Council on Affordable Housing, App.Div. (Decided January 24, 2007), Liebel v. Manalapan Englishtown Regional Board of Education, GRC Complaint No. 2004-51 (September 2004) and Moore v. Township of Old Bridge, GRC Complaint No. 2005-80 (August 2005).
3. As the Custodian failed to provide the Complainant with a written response to his December 15, 2005 and December 19, 2005 requests within the statutorily mandated seven (7) business days, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. which resulted in a "deemed" denial of the requests.
4. The Complainant's December 15, 2005 and December 19, 2005 requests were overbroad and would likely have substantially disrupted agency operations, pursuant to Mag Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super 534, 546 (March 2005), Bent v. Stafford Police Department, 381 N.J. Super 30, 37 (October 2005)<sup>2</sup> and New Jersey Builders Association v. New Jersey Council on Affordable Housing, App.Div. (Decided January 24, 2007), as the records requested in these requests were the same as the records requested in the Complainant's December 1, 2005 request.

Mr. Maltese called for a motion to accept the Executive Director's findings and recommendations as amended. A motion was made by Ms. Berg Tabakin and seconded by Mr. Fleisher. The motion passed unanimously.

### **Edmund Haemmerle, III v. Washington Township (Mercer) (2006-106)**

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 recommendations to the Council as amended:

The Executive Director respectfully recommends the Council find that:

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<sup>1</sup> The Appellate decision affirms GRC Complaint No. 2004-78 (October 2004).

<sup>2</sup> The Appellate decision affirms GRC Complaint No. 2004-78 (October 2004).

1. Because the requested e-mail entitled, “FW: Washington Township Fire Department...Did You Know?” was made or received in the Mayor’s conduct of official government business, the e-mail is considered a government record pursuant to N.J.S.A. 47:1A-1.1 and Donal Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005-127 (May 2006).
2. The Custodian failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 because neither the First Amendment nor the N.J. Constitution, Article I, Paragraph 6 contain exemptions from disclosure to government records. As such, the Custodian initially unlawfully denied access to the requested e-mail. However, on January 31, 2007, the Business Administrator released page one of the requested e-mail to the Complainant, including her typed comments.<sup>3</sup> Further, the Custodian released the requested e-mail in its entirety to the Complainant on February 6, 2007.
3. The Council should conduct an *in camera* review of the requested e-mail sent January 27, 2006 from Mary Caffery to Mayor David Fried in order to verify if the Custodian’s claimed ACD exemption is valid pursuant to Paff v. Department of Labor, 379 N.J. Super. 346, 354-355 (App. Div. 2005).

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

#### **Toni Catrell v. NJ Department of Corrections (2006-121)**

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

The Executive Director respectfully recommends the Council find that based on the Custodian’s February 8, 2007 certification, the Custodian has complied with the Council’s January 31, 2007 Interim Order by certifying that she sent the Complainant a letter dated February 5, 2007 which indicated that the requested records are three (3) pages and will be provided to the Complainant upon payment receipt of \$2.25. (The Custodian has also indicated to the GRC that the records being made available to the Complainant include redactions that have not been challenged as the Complainant has not yet picked up the records).

Mr. Maltese called for a motion to accept the Executive Director’s supplemental findings and recommendations as written. A motion was made by Ms. Berg Tabakin and seconded by Mr. Fleisher. The motion passed unanimously.

#### **Michael Deluca v. Town of Guttenberg (2006-126)**

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:

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<sup>3</sup> This e-mail may have been exempt from disclosure as inter-agency, intra-agency advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-1.1. However, the Custodian released it before the GRC rendered its decision on the issue.

The Executive Director respectfully recommends the Council find that:

1. While the Custodian may have verbally contacted the Complainant within the statutorily mandated seven (7) business day time frame required to respond to OPRA requests, she failed to do so in writing, therefore creating a “deemed” denial of the request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and the Council’s decision in John Paff v. Bergen County Prosecutor’s Office, GRC Complaint No. 2005-115 (March 2006). However, the Custodian certifies that she has provided all the responsive documents and the Complainant states that he has since received all the requested documents.
2. OPRA does not limit the number of times a Complainant may file a Denial of Access Complaint with the GRC. As such, the GRC does not have the authority to limit or remove this right from the Complainant pursuant to N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.b.
3. As the Custodian has certified that all records responsive have been provided to the Complainant and that she had no knowledge of any permits released to the Complainant on June 29, 2006, as said permits did not come from her office, the Custodian’s actions appear merely negligent, heedless or unintentional. As such, 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.

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

**Martin O’Shea v. West Milford Municipal Utilities Authority (2006-138)**

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

The Executive Director respectfully recommends the Council find that:

1. The Custodian has not complied with the Council’s October 19, 2006 Interim Order because she only provided legal justification for the redaction of three (3) meeting minutes (October 26, 2004, November 23, 2004, and January 24, 2006) of the nine (9) meeting minutes requested by the Complainant. The Custodian also failed to legally justify why three (3) meeting minutes (July 2003, August 2003, and February 2006) were not included with its *in camera* documentation submission.
2. Based on the Custodian’s failure to lawfully comply to the Council’s October 19, 2006 Interim Order and failure to respond to the GRC’s January 23, 2007 follow-up correspondence, the GRC shall commence an enforcement proceeding in New Jersey Superior Court against the Custodian in accordance with N.J. Court Rules, 1969 R. 4:67-6 (2007).
3. Based on the Custodian’s failure to lawfully comply to the Council’s October 19, 2006 Interim Order and failure to respond to the GRC’s January 23, 2007 follow-up correspondence, it is possible that the Custodian’s actions were intentional and deliberate, with knowledge of

their wrongfulness, and not merely negligent, heedless or unintentional. As such, the case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of the OPRA under the totality of the circumstances. Such referral shall be made after the enforcement proceeding.

Mr. Maltese called for a motion to accept the Executive Director's supplemental findings and recommendations as amended. A motion was made by Mr. Fleisher and seconded by Ms. Berg Tabakin. The motion passed unanimously.

**John Paff v. Borough of South Bound Brook (2006-158)**

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

The Executive Director respectfully recommends the Council find that:

1. Based on the Custodian's failure to provide the GRC with a legal certification indicating whether or not the meeting minutes had been approved by the governing body prior to the date of the Complainant's request and failure to provide the Complainant with the requested records as ordered in the Council's December 14, 2006 Interim Order, the GRC shall commence an enforcement proceeding in New Jersey Superior Court against the Custodian in accordance with N.J. Court Rules, 1969 R. 4:67-6 (2007).
2. Based on the Custodian's failure to respond to the Complainant after one hundred and thirty-six (136) business days, the Custodian's failure to respond to the GRC after several attempts, and the Custodian's failure to comply with the Council's December 14, 2006 Interim Order, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. Therefore, the Council shall conduct a hearing to determine whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11. Such hearing shall be held on April 25, 2007 at the Council's regularly scheduled meeting.

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

**Darin Hickson v. NJ Department of Law & Public Safety, Division of Criminal Justice (2006-172)**

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

The Executive Director respectfully recommends the Council find that there was no unlawful denial of access as the requested records are criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1 and are exempt from disclosure.

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

**Steven Kossup v. City of Newark Police Department (2006-174)**

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

The Executive Director respectfully recommends the Council find that:

1. Pursuant to the fact that the Newark Police Department employee, Lt. Caroline Clark, did not forward the Complainant's request form or direct the Complainant to the proper records custodian, that employee (Lt. Caroline Clark) has violated N.J.S.A. 47:1A-5.h.
2. Pursuant to the fact that the OPRA Manager certified that neither she nor the Custodian received the Complainant's OPRA request until after the denial of access complaint was filed with the GRC, the Custodian did not unlawfully deny the Complainant's request.

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

**David Herron v. Township of Montclair (2006-178)**

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 recommendations to the Council as amended:

The Executive Director respectfully recommends the Council find that:

1. The Custodian violated N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. by failing to provide the Complainant with a written response stating that the record requested does not exist within the statutorily mandated seven (7) business days therefore creating a "deemed" denial.
2. The Custodian should have obtained a written agreement from the Complainant extending the time period to respond to the request pursuant to John Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006).
3. While the Custodian certifies that the requested contract does not exist, the immediate access language of OPRA (N.J.S.A. 47:1A-5.e.) suggests that the Custodian was still obligated to immediately notify the Complainant of such.

Mr. Maltese called for a motion to accept the Executive Director's findings and recommendations as amended. A motion was made by Ms. Berg Tabakin and seconded by Mr. Fleisher. The motion passed unanimously.

**Joanna Perilli b. Borough of South Bound Brook (2006-180)**

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

The Executive Director respectfully recommends the Council find that:

- 1) The Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide the Complainant with a written response to her OPRA request indicating that all records responsive to the request had been provided within the statutorily mandated seven (7) business days, therefore creating a "deemed" denial.
- 2) Pursuant to the Council's decision in Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006), the Custodian should have obtained a written agreement from the Complainant extending the seven (7) business day time frame required under OPRA if the Custodian required additional time to produce the records responsive.
- 3) Based on the Custodian's failure to respond to the Complainant's OPRA request within the statutorily mandated seven (7) business days, the Custodian's failure to obtain an extension to fulfill the Complainant's OPRA request, and the Custodian's failure to adhere to his own time frame when providing the records responsive and ultimately fulfilling the Complainant's OPRA request fifty-three (53) business days after it was submitted, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, the case should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA under the totality of the circumstances.

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

#### **Complaints Adjudicated on Appeal in Superior Court:**

1. Akbar Na'im v. Union County Prosecutor's Office (2005-66) – AFFIRMED

#### **Motion for Reconsideration:**

None

#### **Executive Director's Report:**

Ms. Starghill introduced the newest addition to the GRC staff, Mr. Frank Caruso who will serve as a Case Manager. Additionally, Ms. Starghill asked the Chairman to vote on new officers of the Council for the new year.

Mr. Maltese called for motion on the position of Chairman. A motion to nominate Vincent Maltese for Chairman was made by Mr. Fleisher and seconded by Ms. Berg Tabakin. The motion passed unanimously. A motion to nominate Robin Berg Tabakin for Vice Chairman was made by Mr. Fleisher and seconded by Ms. Forsyth. The motion passed unanimously. A motion to nominate David Fleisher for Secretary was made by Ms. Berg Tabakin and seconded by Ms. Forsyth. The motion passed unanimously.

**Public Comment:**

None

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

Meeting adjourned at 12:17 p.m.

Respectfully submitted,

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David Fleisher, Secretary

Date Approved: 05/30/2007