



Minutes of the Government Records Council May 30, 2007 Public Meeting – Open Session

The meeting was called to order at 9:45 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: Chairman Vincent Maltese, David Fleisher, Janice Kovach (designee of Commissioner Susan Bass Levin, Department of Community Affairs), as well as Robin Berg Tabakin and Kathryn Forsyth (designee of Commissioner Lucille Davy, Department of Education) who arrived shortly after the open session began.

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

Mr. Maltese read the Resolution for Closed Session (Resolution Number 2007-05-30) to go into closed session pursuant to N.J.S.A. 10:4-12.b(7) to receive legal advice and discuss anticipated litigation in which the public body may become a party in the following matters:

1. John Bart v. City of Paterson (2005-145)
2. Tyrone Jamison v. Somerset Community Action Program (2006-123)
3. John Paff v. Borough of South Bound Brook (2006-158)
4. Robert Vessio v. NJ Department of Community Affairs, Div of Fire Safety (2007-63)

A motion was made by Mr. Fleisher and seconded by Ms. Kovach to go into closed session. 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 majority vote. Ms. Kovach was not present for the vote. The Council met in closed session from 9:50 a.m. until 10:20 a.m.

Open Session reconvened at 10:28 a.m. and Ms. Hairston called the roll.

In attendance:

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

The pledge of allegiance was recited.

There was not a quorum to approve the open and closed session minutes of the January 31, 2007 and March 28, 2007 meetings, therefore Mr. Maltese did not call for a motion to approve these minutes.

Mr. Maltese called for motions to accept the open and closed session minutes of the February 28, 2007, April 2, 2007 and April 25, 2007 meetings. Motions were made by Mr. Fleisher and seconded by Ms. Berg Tabakin with minor edits to the February 28, 2007 open session minutes.

Council Summary Administrative Adjudication:

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

GRC Complaint Name and Number:

1. AJ Nash v. Community School of Family Connections (2006-99)
2. William Asdal v. Lebanon Township (2006-116)
3. Neil Yoskin v. NJ Department of Environmental Protection (2006-171)
4. Scott Grossman v. Freehold Borough Police Department (2006-188)
5. Richard Jacobus v. Town of Hammonton (2006-199)
6. James Krivacska v. NJ Department of Corrections (2006-210)
7. Femaarta Momo v. NJ Department of Agriculture (2007-49)
8. Michael Strauss v. Borough of Woodcliff Lake (2007-62)
9. Mohamed El-Hewie v. Bergen County Vocational District (2007-81)
10. John Paff v. NJ School Board Association Insurance Group (2007-89)
11. Paul Bellan-Boyer v. NJ Economic Development Authority (2007-104)
12. Len Collett v. NJ Department of Treasury (2007-106)
13. Kathleen Fallstick v. Haddon Township (2007-108)
14. Martin O'Shea v. Township of West Milford (2007-112)
15. Matthew Brewer v. Superior Court, Hudson County (2007-116)
16. Vesselin Dittrich v. City of Hoboken (Hudson) (2007-120)

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 Mr. Fleisher and seconded by Ms. Berg Tabakin. The motion passed by an unanimous vote.

Council Adjudication of Individual Complaints:

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

George Burdick, Jr. v. Franklin Township (2005-133)

Ms. Gordon 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 find that:

1. Because the Custodian did not properly bear her burden of proving that the Denial of Access was authorized by law at the time of the denial, she is in violation of N.J.S.A. 47:1A-6.
2. The Custodian failed to comply with the Council's March 28, 2007 Interim Order by failing to provide Complainant with a copy of the record and by failing to provide a certification of compliance to the Executive Director within the required timeframe.
3. Based on the Custodian's actions in this matter, 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 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 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. Ms. Kovach recused herself from a vote in this matter.

John Bart v. City of Paterson (2005-145)

Ms. Gordon reviewed the GRC's analysis and issues as set forth in the case in the Final Decision adopting in part and modifying in part the Initial Decision of the Office of Administrative Law. Ms. Gordon presented the following Final Decision to the Council:

For the foregoing reasons, the Initial Decision in this matter is **MODIFIED** as follows with respect to the errors mentioned herein and **ADOPTED** in all other respects:

Based upon the foregoing, the Council **FINDS** that the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances in connection with her response to Complainant's July 22, 2005 OPRA request. Therefore, the imposition of a civil penalty in the amount of \$1,000.00 against the Custodian is warranted pursuant to N.J.S.A. 47:1A-11.

Therefore, the Council hereby **MODIFIES** the Initial Decision of Administrative Law Judge Moscovitz to find that, under the totality of the circumstances, the Custodian unreasonably denied access to the records requested by Complainant in his July 22, 2005 OPRA request.

The Council further **MODIFIES** the Initial Decision of Administrative Law Judge Moscovitz to reflect that in its May 11, 2006 Findings and Recommendations, the Council found that the Custodian unlawfully denied access to the cover letter to Complainant and violated N.J.S.A. 47:1A-5.i by submitting an unreasonably vague response to Complainant's July 22, 2005 OPRA request.

The Council further **MODIFIES** the Initial Decision of Administrative Law Judge Moscovitz to require that the Custodian shall personally be subject to civil penalties in the

amount of \$1,000 under N.J.S.A. 47:1A-11 for knowingly and willfully violating OPRA and unreasonably denying access to the requested records under the totality of the circumstances.

The Council further **MODIFIES** the Initial Decision of Administrative Law Judge Moscowitz to reflect that Christopher H. Frick of the law firm Rogut McCarthy Troy entered an appearance at the hearing on January 31, 2007, on behalf of the Paterson Housing Authority.

Mr. Maltese called for a motion to accept the Final Decision as written. A motion was made by Ms. Berg Tabakin and seconded by Ms. Forsyth. The motion passed unanimously.

William Langford v. City of Perth Amboy (2005-181)

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

The Executive Director respectfully recommends the Council find that this complaint should be dismissed as the Complainant has voluntarily withdrawn his complaint in a letter to the GRC dated April 13, 2007.

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. Forsyth. The motion passed unanimously.

Yuan (Kellie) Fang v. NJ Department of Transportation (2006-60)

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

The Executive Director respectfully recommends the Council find that:

1. Because OPRA does not require custodians to research files to discern which records may be responsive to a request or compile records which do not otherwise exist, the Custodian has met his burden of proof that access to these records was not unlawfully denied pursuant to N.J.S.A. 47:1A-6. See MAG Entertainment v. Div. of ABC, 375 N.J.Super. 534 (App.Div. 2005).
2. Because the Custodian's February 15, 2006 response to Complainant's OPRA request failed to grant access, deny access, request an extension or seek clarification of the requested records, the Custodian has violated N.J.S.A. 47:1A-5.i.
3. The Custodian's actions do not meet the legal standard for a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a. However, the

Custodian's actions do appear to be at least negligent regarding his knowledge of OPRA.

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.

Yuan (Kellie) Fang v. NJ Department of Transportation (2006-93)

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

The Executive Director respectfully recommends the Council find that:

1. Because OPRA does not require custodians to research files to discern which records may be responsive to a request or compile records which do not otherwise exist, the Custodian has met his burden of proof that access to these records was not unlawfully denied pursuant to N.J.S.A. 47:1A-6. See MAG Entertainment v. Div. of ABC, 375 N.J.Super. 534 (App.Div. 2005).
2. Because the Custodian's March 15 and March 20, 2006 responses to Complainant's OPRA request failed to grant access, deny access, request an extension or seek clarification of the requested records, the Custodian has violated N.J.S.A. 47:1A-5.i.
3. Custodian's actions do not meet the legal standard for a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a. However, the Custodian's actions do appear to be at least negligent regarding his knowledge of OPRA.

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. Berg Tabakin. The motion passed unanimously.

Michael DeLuca v. Town of Guttenberg (2006-102)

Ms. Lownie reviewed the GRC's analysis and issues in the case as set forth in the *Reconsideration* 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 due to the significant question of whether or not the Custodian falsely certified that no records responsive to the Complainant's November 16, 2005 OPRA request exist, this complaint should be referred to the Office of Administrative Law (OAL) for a hearing to resolve the contested facts. Specifically, whether the following records are responsive to the Complainant's request for why no certificate of approval exists: a letter from the Electrical Subcode Official to Waseem Hakeem P.E., and Walter T. Gorman, P.E., P.C., dated

September 7, 2005 as well as a letter from the Electrical Subcode Official to Waseem Hakeem P.E., and Walter T. Gorman, P.E., P.C., dated October 3, 2005.

If it is determined via a fact finding hearing that the requested records do not exist and the records submitted by the Complainant are not responsive to his November 16, 2005 OPRA request, as the Custodian certified, then such determination will render this complaint moot.

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

Tyrone Jamison v. Somerset Community Action Program (2006-123)

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

The Executive Director respectfully recommends the Council find that:

1. Complainant's April 10, 2006 request for records was a valid OPRA request because it was submitted on an official OPRA request form from the agency. N.J.S.A. 47:1A-5.i.
2. Because the Custodian granted access to the requested records within seven (7) business days of her receipt of the Complainant's April 10, 2006 OPRA request, the Custodian has not violated N.J.S.A. 47:1A-5.i.
3. Because Complainant's April 14, 2006 e-mail and June 21, 2006 letter requesting additional records were not submitted to SCAP on an official OPRA request form, these submissions are not valid OPRA requests. N.J.S.A. 47:1A-5.f; Advisory Opinion 2006-01; see also *New Jersey Builders Ass'n v. New Jersey Council on Affordable Hous.*, 390 N.J. Super. 166, 181 (App. Div. 2007).

Mr. Maltese 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 Ms. Kovach. The motion passed unanimously.

Vesselin Dittrich v. City of Hoboken (2006-145)

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

The Executive Director respectfully recommends the Council find that the Custodian complied with the Council's April 25, 2007 Interim Order.

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

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

Ms. Gordon reviewed the GRC's analysis and issues in the case as set forth in the Final Decision. Ms. Gordon presented the Final Decision to the Council as amended:

Based upon the foregoing, the Council **CONCLUDES** that the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances regarding John Paff's May 19, 2006 OPRA request. Therefore, the assessment of a civil penalty in the amount of \$1,000.00 against the Custodian personally is warranted pursuant to N.J.S.A. 47:1A-11.

Mr. Maltese called for a motion to accept the Final Decision as amended. A motion was made by Ms. Berg Tabakin and seconded by Mr. Fleisher. The motion passed by a majority vote. Ms. Kovach abstained from a vote in this matter.

Mr. Fleisher stated the while the penalty is assessed against the records custodian, it is the responsibility of the governing body to provide the necessary resources for the records custodian to do his or her job including properly responding to OPRA requests.

Mr. Maltese stated that actions taken by this Council today in the Paff v. South Bound Brook and Bart v. City of Paterson Housing Authority cases underscore the GRC's commitment to require those few remaining uninformed or defiant records custodian in the State of New Jersey to "get with the program." He further stated that to those custodians I say that a claim of ignorance of OPRA's provisions or a dereliction of duty rising to the level of knowing and willful conduct is not an excuse for non-compliance. Mr. Maltese also stated that the GRC remains ever vigilant with respect to those situations warranting a "knowing and willful" hearing and rest assured that the Council will not be shy about processing "knowing and willful" hearings against any records custodian who fails to "get with the program."

Akbar Na'im v. Essex County Correctional Facility (2006-170)

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

The Executive Director respectfully recommends the Council find that:

1. Because the Deputy Director of Essex County Correctional Facility failed to grant access, deny access, seek clarification or request and extension of time to respond to the Complainant's request within the statutorily mandated seven (7) business days, Deputy Director "Keith Ali" (now retired) of Essex

County Correctional Facility is in violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

2. Pursuant to N.J.S.A. 47:1A-6, the Custodian has borne her burden of proving that the Complainant's request was not received, no records are responsive to this request and that the Custodian had no prior knowledge of the Complainant's OPRA request or the response by Deputy Director "Keith Ali" (now retired).

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.

Dionmedes Valenzuela v. Township of Irvington (2006-182)

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

The Executive Director respectfully recommends the Council find that:

1. Based on the Custodian's certification dated March 13, 2007, the Custodian has complied with the Council's February 28, 2007 Interim Order by providing the Complainant with the requested reports which were created by the Complainant on November 27, 2001.
2. Pursuant to the Council's February 28, 2007 Interim Order, 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 supplemental findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Kovach. The motion passed by a majority vote. Mr. Maltese recused himself from a vote in this matter.

Robert Vessio v. NJ Department of Community Affairs, Division of Fire Safety (2007-63)

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

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian granted the Complainant access to inspect the Uniform Fire Code Book for requested items #1, 3, 4, 7, 8, and 9, and granted access to the Complainant to inspect the Uniform Construction Code Book for requested item #10 on November 29, 2006, seven (7) days after receipt of the Complainant's OPRA request, and because the Custodian attempted to schedule an appointment with the Complainant to inspect these records but the Complainant did not respond, the Custodian has granted access to the requested documents pursuant to N.J.S.A. 47:1A-5.i. and has met his burden of proof that access to these records was not unlawfully denied under N.J.S.A. 47:1A-6.
2. Because OPRA does not require custodians to research files or compile records which do not otherwise exist, and because the Custodian denied access to these records within the required seven (7) day period pursuant to N.J.S.A. 47:1A-5.i., the Custodian has met his burden of proof that access to these records was not unlawfully denied pursuant to N.J.S.A. 47:1A-6. See MAG Entertainment v. Div. of ABC, 375 N.J.Super. 534, 546 (App.Div. 2005).
3. Based upon the Appellate Division's decision in New Jersey Builders Association v. New Jersey Council On Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), the Complainant's voluminous November 2, 2006 OPRA request, a thirteen (13) paragraph request for numerous records, is not a valid OPRA request because it bears no resemblance to the record request envisioned by the Legislature, which is one submitted on a form that "provide[s] space for . . . a brief description of the record sought." *Id.* at 179.
4. Based on the Custodian's certification that granting access to all fire safety inspection files from 1986 to 2006 would result in a substantial disruption to the agency's operations, and the Custodian's mediation efforts to reach a "reasonable solution" with the Complainant that accommodates the interests of the requestor and the agency, and the voluminous nature of the Complainant's November 2, 2006 OPRA request, the Custodian's denial of access was authorized by N.J.S.A. 47:1A-5.i. The Custodian has therefore borne his burden of proof that the denial of access was authorized by law. N.J.S.A. 47:1A-6.
5. Because Inspector Robert Kozlowski, who maintained the file of the inspection of Complainant's property, improperly forwarded the Complainant's OPRA request to the Custodian, Inspector Kozlowski has violated N.J.S.A. 47:1A-5.h.

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. Berg Tabakin. The motion passed by a majority vote. Ms. Kovach recused herself from a vote in this matter.

Tivon Neals v. City of Burlington Police Department (2007-94)

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 following recommendations to the Council:

The Executive Director respectfully recommends the Council find that as the Custodian legally certifies to forwarding the Complainant's OPRA request to the custodian of the records responsive, as required by N.J.S.A. 47:1A-5.h., and also legally certifies that at the time of the request the Custodian did not have any records responsive to the Complainant's OPRA request, the Custodian has not unlawfully denied the Complainant access to the requested records.

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.

Complaints Adjudicated on Appeal in Superior Court:

1. John Paff v. NJ Department of Labor, Board of Review, 392 N.J. Super. 334 (App.Div. 2007).
2. Donna Janeczko v. NJ Department of Law & Public Safety, Division of Criminal Justice, Docket No. MER-L-15-06, Superior Court of New Jersey Law Division – Mercer County (Decided May 11, 2007).

Motion for Reconsideration:

None

Executive Director's Report:

Ms. Starghill welcomed Case Manager Rebecca DeVoe back from her honeymoon and absence from last month's Council meeting. Ms. Starghill informed the Council that Ms. Richardson (the previous designee of Commissioner Susan Bass Levin) was now the Assistant Commissioner of the NJ Department of Labor and introduced Ms. Kovach as the new designee of Commissioner Bass Levin. Ms. Starghill introduced the new, improved and more user friendly GRC website (thanking Resource Manager Jyothi Pamidimukkala for all of her "extreme" efforts to move the website into production).

Lastly, Ms. Starghill read correspondence addressed to the Council and the GRC In-House Counsel from Mr. Paff regarding (1) the Appellate Division's directive to the GRC contained in Paff v. NJ Department of Labor, Board of Review, 392 N.J. Super. 334 (App.Div. 2007) and (2) a Trial Division order interpreting the Open Public Meetings Act directing the Kearny Board of Education to grant access to minutes of public meeting no later than three business days prior to the next public meeting which directly conflicts with the GRC's interpretation of OPRA in Dina Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint N. 2006-51.

Public Comment:

- (1) John Paff
- (2) Thomas Caggiano, resident of Stanhope, NJ
- (3) Donald Baldwin

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

Meeting adjourned at 11:40 p.m.

Respectfully submitted,

David Fleisher, Secretary

Date Approved: 06/27/2007