

1 STATE OF NEW JERSEY
2 COMMUNITY AFFAIRS
3 GOVERNMENT RECORDS COUNCIL

4

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6

7

8 PUBLIC SESSION

9

10 TRANSCRIPT OF PROCEEDINGS

11

12

13 AT: DEPARTMENT OF COMMUNITY AFFAIRS

14 101 South Broad Street - Room 129

15 Trenton, New Jersey 08625-0819

16 DATE: WEDNESDAY, SEPTEMBER 26, 2007

17 TIME: 9:32 A.M. TO 12:10 P.M.

18

19

20 GUY J. RENZI & ASSOCIATES
21 GOLDEN CREST CORPORATE CENTER
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2

1 B O A R D M E M B E R S:

2

3 VINCENT P. MALTESE, Chairman

4 DAVID FLEISHER, Secretary

5 KATHRYN FORSYTH

6 JANICE L. KOVACH

7 ROBIN BERG TABAKIN

8

9 B O A R D P R O F E S S I O N A L S:

10

11 CATHERINE STARGHILL, ESQ.

12 KARYN GORDON, ESQ.

13 DEBRA ALLEN, ESQ.

14 MEAGHAN TUOHEY-KAY, ESQ.

- 15 JOHN STEWART, ESQ.
- 16 DARA LOWNIE
- 17 TIFFANY L. MAYERS
- 18 FRANK CARUSO
- 19 JYOTHI PAMIDIMUKKALA
- 20 BRIGITTE HAIRSTON

- 21
- 22
- 23
- 24
- 25

3

1 A G E N D A

2 PAGE

3

4 CALL TO ORDER 9

5

6 MEETING NOTICE 9

7

8 ROLL CALL 9

9

10 CLOSED SESSION:

11 Closed Session Resolution 74

12

13 APPROVAL OF MINUTES:

14 July 25, 2007 - Closed Session Minutes 13

15

16 CASES SCHEDULED FOR ADJUDICATION

17 A. ADMINISTRATIVE COUNCIL ADJUDICATION:

18 1. Fred Burnett v. Mercer County Clerk

19 (2004-20) 15

20 2. John Paff v. Borough of Bound Brook

21 (2006-179) 15

22 3. Marc Pakrul v. NJ Dept of Law & Public

23 Safety, Div. of the NJ State Police

24 (2006-195) 15

25 (CONTINUED)

4

1 A G E N D A (CONTINUED)

2 PAGE

3

4	4. Martin O'Shea v. West Milford Board of	
5	Education (2006-213)	15
6	5. Martin O'Shea v. West Milford Board of	
7	Education (Passaic) (2007-68)	15
8	6. Michael Boyle v. City of Newark (Essex)	
9	(2007-96)	15
10	7. David Herron v. Township of Montclair	
11	(Essex) (2007-111)	15
12	8. Mary Walsh v. NJ Dept of Treasury	
13	(2007-123)	15
14	9. David Weiner v. County of Essex (Essex)	
15	(2007-150)	15
16	10. Vesselin Dittrich v. City of Hoboken	
17	(Hudson) (2007-158)	15
18	11. Jane Copeland v. Burlington County	
19	Prosecutor's Office (Burlington)	
20	(2007-163)	15
21	12. Martin O'Shea v. Township of Long Hill	
22	(Morris)(2007-169)	15
23	13. Chaim Fisher v. Lakewood Board of	
24	Education (Ocean)(2007-170)	15

25 (CONTINUED)

5

1 A G E N D A (CONTINUED)

2 PAGE

3 14. Brenda Taylor v. NJ Dept. Of Children &

4 Family Services, Div. of Youth & Family

5 (2007-171) 15

6 15. John Finne v. County of Union (Union)

7 (2007-172) 15

8 16. Barbara Sachau v. Morris County Superior

9 Courts (Morris) (2007-173) 15

10 17. Michael Powell v. City of Newark (Essex)

11 (2007-1780) 15

12 18. William v. Higgins v. Borough of Pine

13 Beach (Ocean)(2007-186) 15

14 19. Cynthia McBride v. Township of

15 Mt. Laurel (2007-1970) 15

16 20. David Nash v. Ocean County Prosecutor's

17 Office (Ocean) (2007-198) 15

18

19 B. INDIVIDUAL COMPLAINT COUNCIL ADJUDICATION

20	1. Jennifer Dressel v. Monroe Twp. Board	
21	of Education (2005-249) VM RECUSED	56
22	2. Joe Truland, Jr. v. Borough of Madison	
23	(2006-88)	15
24	3. Amelia Spaulding v. Hudson County	
25	Register (2006-157) VM RECUSED	58

6

1 A G E N D A (CONTINUED)

2 PAGE

3	4. Vesselin Dittrich v. Secaucus Town	
4	(2006-163)	18
5	5. Martin O'Shea v. Wayne Board of	
6	Education (2006-173)	20
7	6. Joanna Perilli v. Borough of	
8	South Bound Brook (2006-180)	22
9	7. Shirlee Manahan v. Salem County	
10	(2006-184)	23
11	8. Femaarta Momo v. NJ Dept. Of Community	
12	Affairs, Div. of Community Resources	
13	(2007-17) JK RECUSED	52

14	9. Thomas Caggiano v. Borough of Stanhope	
15	(Sussex)(2007-20)	29
16	10. Thomas Caggiano v. Borough of Stanhope	
17	(Sussex)(2007-21)	29
18	11. Thomas Caggiano v. Borough of Stanhope	
19	(Sussex)(2007-22)	29
20	12. Thomas Caggiano v. Borough of Stanhope	
21	(Sussex) (2007-23)	29
22	13. William Lamboy v. NJ Commission of	
23	Motor Vehicles (2007-67)	42
24		
25	(CONTINUED)	

1 A G E N D A (CONTINUED)

2 PAGE

3

4 14. Thomas Caggiano v. NJ Dept. Of Law &

5 Public Safety, Div. of Consumer Affairs

6 (2007-69) 43

7 15. George Burdick v. Franklin Township

8 Board of Education (Hunterdon)

9 (2007-74) VM & JK RECUSED --

10 16. Joseph Oswald v. Township of Hamilton

11 (Mercer) (2007-86) 46

12 17. Martin Costello v. Township of Wyckoff

13 (Bergen) (2007-137) 48

14 18. Charles Popadines v. Township of Hanover

15 (Morris)(2007-180) 50

16

17 C. COMPLAINTS ADJUDICATED IN SUPERIOR COURT:

18 1. Tina Renna v. County of Union - This

19 matter was never filed with the GRC. The Trial

20 Division of New Jersey Superior Court affirmed

21 the GRC's Advisory Opinion NO. 2005-01 (requiring

22 the use of an OPRA request form). Decided

23 September 5, 2007. 75

24

25 (CONTINUED)

1 A G E N D A (CONTINUED)

2 PAGE

3

4 D. RECONSIDERATIONS:

5 1. Martin O'Shea v. NJ Intergovernmental

6 Insurance Fund (2006-137) 59

7 2. Thomas Caggiano v. Borough of Stanhope

8 (2006-220) 61

9

10 EXECUTIVE DIRECTOR'S REPORT AND NEW BUSINESS 79

11

12 PUBLIC COMMENT 81

13

14 ADJOURNMENT 100

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1 CHAIRMAN MALTESE: Good morning
2 ladies and gentlemen, welcome to our 2007
3 meeting. This meeting was called pursuant to the
4 provisions of the Open Public Meeting Act.
5 Notices of this meeting were faxed to the Newark
6 Start Ledger, Trenton Times, Courier-Post in
7 Cherry Hill, the Secretary of State and e-mailed
8 to the NJ Foundation for Open Government on
9 September 21, 2007.

10 Proper Notice having been given, the
11 Secretary is directed to include this statement
12 in the minutes of this meeting.

13 In the event of a fire alarm
14 activation, please exit the building following
15 the exit signs located within the conference
16 rooms and throughout the building. The exit
17 signs will direct you to the two fire evacuations
18 stairways located in the building. Upon leaving,

19 please follow the fire wardens which can be --
20 who can be located by yellow helmets. Please
21 follow the flow of traffic away from the
22 building.

23 Let's do roll call, please.

24 MS. HAIRSTON: Vince Maltese?

25 CHAIRMAN MALTESE: Present.

10

1 MS. HAIRSTON: Robin Berg Tabakin?

2 Janice Kovach?

3 MS. KOVACH: Yes.

4 MS. HAIRSTON: Kathryn Forsyth?

5 Dave Fleisher?

6 MR. FLEISHER: Here.

7 CHAIRMAN MALTESE: Okay. I'll

8 entertain a motion to move into Closed Session?

9 So moved.

10 MR. O'SHEA: I get here and you

11 leave.

12 CHAIRMAN MALTESE: Timing is -- has

13 not been your strong point.

14 WHEREAS, N.J.S.A 10:4-12 permits a
15 public body to go into Closed Session during the
16 public meeting; and

17 WHEREAS, the Government Records
18 Council has deemed it necessary to go into Closed
19 Session to discuss certain matters which are
20 exempt from public discussion under the Open
21 Public Meetings Act; and

22 WHEREAS, the regular meeting of the
23 Council will reconvene at the conclusion of the
24 closed meeting;.

25 NOW, THEREFORE, BE IT RESOLVED, that

11

1 the Council will convene in Closed Session to
2 receive legal advice and discuss the anticipated
3 litigation in which the Council may become a
4 party pursuant to N.J.S.A. 10:4-12.b(7) in the
5 following matters:

6 Martin O'Shea v. NJ
7 Intergovernmental Insurance Fund;

8 Thomas Caggiano v. The Borough of

9 Stanhope;

10 Femaarta Momo v. NJ Department of

11 Community Affairs, Division of Community

12 Resources;

13 Thomas Caggiano v. Borough of

14 Stanhope (different number);

15 George Burdick v. Franklin Township

16 Board of Education.

17 BE IT FURTHER RESOLVED, that the

18 Council will disclose to the public the matters

19 discussed or determined in Closed Session as soon

20 as possible after final decisions have been made.

21 I'll entertain a motion, please?

22 MR. FLEISHER: So moved.

23 CHAIRMAN MALTESE: Second, please?

24 MS. KOVACH: Second.

25 CHAIRMAN MALTESE: Roll call?

12

1 MS. HAIRSTON: Vince Maltese?

2 CHAIRMAN MALTESE: Yes.

3 MS. HAIRSTON: Janice Kovach?

4 MS. KOVACH: Yes.

5 MS. HAIRSTON: Dave Fleisher?

6 MR. FLEISHER: Yes.

7 CHAIRMAN MALTESE: Okay. We're in

8 Closed Session at 9:40. Thank you, ladies and

9 gentleman, please be adjourned.

10 (Closed Session. The time is 9:35

11 a.m.)

12 (Back in Public Session. The time

13 is 10:35 a.m.)

14 CHAIRMAN MALTESE: Good morning,

15 ladies and gentlemen, welcome to our September

16 2007 meeting. Won't you please join me the

17 Pledge of Allegiance.

18 (The Pledge of Allegiance.)

19 CHAIRMAN MALTESE: Thank you very

20 much. We're back in Open Session, 10:40.

21 Roll call, please.

22 MS. HAIRSTON: Vince Maltese?

23 CHAIRMAN MALTESE: Present.

24 MS. HAIRSTON: Robin Berg Tabakin?

25 MS. BERG TABAKIN: Here.

13

1 MS. HAIRSTON: Janice Kovach?

2 MS. KOVACH: Here.

3 MS. HAIRSTON: Kathryn Forsyth?

4 MS. FORSYTH: Here.

5 MS. HAIRSTON: Dave Fleisher?

6 MR. FLEISHER: Here.

7 CHAIRMAN MALTESE: Thank you.

8 You have before you the minutes from

9 our July 25th, 2007 meeting which are in the form

10 of an actual transcript. Any amendments,

11 modifications? If not, I'll entertain a motion?

12 MS. BERG TABAKIN: So moved.

13 CHAIRMAN MALTESE: Thank you.

14 Second, please?

15 MS. FORSYTH: Second.

16 CHAIRMAN MALTESE: Thank you.

17 Roll call?

18 MS. HAIRSTON: Who seconded that,

19 please?

20 CHAIRMAN MALTESE: Kathy.

21 MS. HAIRSTON: Vince Maltese?

22 CHAIRMAN MALTESE: Yes.

23 MS. HAIRSTON: Robin Berg Tabakin?

24 MS. BERG TABAKIN: Yes.

25 MS. HAIRSTON: Janice Kovach?

14

1 MS. KOVACH: Yes.

2 MS. HAIRSTON: Kathryn Forsyth?

3 MS. FORSYTH: Yes.

4 MS. HAIRSTON: Dave Fleisher?

5 MR. FLEISHER: Yes.

6 CHAIRMAN MALTESE: Thank you.

7 You have before you Administrative

8 Councils Adjudications Numbers 1 through 20. And

9 comments?

10 If not, I'll entertain a motion?

11 MS. BERG TABAKIN: So moved.

12 CHAIRMAN MALTESE: Thank you.

13 MR. FLEISHER: Second.

14 CHAIRMAN MALTESE: Thank you.

15 Roll call.

16 MS. HAIRSTON: Vince Maltese?

17 CHAIRMAN MALTESE: Yes.

18 MS. HAIRSTON: Robin Berg Tabakin?

19 MS. BERG TABAKIN: Yes.

20 MS. HAIRSTON: Janice Kovach?

21 MS. KOVACH: Yes.

22 MS. HAIRSTON: Kathryn Forsyth?

23 MS. FORSYTH: Yes.

24 MS. HAIRSTON: Dave Fleisher?

25 MR. FLEISHER: Yes.

15

1 CHAIRMAN MALTESE: Okay. There are a
2 number of recusals, first?

3 MS. STARGHILL: Would you like to
4 leave them for the end?

5 CHAIRMAN MALTESE: Why don't I would
6 get rid of them before they...

7 MS. STARGHILL: Actually, we don't

8 have that problem there.

9 CHAIRMAN MALTESE: Okay, all right.

10 MS. STARGHILL: So we can move right

11 to three, saving the recusals, your recusal to

12 the end. It's your preference.

13 CHAIRMAN MALTESE: Well, what

14 happened with two, Truland?

15 MS. STARGHILL: I'm sorry, two.

16 CHAIRMAN MALTESE: All right, let's

17 do Truland v. Borough of Madison.

18 MS. LOWNIE: Before I begin on this

19 one I just want to note there has been an

20 amendment to conclusion No. 3.

21 CHAIRMAN MALTESE: Okay, we have

22 that.

23 MS. LOWNIE: Okay. The Executive

24 Director respectfully recommends the Council find

25 that:

16

1 1. While public agencies may

2 routinely accept non-OPRA requests for motor
3 vehicle accident reports, because the Complainant
4 submitted his request for said reports on the
5 agency's official OPRA request form and because
6 the Custodian attempted to fulfill the
7 Complainant's request, the Complainant's March
8 31, 2006 request is considered a valid OPRA
9 request.

10 No. 2, Although the Custodian
11 provided a written response within the
12 statutorily mandated seven business days, said
13 response is not adequate pursuant to OPRA because
14 it does not grant access, deny access, seek
15 clarification, or request an extension of time.
16 Thus, the request is "deemed" denied pursuant to
17 N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., John
18 Paff v. Bergen County Prosecutor's Office, GRC
19 Complaint No. 2005-115 (March 2006) and John
20 Bart, Esq. v. City of Paterson Housing Authority.
21 GRC Complaint No. 2005-145 (May 2007).

22 No. 3, Pursuant to N.J.S.A.
23 47:1A-9.a., the provisions of OPRA do not

24 abrogate the provisions of N.J.S.A 39:4-131.

25 Consequently, the Custodian has lawfully charged

17

1 the Complainant \$40.25 for the requested accident

2 reports pursuant to N.J.S.A. 39:4-131.

3 No. 4, No redactions to the

4 requested auto accident reports are warranted

5 pursuant to N.J.S.A 39:4-131.

6 And lastly No. 5, Because the

7 Custodian provided a written response within the

8 statutorily mandated seven business days

9 indicating that he was seeking legal advice, and

10 because the Custodian provided the requested

11 records to the Complainant within one month of

12 receiving the request, it is concluded that the

13 Custodian's actions do not rise to the level of a

14 knowing and willful violation of OPRA and

15 unreasonable denial of access under the totality

16 of the circumstances. However, the Custodian's

17 unlawful denial of access appears negligent and

18 heedless since she is vested with the legal
19 responsibility of granting and denying access in
20 accordance with the law.

21 CHAIRMAN MALTESE: Comments?

22 Motion?

23 MS. BERG TABAKIN: So moved.

24 CHAIRMAN MALTESE: Second?

25 MS. KOVACH: Second.

18

1 CHAIRMAN MALTESE: Thank you.

2 Roll call.

3 MS. HAIRSTON: Vince Maltese?

4 CHAIRMAN MALTESE: Yes.

5 MS. HAIRSTON: Robin Berg Tabakin?

6 MS. BERG TABAKIN: Yes.

7 MS. HAIRSTON: Janice Kovach?

8 MS. KOVACH: Yes.

9 MS. HAIRSTON: Kathryn Forsyth?

10 MS. FORSYTH: Yes.

11 MS. HAIRSTON: Dave Fleisher?

12 MR. FLEISHER: Yes.

13 CHAIRMAN MALTESE: Dittrich v.
14 Secaucus Town. Maybe the Town of Secaucus.

15 MS. GORDON: It's actually Town of
16 Secaucus.

17 In this matter the Executive
18 Director respectfully recommends the Council find
19 that:

20 1. Because the Custodian responded
21 in writing on the fifth business day following
22 receipt of Complainant's August 4, 2006 OPRA
23 request granting access to the requested records,
24 the Custodian has not violated N.J.S.A.
25 74:1A-5.g. and N.J.S.A. 47:1a-5.i.

19

1 2. Because the Custodian in the
2 matter before the Council had security concerns
3 regarding the Complainant's use of a handheld
4 scanner to copy the requested records, the
5 Custodian's refusal to permit the Complainant to
6 do so did not violate OPRA. N.J.S.A. 47:1a-5.A.

7 Janet Hascup v. Waldwick Board of Education, GRC

8 Complaint No. 2005-192 (April 2007). The

9 Custodian has therefore borne his burden of proof

10 that the denial of access was lawful. N.J.S.A.

11 47:1A-6.

12 CHAIRMAN MALTESE: Comments?

13 Motion?

14 MS. KOVACH: So moved.

15 CHAIRMAN MALTESE: Second?

16 MS. BERG TABAKIN: Second.

17 CHAIRMAN MALTESE: Roll call.

18 MS. HAIRSTON: Vince Maltese?

19 CHAIRMAN MALTESE: Yes.

20 MS. HAIRSTON: Robin Berg Tabakin?

21 MS. BERG TABAKIN: Yes.

22 MS. HAIRSTON: Janice Kovach?

23 MS. KOVACH: Yes.

24 MS. HAIRSTON: Kathryn Forsyth?

25 MS. FORSYTH: Yes.

20

1 MS. HAIRSTON: Dave Fleisher?

2 MR. FLEISHER: Yes.

3 CHAIRMAN MALTESE: O'Shea v. Wayne
4 Board of Education.

5 MR. CARUSO: The Executive Director
6 respectfully recommends the Council find that:

7 1. Pursuant to N.J.S.A. 47:1A-5.g.
8 and N.J.S.A. 47:1A-5.i, the Custodian failed to
9 provide a written response granting access,
10 denying access, seeking clarification or
11 requesting an extension of time within the
12 statutorily mandated seven business days,
13 resulting in a deemed denial. Thus, the
14 Custodian has not borne has burden of proving
15 that the deemed denial was authorized by law
16 pursuant to N.J.S.A. 47:1A-6.

17 2. The GRC must conduct an in
18 camera review to decide whether or not the
19 Custodian has lawfully denied access to redacted
20 portions of the records responsive to the
21 Complainant's November 6, 2006 OPRA request.

22 3. The Custodian must deliver to

23 the Council in a sealed envelope six copies of
24 the requested unredacted document (see No. 2
25 above), a document or redaction index, as well as

21

1 a legal certification from the Custodian, in
2 accordance with N.J. Court Rule 1:4-4, that the
3 document provided is the document requested by
4 the Council for the in camera inspection. Such
5 delivery must be received by the GRC within five
6 business days from the receipt of the Council's
7 Interim Order.

8 4. Pursuant to O'Shea v. West
9 Milford Board of Education, 391 N.J. Super. 534
10 (App. Div. 2007), the notes of executive session
11 meetings requested by the Complainant's September
12 6, 2006 OPRA request are not subject to
13 disclosure if any exist.

14 5. The Council defers a decision as
15 to whether the Custodian's delay in access to the
16 requested records rises to the level of a knowing
17 and willful violation of OPRA and unreasonable

18 denial of access under the totality of the
19 circumstances until after the conclusion of an in
20 camera review of the requested records.

21 CHAIRMAN MALTESE: Do we have room
22 to put that in camera at the next meeting?

23 MS. STARGHILL: How many records?

24 MR. CARUSO: It's only I think 13
25 pages, thereabouts, maybe 20, but the redactions

22

1 were minimal, maybe one sentence per record.

2 MS. STARGHILL: I think we can.

3 CHAIRMAN MALTESE: All right. Let's
4 schedule that in camera for our next meeting.

5 I'll entertain a motion?

6 MR. FLEISHER: So moved.

7 MS. BERG TABAKIN: Second.

8 CHAIRMAN MALTESE: Thank you.

9 Let's give that to David, Robin will

10 be the second.

11 MS. HAIRSTON: Thank you.

12 Vince Maltese?
13 CHAIRMAN MALTESE: Yes.
14 MS. HAIRSTON: Robin Berg Tabakin?
15 MS. BERG TABAKIN: Yes.
16 MS. HAIRSTON: Janice Kovach?
17 MS. KOVACH: Yes.
18 MS. HAIRSTON: Kathryn Forsyth?
19 MS. FORSYTH: Yes.
20 MS. HAIRSTON: Dave Fleisher?
21 MR. FLEISHER: Yes.
22 CHAIRMAN MALTESE: Perilli v.
23 Borough of South Bound Brook.
24 MR. CARUSO: The Executive Director
25 respectfully recommends that the Council find

23

1 that the complaint be dismissed because of the
2 Complainant withdrew the matter from the Office
3 of Administrative Law

4 CHAIRMAN MALTESE: All right.

5 Motion?

6 MS. BERG TABAKIN: So moved.

7 CHAIRMAN MALTESE: Second?

8 MS. FORSYTH: Second.

9 CHAIRMAN MALTESE: Thank you.

10 Roll call.

11 MS. HAIRSTON: Vince Maltese?

12 CHAIRMAN MALTESE: Yes.

13 MS. HAIRSTON: Robin Berg Tabakin?

14 MS. BERG TABAKIN: Yes.

15 MS. HAIRSTON: Janice Kovach?

16 MS. KOVACH: Yes.

17 MS. HAIRSTON: Kathryn Forsyth?

18 MS. FORSYTH: Yes.

19 MS. HAIRSTON: Dave Fleisher?

20 MR. FLEISHER: Yes.

21 CHAIRMAN MALTESE: Manahan v. Salem

22 County.

23 MS. STARGHILL: The Executive

24 Director respectfully recommends the Council find

25 that:

1 1. Pursuant to N.J.S.A. 47:1A-7.b
2 and Loigman v. Township of Middletown, GRC
3 Complaint No. 2004-138 (March 2005), the GRC does
4 not have authority to regulate how a Custodian
5 utilizes its Counsel in its response to an OPRA
6 request. The Custodian may, therefore, use an
7 attorney to respond to an OPRA request.

8 No. 2, Because the Custodian failed
9 to provide the Complainant with the records
10 responsive in the medium requested and failed to
11 provide copies of the requested records in a
12 meaningful medium, the Complainant -- the
13 Custodian has violated N.J.S.A. 47:1A-5.d. and
14 unlawfully denied access.

15 No. 3, Because the Custodian's
16 October 12, 2006 response to the Complainant's
17 request for a list of all county employees and
18 their departments who have been issued vehicles,
19 and a list of all county employees issued a cell
20 phone or a Blackberry, failed to inform the
21 Complainant when the records would be made
22 available, or provide a specific basis for denial

23 of access, the Custodian has violated N.J.S.A.

24 47:1A-5.i. and unlawfully denied access.

25 4. Because the Custodian failed to

25

1 indicate the specific basis for the denial of a

2 copy of the most recent cell phone and/or

3 Blackberry phone bills for County Freeholders,

4 the Custodian has failed to provide that the

5 denial of access was authorized by law,

6 therefore, violating N.J.S.A. 47:1A-6 and

7 unlawfully denying access.

8 5. Additionally, the Custodian

9 should have granted access to the requested cell

10 phone and Blackberry bills for County freeholders

11 with the appropriate redactions made pursuant to

12 N.J.S.A. 47:1A-5.g., which states that a

13 custodian shall delete or excise from a copy of

14 the record that portion which the Custodian

15 asserts is exempt from access "and shall promptly

16 permit access to the remainder of the record..."

17 (Emphasis added). The Custodian has, therefore,
18 violated N.J.S.A. 47:1A-5.g. and unlawfully
19 denied access.

20 No. 6, Because the Custodian failed
21 to immediately provide the Complainant with the
22 requested budget in the medium requested, the
23 Custodian has violated N.J.S.A. 47:1A-5.d. and
24 5.e. and unlawfully denied access.

25 7. Because the Custodian directed

26

1 the Complainant to the appropriate Custodian of
2 the requested list of all bills paid in 2006 by
3 the Salem County Improvement Authority (another
4 agency) pursuant to N.J.S.A. 47:1A-5.h, the
5 Custodian has not violated OPRA.

6 8. Because the service fees which
7 the Custodian seeks to charge for costs
8 associated with gathering the large number of
9 records responsive that will need to be redacted,
10 scanned and e-mailed to the Complainant, and the
11 time it will take the Custodian to fulfill the

12 records request in the medium requested, the
13 charge appears to be reasonable and based on the
14 actual cost of labor for personnel providing the
15 service and therefore the Custodian is authorized
16 to charge this special service charge of \$12.05
17 an hour.

18 However, because there are no
19 physical costs associated with the scanning of
20 documents, such as the cost of paper and toner
21 associated with the physical duplication of the
22 records requested, the Custodian may not charge
23 duplication costs in addition to the special
24 service charge authorized by Section 5.d. of
25 OPRA.

27

1 No. 9, The Custodian is to obtain
2 the cost of electronically providing copies of
3 all of the records responsive to the
4 Complainant's OPRA request pursuant to N.J.S.A.
5 47:1a-5, and inform the Complainant of said

6 costs.

7 10. The Custodian is to provide the
8 information required in No. 9 above to the
9 Complainant and the Executive Director within
10 five business days after receipt of the Council's
11 decision and simultaneously provide certified
12 confirmation of compliance, in accordance with
13 N.J. Court Rule 1:4-4, to the Executive Director.

14 11. The Complainant is to inform
15 the Custodian with five business days after
16 receipt of the cost information whether or not
17 she still wishes to receive the requested
18 documents electronically.

19 12, and the last one. Because the
20 Custodian denied the Complainant's request that
21 the records be sent to her electronically,
22 stating that the Custodian did not have the
23 capability to transmit the records
24 electronically, only to later supply the Council
25 with a chart detailing some of the charges the

1 Custodian planned to impose on the Complainant
2 for scanning and e-mailing the records responsive
3 from a different department, as well as the
4 Custodian's failure to respond the GRC's request
5 for additional information regarding the special
6 service charge, it is possible that the
7 Custodian's actions were intentional and
8 deliberate, with knowledge of their wrongfulness,
9 and not merely negligent, heedless or
10 unintentional. As such, this complaint should be
11 referred to the Office of Administrative law for
12 determination of whether the Custodian knowingly
13 and willfully violated OPRA and unreasonably
14 denied access under the totality of the
15 circumstances.

16 This was a doozy.

17 CHAIRMAN MALTESE: Thank you.

18 Any comments from members of the
19 Council?

20 If not, I'll entertain a motion.

21 MS. BERG TABAKIN: So moved.

22 MS. KOVACH: Second.
23 CHAIRMAN MALTESE: Okay.
24 Roll call.
25 MS. HAIRSTON: Vince Maltese?

29

1 CHAIRMAN MALTESE: Yes.
2 MS. HAIRSTON: Robin Berg Tabakin?
3 MS. BERG TABAKIN: Yes.
4 MS. HAIRSTON: Janice Kovach?
5 MS. KOVACH: Yes.
6 MS. HAIRSTON: Kathryn Forsyth?
7 MS. FORSYTH: Yes.
8 MS. HAIRSTON: Dave Fleisher?
9 MR. FLEISHER: Yes.
10 CHAIRMAN MALTESE: Okay. Let's see,
11 let's skip to Thomas Caggiano v. Borough of
12 Stanhope (2007-20).
13 MS. GORDON: This is actually four
14 consolidated complaints Nos. 2007-20, 2007-21,
15 2007-22 and 2007-23. These have been combined
16 because they involve the same Complainant and

17 Custodian. And the records reflect the issues in
18 these complaints are identical. And because this
19 case is a case of first impression before the
20 Council, I would like to read a portion of the
21 analysis.

22 CHAIRMAN MALTESE: If you can just
23 give us a thumbnail sketch of the facts.

24 MS. GORDON: Certainly. In this
25 Complaint the Requester filed four requests for

30

1 identical records within a few days of each
2 other. The records were not in the possession of
3 the Custodial agency at the time of the requests.
4 They were subsequently made available to the
5 Requester at some period thereafter when the
6 Borough actually came into records that were
7 requested.

8 And I'm going to pick up the
9 analysis on page 5 whether it's known that the
10 acts by the Complainant are frivolous.

11 CHAIRMAN MALTESE: Excuse me,

12 Karyn --

13 MS. GORDON: Certainly.

14 CHAIRMAN MALTESE: -- let me just

15 ask you this question.

16 As I understand it, he was seeking

17 some professional contracts which were not in

18 possession of the Custodian at the time of the

19 request?

20 MS. GORDON: That's correct.

21 CHAIRMAN MALTESE: And that he made

22 the same request basically every other day or

23 every day --

24 MS. GORDON: Essentially, yes.

25 CHAIRMAN MALTESE: -- and he did

31

1 that four times?

2 MS. GORDON: Correct. And in each

3 case he did not essentially wait or permit the

4 Custodian to respond to the previous complaint

5 before filing another one.

6 CHAIRMAN MALTESE: Go ahead.

7 MS. GORDON: Okay. Whether the

8 denial of access complaints filed by the

9 Complainant are frivolous. OPRA provides that:

10 "If any party declines mediation or

11 if mediation fails to resolve the matter to the

12 satisfaction of all parties, the Council shall

13 initiate an investigation concerning the facts

14 and circumstances set forth in the complaint.

15 The Council shall make a determination as to

16 whether the complaint is within its jurisdiction

17 or frivolous or without any reasonable factual

18 basis. If the Council shall conclude that the

19 complaint is outside its jurisdiction frivolous,

20 or without factual basis, it shall reduce that

21 conclusion to writing and transmit a copy thereof

22 to the Complainant and to the records Custodian

23 against whom the complaint was filed." N.J.S.A.

24 47:1A-7.e.

25 N.J.S.A. 2A:15-59.1 the Frivolous

1 Litigation Act states in pertinent part that:

2 "In order to find that a complaint,
3 counterclaim, cross-claim or defense of the
4 nonprevailing party was frivolous, the judge
5 shall find on the basis of the pleadings,
6 discovery or the evidence presented that...the
7 complaint, counterclaim, cross-claim, or defense
8 was commenced, used or continued in bad faith
9 solely for the purpose of harassment, delay or
10 malicious injury."

11 A claim constitutes frivolous
12 litigation is, quote, judging the Claimant's
13 conduct as a whole, unquote, the claim, quote,
14 was brought in bad faith for the purpose of delay
15 and harassment, close quote. Deutch & Shur, P.C.
16 v. Roth. And that's a Law Division case from
17 1995.

18 In Deutch, the defendant retained
19 the plaintiff attorneys to represent him in an
20 action to recover insurance proceeds. The
21 defendant lied under oath about four convictions

22 of insurance fraud and lost the case, then
23 refused to pay the plaintiffs' fees. The
24 plaintiffs filed an action to recover and the
25 defendant did not answer. A default judgement

33

1 was entered and a levy was placed on the
2 defendant's property. The defendant then had the
3 judgement vacated and filed a counterclaim
4 alleging legal malpractice.

5 The trial court granted the
6 plaintiffs' motion to strike the defendant's
7 counterclaim and granted summary judgment to the
8 plaintiffs. The court granted plaintiffs' motion
9 for fees and costs under N.J.S.A. 2A:15-59.1, the
10 Frivolous Litigation Act. In doing so, the court
11 found that the defendant had prosecuted his
12 counterclaim to delay and harass and had no basis
13 for believing that he had somehow been wronged by
14 plaintiffs. The court further found that the
15 only purpose of the defendant's counterclaim was

16 to "scare" the plaintiff into compromise or make
17 collection more expensive.

18 With regard to the definition of
19 "bad faith," the Superior Court of New Jersey,
20 Appellate Division has held that:

21 We regard "malice" (explicit in
22 N.J.S.A. 2A:15-59.1b and implicit in Court Rule
23 1:4-8(a) and "bad faith" to be related, but not
24 necessarily identical concepts. Dictionary
25 definitions of malice require an animus that is

34

1 lacking in the concept of bad faith.

2 CHAIRMAN MALTESE: Excuse me,
3 "malice."

4 MS. GORDON: Malice, I'm sorry.

5 However, the Supreme Court has held
6 when describing the elements of tortious
7 interference with business, that malice, an
8 element of the tort, "is not used in the literal
9 sense requiring ill will toward the plaintiff,"
10 but instead "malice is defined to mean that the

11 harm was inflicted intentionally and without
12 justification or excuse." Printing Mart v. Sharp
13 Electronics, that's a New Jersey Supreme Court
14 case from 1989.

15 We adopted the latter definition
16 when construing the term malice in the present
17 context... Moreover, we note that the bad faith
18 necessary for sanctions here can be demonstrated
19 as stated in the Frivolous Litigation statute if
20 litigation was used in bad faith "solely for the
21 purpose of harassment, delay or malicious
22 injury." Port-O-San Corp. V. Teamsters Local
23 Union No. 863, Welfare & Pension Funds. That's
24 an Appellate Division case from 2003.

25 The evidence of record indicates the

1 Complainant in these consolidated complaints
2 commenced the complaints "in bad faith, solely
3 for the purpose of harassment." The Complainant
4 filed four separate OPRA requests for identical

5 records within a few days of each other.

6 While there is no limitation in OPRA
7 on the number of times a requester may file a
8 request for records, Thomas Caggiano v. Borough
9 of Stanhope, GRC Case No. 2005-211 (January
10 2006), the number and frequency of the
11 Complainant's repetitive requests herein and the
12 short time period between each filing indicates
13 that the Complainant's OPRA requests were made
14 solely to harass the Custodian and the Borough of
15 Stanhope.

16 In each OPRA request, the
17 Complainant failed to wait until the expiration
18 of the statutorily-mandated seven business day
19 response period at N.J.S.A. 47:1A-5.i. before he
20 filed another OPRA request for identical records.
21 Moreover, the evidence of record indicates that
22 the Custodian offered the requested records to
23 the Complainant on July 25, 2006 and September
24 12, 2006 when the contracts were received by the
25 Borough, but that the complainant refused to

1 accept the records and denied that they were
2 contracts.

3 In spite of the disclosure of the
4 requested records (whether or not the Complainant
5 agreed with the content of those records), the
6 Complainant filed the instant Denial of Access
7 Complaints with the GRC. In addition, the
8 Complainant failed to inform the GRC in any of
9 his filings that the Custodian had made available
10 to him the requested records prior to the filing
11 of the Complainant's Denial of Access Complaints.
12 In his May 21, 2007 letter to the Custodian, the
13 Complainant threatens to file, quote, five
14 separate complaints for each contract not being
15 immediately available, close quote. This
16 expressed intention is prima facie evidence of
17 the Complainant's ongoing bad faith and intention
18 to harass the Custodian and the Borough of
19 Stanhope in these consolidated complaints.

20 Finally, the extremely high number

21 and frequency of OPRA requests filed by the
22 Complainant with the Borough of Stanhope in 2006
23 and 2007 provide further support for the
24 conclusion that the Complainant's continuous
25 repetitive filings of OPRA requests, in this case

37

1 it should read, is "in bad faith, solely for the
2 purpose of harassment."

3 The Complainant's Denial of access
4 Complaints herein should therefore be dismissed
5 as frivolous pursuant to N.J.S.A. 47:1A-7.e.

6 CHAIRMAN MALTESE: And your
7 recommendation to that conclusion?

8 MS. GORDON: Yes.

9 The Executive Director respectfully
10 recommends the Council find that:

11 1. Because the evidence of record
12 indicates that the Borough of Stanhope had not
13 made, maintained, kept on file or received the
14 requested contracts at the time of Complainant's
15 OPRA requests, and because the Custodian made the

16 contracts available to the Complainant as soon as
17 the Borough of Stanhope received the requested
18 contracts, the Custodian has not violated
19 N.J.S.A. 47:1A-5.e. requiring immediate access to
20 these records.

21 2. Despite the Complainant's
22 objection to the records actually being
23 contracts, the Government Records Council does
24 not have jurisdiction over the content of these
25 documents pursuant to N.J.S.A. 47:1A-7.b. See

38

1 Chaka Kwanzaa v. New Jersey Department of
2 Corrections, GRC Complaint No. 2004-167 (March
3 2005).

4 3. The Custodian's failure to
5 respond in writing to the Complainant's May 19
6 and May 22, 2007 OPRA requests within the
7 statutorily mandated seven business days results
8 in a deemed denial for these requests, N.J.S.A.
9 47:1A-5.g. and 5.i. Kelly v. Rockaway Township,

10 GRC Complaint No. 2006-176 (March 2007).

11 4. Because the Custodian responded
12 in writing to the Complainant's May 27 and May
13 31, 2007 OPRA requests within the statutorily
14 mandated seven business days, the Custodian has
15 not violated Section 5.g. and 5.i of OPRA.

16 5. The following evidence of record
17 supports the conclusion that the Complainant in
18 these consolidated Denial of Access Complaints
19 commenced these complaints "in bad faith, solely
20 for the purpose of harassment." The Complainant
21 filed four separate OPRA requests for identical
22 records within a few days of each other. In each
23 OPRA request, the Complainant failed to wait
24 until the expiration of the statutorily-mandated
25 seven business day response period at N.J.S.A.

1 47:1A-5.i. before he filed another OPRA request
2 for identical records. The Custodian offered the
3 requested records to the Complainant on July 25,
4 2006 and September 12, 2006 when the contracts

5 were received by the Borough, but the Complainant
6 refused to accept the records and denied that
7 they were contracts.

8 In spite of the disclosure of the
9 requested records (whether or not the Complainant
10 agreed with the content of those records), the
11 Complainant filed the instant Denial of Access
12 Complaints with the GRC. The Complainant failed
13 to inform the GRC in any of his filings that the
14 Custodian had made available to him the requested
15 records prior to the filing of the Complainant's
16 Denial of Access Complaints. In his May 21, 2007
17 letter to the Custodian, the Complainant
18 threatens to file, quote, five separate
19 complaints for each contract not being
20 immediately available," close quote, which is
21 prima facie evidence of the Complainant's ongoing
22 bad faith and intention to harass the Custodian
23 and Borough of Stanhope in these consolidated
24 complaints, and the extremely high number and
25 frequency of OPRA requests filed by the

1 Complainant with the Borough of Stanhope in 2006
2 and 2007. The complaints herein should therefore
3 be dismissed as frivolous pursuant to Section
4 7.e. of OPRA.

5 6. Because the Custodian responded
6 in writing to the Complainant's May 19, 2006; May
7 22, 2006; May 27, 2006; and May 31, 2006; OPRA
8 requests on June 5, 2006 by requesting additional
9 time to locate the requested records, and because
10 the Custodian provided the requested records on
11 July 25, 2006 and September 12, 2006 when the
12 Borough of Stanhope actually received the
13 documents, it is concluded that the Custodian's
14 actions do not rise to the level of a knowing and
15 willful violation of OPRA and unreasonable denial
16 of access under the totality of the
17 circumstances. However, the Custodian's unlawful
18 deemed denial of access appears negligent and
19 heedless since she is vested with the legal
20 responsibility of granting and denying access in

21 accordance with the law.

22 CHAIRMAN MALTESE: I think it's also
23 important to note that the Custodian was under no
24 obligation to give those contracts to the
25 Requester when they were received given the fact

41

1 they were not an existence when the requests were
2 made. So I think that's just an aside. And I
3 want to commend you, I think it's a very
4 well-written recommendation.

5 Are there any comments from members
6 of the Council?

7 If not I'll entertain a motion?

8 MS. BERG TABAKIN: So moved.

9 CHAIRMAN MALTESE: Second, please?

10 MS. KOVACH: Second.

11 CHAIRMAN MALTESE: Thank you.

12 Roll call, please.

13 MS. HAIRSTON: Vince Maltese?

14 CHAIRMAN MALTESE: Yes.

15 MS. HAIRSTON: Robin Berg Tabakin?

16 MS. BERG TABAKIN: Yes.

17 MS. HAIRSTON: Janice Kovach?

18 MS. KOVACH: Yes.

19 MS. HAIRSTON: Kathryn Forsyth?

20 MS. FORSYTH: Yes.

21 MS. HAIRSTON: Dave Fleisher?

22 MR. FLEISHER: Yes.

23 CHAIRMAN MALTESE: Caggiano v.

24 Borough of Stanhope 2007- -- no, I'm sorry, these

25 were consolidated. This was 200 --

42

1 MS. STARGHILL: William Lamboy.

2 CHAIRMAN MALTESE: Yeah, well, I'm

3 sorry, we're through the Caggianos. Now we're at

4 Lamboy v. NJ Commission of Motor Vehicles.

5 MS. LOWNIE: The Executive Director

6 respectfully recommends the Council find that:

7 1. Because the Custodian did not

8 provide the Complainant with a written response

9 denying access to the requested records within

10 the statutorily mandated seven business days, the
11 Custodian violated N.J.S.A. 47:1A-5.g. and
12 N.J.S.A 47:1A-5.i. resulting in a "deemed"
13 denial.

14 2. Because the Complainant did not
15 request an identifiable government record, and
16 because the Custodian is not required to conduct
17 research in response to an OPRA request, the
18 Custodian has carried his burden of proving a
19 lawful denial of access pursuant to N.J.S.A.
20 47:1A-6, *Mag Entertainment, LLC v. Division of*
21 *Alcoholic Beverage Control*, which was a New
22 Jersey Superior Court case (March 2005) and
23 *Bent v. Stafford Police Department*, also New
24 Jersey Superior Court case (October 2005).

25 CHAIRMAN MALTESE: Comments?

43

1 Motion?

2 MR. FLEISHER: So moved.

3 CHAIRMAN MALTESE: Second?

4 MS. FORSYTH: Second.

5 CHAIRMAN MALTESE: Roll call.

6 MS. HAIRSTON: Vince Maltese?

7 CHAIRMAN MALTESE: Yes.

8 MS. HAIRSTON: Robin Berg Tabakin?

9 MS. BERG TABAKIN: Yes.

10 MS. HAIRSTON: Janice Kovach?

11 MS. KOVACH: Yes.

12 MS. HAIRSTON: Kathryn Forsyth?

13 MS. FORSYTH: Yes.

14 MS. HAIRSTON: Dave Fleisher?

15 MR. FLEISHER: Yes.

16 CHAIRMAN MALTESE: Caggiano vs. New

17 Jersey Department of Law & Public Safety,

18 Division of Consumer Affairs.

19 MS. LOWNIE: The Executive Director

20 respectfully recommends the Council find that:

21 1. Although the Custodian verbally

22 sought clarification from the Complainant on the

23 sixth business day following the receipt of the

24 request, the Custodian failed to respond in

25 writing to the OPRA request within the

1 statutorily mandated seven business days, thus
2 violating N.J.S.A. 47:1A-5.g. and N.J.S.A.
3 47:1A-5.i. and resulting in a "deemed" denial.

4 2. Because the Custodian has
5 certified that the extended records inspection
6 contemplated by the Complainant (approximately
7 one week) would substantially disrupt the
8 agency's operations, and because the Custodian
9 has attempted to reasonably accommodate the
10 Complainant's request but has been rejected by
11 the Complainant, the Custodian has not unlawfully
12 denied access to the requested records under
13 N.J.S.A. 47:1A-5.c. and N.J.S.A. 47:1A-5.g.

14 The Custodian has borne his burden
15 of proving that the denial of access was
16 authorized by law under N.J.S.A. 47:1A-6 and
17 *Vessio v. Barnegat Township Zoning and Building*,
18 GRC Complaint No. 2006-70 (April 2007).

19 3. Because the Custodian attempted

20 to reach several reasonable solutions with the
21 Requestor that accommodate the interests of the
22 Requestor and the agency pursuant to N.J.S.A.
23 47:1A-5.g., it is concluded that the Custodian's
24 actions do not rise to the level of a knowing and
25 willful violation of OPRA and unreasonable denial

45

1 of access under the totality of the
2 circumstances.

3 However, the Custodian's unlawful
4 deemed denial of access appears negligent and
5 heedless since he is vested with the legal
6 responsibility of granting and denying access in
7 accordance with the law.

8 CHAIRMAN MALTESE: Any comments from
9 members of the Council?

10 I'll entertain a motion, please?

11 MS. BERG TABAKIN: So moved.

12 CHAIRMAN MALTESE: Second?

13 MS. KOVACH: Second.

14 CHAIRMAN MALTESE: Thank you.

15 Roll call.

16 MS. HAIRSTON: Vince Maltese?

17 CHAIRMAN MALTESE: Yes.

18 MS. HAIRSTON: Robin Berg Tabakin?

19 MS. BERG TABAKIN: Yes.

20 MS. HAIRSTON: Janice Kovach?

21 MS. KOVACH: Yes.

22 MS. HAIRSTON: Kathryn Forsyth?

23 MS. FORSYTH: Yes.

24 MS. HAIRSTON: Dave Fleisher?

25 MR. FLEISHER: Yes.

46

1 CHAIRMAN MALTESE: Thank you very
2 much.

3 Next case -- what are we doing with
4 Burdick?

5 MS. STARGHILL: It's being pulled
6 for lack of a quorum. It will be adjudicated
7 next month. I'm going to ask for an alternate
8 for Ms. Kovach.

9 CHAIRMAN MALTESE: Oswald v.

10 Township of Hamilton.

11 MR. CARUSO: Before I start I just

12 want to note for the record that in this FR, the

13 footnote on page 2 has been edited to correct the

14 citation of a case citation.

15 CHAIRMAN MALTESE: All right. Could

16 you give us the correct citation, please.

17 MR. CARUSO: The actual citation is

18 just See Caggiano v. Borough of Stanhope, GRC

19 Complaint No. 2005-211, et sec. (January 2006).

20 All the stuff before that is taken out.

21 CHAIRMAN MALTESE: Thank you.

22 Go ahead, please.

23 MR. CARUSO: The Executive Director

24 respectfully recommends the Council find that

25 while the Custodian disclosed the requested

47

1 records to the Complainant pursuant to the

2 Council's July 25, 2007 Interim Order, the

3 Custodian has not complied with the Interim Order

4 because the Custodian failed to provide access to
5 the requested records within the five business
6 days required by the Council's July 25, 2007
7 Interim Order. No further action is required in
8 this complaint.

9 CHAIRMAN MALTESE: Well, I don't
10 really think we're going to beat around the bush
11 and talk about the fact that the Custodian's
12 noncompliant. In fact, the Custodian was in
13 contempt of this Council's order. And I think
14 that the recommendation should be revised to
15 confirm that that was a contemptuous act on the
16 part of the Custodian rather than just simply
17 noncompliance.

18 So I would suggest that we revise
19 the conclusions to provide in the third line to
20 say that instead of "the Custodian has not
21 complied with," to say that "the Custodian is in
22 contempt of." And then we'll go on to the
23 Interim Order because the Custodian failed to
24 provide access to the requested records within

25 the five business days "ordered by the Council,"

48

1 instead of "required by" on July 25, 2007.

2 And then I would say, "Given that

3 the nature of the contempt is not flagrant, no

4 further action is required of the..." That would

5 be my suggested revisions to the FR.

6 Comments? Motion?

7 MR. FLEISHER: So move as amended.

8 CHAIRMAN MALTESE: Thank you.

9 Second, please?

10 MS. BERG TABAKIN: Second.

11 CHAIRMAN MALTESE: Roll call.

12 MS. HAIRSTON: Vince Maltese?

13 CHAIRMAN MALTESE: Yes.

14 MS. HAIRSTON: Robin Berg Tabakin?

15 MS. BERG TABAKIN: Yes.

16 MS. HAIRSTON: Janice Kovach?

17 MS. KOVACH: Yes.

18 MS. HAIRSTON: Kathryn Forsyth?

19 MS. FORSYTH: Yes.

20 MS. HAIRSTON: Dave Fleisher?

21 MR. FLEISHER: Yes.

22 CHAIRMAN MALTESE: Thank you.

23 Costello v. Township of Wyckoff.

24 MS. MAYERS: The Executive director

25 respectfully recommends the Council find that:

49

1 1. The Custodian's failure to
2 respond in writing to the Complainant's OPRA
3 request within seven business days resulted in a
4 deemed denial. Therefore, the Custodian has
5 unlawfully denied access to the requested records
6 pursuant to N.J.S.A. 47:1A-5.g. and 5.i. The
7 Custodian has also failed to bear her burden of
8 proof that the denial of access was authorized by
9 law pursuant to N.J.S.A. 47:1A-6.

10 No. 2, Because the Custodian
11 provided the Complainant with a copy of the
12 landscape plan as soon as she realized that it
13 was also included within the request and provided

14 the Complainant with a copy of the audiotapes
15 once they were reformatted and copied, it is
16 concluded that the Custodian's actions do not
17 rise to the level of a knowing and willful
18 violation of OPRA and unreasonable denial of
19 access under the totality of the circumstances.

20 However, the Custodian's unlawful
21 denial of access appears negligent and heedless
22 since she is vested with the legal responsibility
23 of granting and denying access in accordance with
24 the law.

25 CHAIRMAN MALTESE: Okay. Any

50

1 comments? Motion?

2 MS. KOVACH: So moved.

3 CHAIRMAN MALTESE: Second?

4 MS. BERG TABAKIN: Second.

5 CHAIRMAN MALTESE: Thank you.

6 Roll call.

7 MS. HAIRSTON: Vince Maltese?

8 CHAIRMAN MALTESE: Yes.

9 MS. HAIRSTON: Robin Berg Tabakin?

10 MS. BERG TABAKIN: Yes.

11 MS. HAIRSTON: Janice Kovach?

12 MS. KOVACH: Yes.

13 MS. HAIRSTON: Kathryn Forsyth?

14 MS. FORSYTH: Yes.

15 CHAIRMAN MALTESE: Popadines v. The

16 Township of Hanover.

17 MR. CARUSO: The Executive Director

18 respectfully recommends the Council find that

19 since the Complainant's August 6,1981 request for

20 records predates OPRA and because the Custodian

21 certifies that the Township of Hanover is not in

22 possession of the Complainant's request and that

23 no records responsive to the Complainant's

24 request exist, this complaint should be

25 dismissed. See Laufgas v. City of Patterson, GRC

1 Complaint No. 2006-23 (February 2007) and

2 Pusterhofer v. New Jersey Department of

3 Education, GRC Complaint No. 2005-49 (July 2005).

4 CHAIRMAN MALTESE: Okay. Frank,

5 just one housekeeping item. On page 3 at the

6 bottom, fifth line up from the bottom --

7 MR. CARUSO: Okay.

8 CHAIRMAN MALTESE: -- "the

9 Complainant's," I think you could delete the word

10 "a" in front of request, "Complainant's request."

11 Do you see that, five lines up from the bottom of

12 page 3?

13 MS. STARGHILL: Just "Complainant's

14 request," instead of "Complainant's a request."

15 MR. CARUSO: Okay. I got it, sorry.

16 CHAIRMAN MALTESE: Okay, motion?

17 MS. BERG TABAKIN: So moved.

18 CHAIRMAN MALTESE: Thank you.

19 Second?

20 MS. FORSYTH: Second.

21 MS. HAIRSTON: Who second?

22 CHAIRMAN MALTESE: Kathy.

23 Okay, roll call.

24 MS. HAIRSTON: Vince Maltese?

25 CHAIRMAN MALTESE: Yes.

52

1 MS. HAIRSTON: Robin Berg Tabakin?

2 MS. BERG TABAKIN: Yes.

3 MS. HAIRSTON: Janice Kovach?

4 MS. KOVACH: Yes.

5 MS. HAIRSTON: Kathryn Forsyth?

6 MS. FORSYTH: Yes.

7 CHAIRMAN MALTESE: Momo v. The

8 Department of Community Affairs. We have a

9 recusal.

10 MS. KOVACH: Yes.

11 (Ms. Kovach recuses herself and

12 leaves the room.)

13 MS. MAYERS: The Executive Director

14 respectfully recommends the Council find that:

15 1. The Custodian certified that the

16 Complainant's OPRA request was not forwarded to

17 her until December 4, 2006 and consequently

18 responded in a timely manner on December 8, 2006

19 informing the Complainant that the requested
20 records are not made, maintained, kept on file or
21 received by the Division of Community Resources.
22 Therefore, the Custodian did not unlawfully deny
23 access to the requested records pursuant to
24 N.J.S.A. 47:1A-5.g. or N.J.S.A. 47:1A-5.i.

25 2. Because of the Division of

53

1 Housing's Records Custodian, Patricia Fowler
2 determined that the request should have been
3 directed to the Division of Community Resources,
4 the Administrative Assistant (Cath Cox) forwarded
5 the OPRA request form to the Central Services
6 Supervisor (Roseanne Rizza) within the Division
7 of Community Resources. Therefore, the employees
8 of the Division of Housing did not violate
9 N.J.S.A. 47:1A-5.h.

10 CHAIRMAN MALTESE: Well, this -- I
11 think what we should do -- I'm not really sure
12 how to accomplish it, but we should be put
13 something maybe on our website advising all

14 Custodians that if they intend to accept OPRA
15 requests via fax, that the fax number or fax
16 numbers be prominently displayed on the
17 respective agency or a state government agency's
18 website.

19 This fax went to a fax machine which
20 was not in service which I think was part of this
21 FR. We should send a directive to the Executive
22 Director of this Division strongly recommending
23 that that fax machine be taken out of service.
24 And strongly suggesting that if additional OPRA
25 requests come in on that fax machine we will deem

54

1 them as valid OPRA requests.

2 So we understand that these things
3 happen. But I think that now that the Executive
4 Director of that Department is aware of the
5 situation, he needs to take steps in order to
6 rectify the situation.

7 I'll entertain motion --

8 MS. MAYERS: Excuse me,

9 Mr. Chairman --

10 CHAIRMAN MALTESE: Yes.

11 MS. MAYERS: -- I have one more

12 edit.

13 I just want to bring to your

14 attention on page 1, the third footnote to read,

15 "the Custodian did not received the Complainant's

16 OPRA request until December 4th, 2006."

17 CHAIRMAN MALTESE: Sixth.

18 MS. MAYERS: Not 2007.

19 CHAIRMAN MALTESE: Okay, thank you.

20 Okay, motion?

21 MS. FORSYTH: I think also that we

22 have to make it clear that if people don't on

23 their websites -- on their OPRA website that if

24 that they don't have a fax number, they should

25 probably list one that would be convenient.

1 Because otherwise people will just find any fax

2 number in the department or office and just send

3 it there.

4 CHAIRMAN MALTESE: Good point.

5 MS. FORSYTH: So if they don't have

6 a fax number, they should clearly list one so

7 that people know where to fax it so these

8 situations could possibly be avoided.

9 CHAIRMAN MALTESE: Karyn, you'll

10 work with Kathryn to get that news out?

11 MS. GORDON: I will.

12 CHAIRMAN MALTESE: Thank you.

13 Motion?

14 MS. FORSYTH: So moved.

15 CHAIRMAN MALTESE: Thank you.

16 Second?

17 MS. BERG TABAKIN: Second.

18 CHAIRMAN MALTESE: Thank you.

19 Roll call.

20 MS. HAIRSTON: Vince Maltese?

21 CHAIRMAN MALTESE: Yes.

22 MS. HAIRSTON: Robin Berg Tabakin?

23 MS. BERG TABAKIN: Yes.

24 MS. HAIRSTON: Kathryn Forsyth?

25 MS. FORSYTH: Yes.

56

1 CHAIRMAN MALTESE: Okay. We're now

2 going to do two cases, Dressel and that will be

3 followed by Spaulding. And I need to recuse

4 myself from both of those cases.

5 (Chairman Maltese recuses himself

6 and leaves the room.)

7 MS. BERG TABAKIN: Wait a minute, we

8 don't have a quorum.

9 CHAIRMAN MALTESE: I'll get her.

10 (Ms. Kovach returns.)

11 MS. BERG TABAKIN: Okay, we're doing

12 Dressel v. Monroe Township Board of Education.

13 MR. STEWART: The Executive Director

14 respectfully recommends the Council find that:

15 1. The Custodian did not violate

16 OPRA by withholding release of the requested

17 records until the Complainant paid the balance of

18 payment due for the cost of copying the records

19 because, although the Custodian agreed to release
20 to the Complainant copies of all unredacted
21 records requested, the Complainant failed to pay
22 the balance due for copying charges and the
23 Custodian is not required to release copies of
24 records until such payment is received pursuant
25 to N.J.S.A. 47:1A-5.b., Santos v. New Jersey

57

1 State Parole Board, GRC Case No. 2004-74 (August,
2 2004), Cuba v. Northern State Prison, GRC case
3 NO. 2004-136 (February, 2005) and Paff v. City of
4 Plainfield, GRC Complaint No. 2006-54 (July
5 2006).

6 2. The complaint should be referred
7 to the Office of Administrative Law for
8 determination of whether the Custodian knowingly
9 and willfully violated OPRA and unreasonably
10 denied access under the totality of the
11 circumstances because the Custodian certified the
12 requested records were exempt from disclosure and

13 withheld them for approximately thirteen months
14 following receipt of the Complainant's request
15 then offered to release the records without
16 citing a specific change in circumstances
17 relevant to the exemption which would have
18 permitted such disclosure.

19 MS. BERG TABAKIN: Any discussion?

20 Motion?

21 MS. FORSYTH: So moved.

22 MS. KOVACH: Second.

23 MS. BERG TABAKIN: Roll call.

24 MS. HAIRSTON: Robin Berg Tabakin?

25 MS. BERG TABAKIN: Yes.

58

1 MS. HAIRSTON: Janice Kovach?

2 MS. KOVACH: Yes.

3 MS. HAIRSTON: Kathryn Forsyth?

4 MS. FORSYTH: Yes.

5 MS. BERG TABAKIN: Amelia Spaulding

6 v. Hudson County Register.

7 MS. LOWNIE: The Executive Director

8 respectfully recommends the Council find that
9 this complaint should be dismissed as the
10 Complainant has voluntarily withdrawn his
11 complaint in an e-mail to the GRC dated September
12 10, 2007.

13 MS. BERG TABAKIN: Any discussion?

14 Motion?

15 MS. KOVACH: So moved.

16 MS. BERG TABAKIN: Second?

17 MS. FORSYTH: Second.

18 MS. BERG TABAKIN: Roll call.

19 MS. HAIRSTON: Robin Berg Tabakin?

20 MS. BERG TABAKIN: Yes.

21 MS. HAIRSTON: Janice Kovach?

22 MS. KOVACH: Yes.

23 MS. HAIRSTON: Kathryn Forsyth?

24 MS. FORSYTH: Yes.

25 MS. STARGHILL: Debra, would you

1 mind asking the Chairman to come in? Thank you.

2 CHAIRMAN MALTESE: Okay. We're now
3 at that part of the agenda it's that part of the
4 a den we're going to talk about a complaint that
5 was adjudicated in Superior Court.

6 MS. STARGHILL: Can we go to the
7 reconsiderations?

8 CHAIRMAN MALTESE: You want to go to
9 the reconsiderations, okay.

10 Martin O'Shea v. New Jersey
11 Intergovernmental Insurance Fund.

12 MS. STARGHILL: The Executive
13 Director respectfully recommends the Council
14 finds that the January 31, 2007 Final Decision
15 should be revised to delete the finding that the
16 Custodian unlawfully denied access to the chart
17 in response to the GRC's October 19, 2007 -- I
18 think that's 2006 -- Interim Order because the
19 chart is not a record subject to the records
20 request relevant to this complaint. Therefore,
21 this finding of the GRC was inappropriate in the
22 adjudication of the complaint as submitted by the
23 Complainant.

24 CHAIRMAN MALTESE: We assumed that
25 the chart was in response to the OPRA request,

60

1 but in fact it was supplemental material that was
2 submitted by the Custodian as a courtesy, if you
3 will?

4 MS. STARGHILL: If you will.

5 After going through the file, after
6 the -- he filed a request, the Complainant
7 himself stated that if the chart was not
8 provided, I think, in a redacted form, then he
9 was going to file a request for it, proper
10 request, and file a complaint if the redactions
11 were made.

12 CHAIRMAN MALTESE: But ultimately
13 Mr. O'Shea was provided with an unredacted copy?

14 MS. STARGHILL: Yes. We were -- I
15 think the GRC was in overzealous, maybe -- in
16 error in including that finding because that
17 record was not listed in the denial of access

18 complaint as being relevant to the complaint or
19 the records request at issue.

20 CHAIRMAN MALTESE: Motion?

21 MS. BERG TABAKIN: So moved.

22 CHAIRMAN MALTESE: Second?

23 MS. KOVACH: Second.

24 CHAIRMAN MALTESE: Thank you.

25 Roll call.

61

1 MS. HAIRSTON: Vince Maltese?

2 CHAIRMAN MALTESE: Yes.

3 MS. HAIRSTON: Robin Berg Tabakin?

4 MS. BERG TABAKIN: Yes.

5 MS. HAIRSTON: Janice Kovach?

6 MS. KOVACH: Yes.

7 MS. HAIRSTON: Kathryn Forsyth?

8 MS. FORSYTH: Yes.

9 CHAIRMAN MALTESE: Okay. Caggiano

10 v. Borough of Stanhope (2006-220).

11 MS. STARGHILL: Yes, I'm going to

12 read some of the analysis and draw the picture --

13 CHAIRMAN MALTESE: Just go to the
14 facts, okay.

15 MS. STARGHILL: Yes. Because this
16 is not an issue of first impression, but a
17 substantial finding for the GRC.

18 The Borough of Stanhope is a
19 custodial agency is one of those small
20 municipalities with less than four, five thousand
21 residents which the Legislature specifically
22 states in OPRA is allowed to have limited OPRA
23 hours. And as certified by the Custodian there
24 are only three full-time employees of the
25 municipality, everyone else is part-time or works

62

1 on a contract basis with the municipality.

2 The Complainant's seven-page, 59
3 item October 30th, 2006 request sought access to
4 voluminous records of the Borough of Stanhope, in
5 some cases spanning over a 12-year period. The
6 Custodian responded in writing to the Complainant

7 within seven business days of receiving the
8 request and alerted the Complainant that the
9 Custodian required additional time to respond to
10 the voluminous OPRA request. The Custodian
11 stated that in an effort to provide records as
12 soon as possible, the Custodian provided records
13 to the Complaint as they were retrieved from
14 various departments and from storage or archives.

15 Various records were provided on
16 various dates following that correspondence.
17 Additionally, the Custodian informed the
18 Complainant that several of the items,
19 specifically Items Nos. 25, 28, 29, 30, 31, 32,
20 33, 34, 39, 50, 52, 53, and 55 are requests for
21 information or answers are broad and/or unclear.

22 In New Jersey Builders Association
23 the Appellate Division determined that a
24 five-page 39 paragraph OPRA request --

25 MS. GORDON: Fifty-nine.

1 MS. STARGHILL: -- fifty-nine -- no,

2 not Mr. Caggiano --

3 MS. GORDON: I'm sorry.

4 MS. STARGHILL: -- the New Jersey

5 Builder's Association, the Appellate Division

6 determined that a five-page 39 paragraph OPRA

7 request for records less than the request that's

8 issued in this complaint before the GRC now, bore

9 no resemblance to the record request envisioned

10 by the Legislature, which is one submitted on a

11 form that "provides space for...a brief

12 description of the record sought."

13 The court noted that descriptions of

14 the sort that New Jersey Builder's Association

15 gave the Council On Affordable Housing have been

16 found inadequate by courts of other jurisdictions

17 applying similar statutes, and this court has

18 determined that OPRA should be applied in the

19 same manner. Because New Jersey Builder's

20 Association voluminous was "so far removed from

21 the type of OPRA request anticipated by the

22 Legislature," that was a quote, the court

23 concluded that the custodian was not bound by
24 those provisions of OPRA "which require timely
25 response and provide for an award of attorney's

64

1 fees when such access is denied and litigation is
2 required."

3 Regarding a similar voluminous
4 records request in Robert Vessio v. NJ Department
5 of Community Affairs, Division of Fire Safety,
6 GRC Complaint No. 2007-63, adjudicated May 2007,
7 the GRC ruled that based upon the Appellate
8 Division's decision in New Jersey Builder's
9 Association, the Complainant's voluminous
10 request, a thirteen paragraph request for
11 numerous records, though spanning over 20 years,
12 was not a valid OPRA request because it bore no
13 resemblance to the record request envisioned by
14 the Legislature, which is one submitted on a form
15 that "provides space for...a brief description of
16 the record sought."

17 Additionally, the GRC ruled that

18 based on the Custodian's certification that
19 granting access to all fire safety inspection
20 files from 1986 to 2006 would result in a
21 substantial disruption to the agency's
22 operations, and the Custodian's efforts to reach
23 a "reasonable solution" with the Complainant that
24 accommodates the interests of the Requestor and
25 the agency, the voluminous nature of the

65

1 Complainant's request WAS -- the Custodian's
2 denial of access was authorized by N.J.S.A.
3 47:1a-5.i.

4 Also, in a second instance more
5 pertinent to this case, the Appellate Divisio
6 provides that, quote, If a request for access to
7 a government record would substantially disrupt
8 operations, the Custodian may deny access to the
9 record after attempting to reach a reasonable
10 solution with the Requestor that accommodates the
11 interests of the Requestor and the agency,

12 unquote. N.J.S.A. 47:1A-5(g).

13 The conduct of -- and I'm citing,

14 pulling from the New Jersey Builder's Association

15 -- the conduct of the Council On Affordable

16 Housing was consistent with this exception.

17 Within six business days of receipt of the New

18 Jersey Builder's Association non-complying

19 request, the Council On Affordable Housing's

20 Custodian advised that it could not comply until

21 September 20, 2004, because the New Jersey

22 Builder's Association's demand required the

23 Custodian to "assess" 39 request for information

24 and then gather the information.

25 Although the statute does not give

66

1 any guidance on the disruptions that should be

2 deemed "substantial" or the solutions that should

3 be deemed "reasonable" within the meaning of

4 5(g), there is ample evidence of both in this

5 case.

6 A request that does not comply with

7 OPRA and demands assessment and preliminary
8 inquiry of the sort required by New Jersey
9 Builder Association's demand is sufficient to
10 give rise to an inference that compliance will
11 "disrupt agency operations." Disruption may be
12 inferred because a request like New Jersey
13 Builder's Association necessitates work by the
14 Council On Affordable Housing employees that is
15 neither assigned by the agency nor envisioned by
16 OPRA.

17 There is persuasive evidence of the
18 "substantiality" of the disruption that would
19 have followed if the Council On Affordable
20 Housing produced the information the New Jersey
21 Builder's Association sought within seven
22 business days. New Jersey Builder's
23 Association's expert, who simply had to review
24 what the Council On Affordable Housing provided,
25 needed more than ten business days to identify

1 inadequacies. New Jersey Business Association
2 asked the trial court for additional time to
3 complete that review.

4 The New Jersey Builder's Association
5 does not dispute the volume of the materials the
6 Council On Affordable Housing provided or the
7 fact that the Council On Affordable Housing
8 created new records to provide the information
9 sought. We conclude that the Legislature would
10 not expect or want courts to require more
11 persuasive proof of the substantiality of a
12 disruption to agency operations than the agency's
13 need to survey employees, identify information
14 and generate new records and the Requestor's need
15 for more than ten business days to review what
16 the agency provided.

17 That was all from the New Jersey
18 Builders Association, again the Appellate
19 Division Case, again we're in January 2007.

20 In the matter now before the Council
21 which is similar to both those of New Jersey
22 Builders Association and the Vessio, supra, The

23 Complainant's October 30, 2006 OPRA request
24 encompassed, again, seven pages and 59 itemized
25 requests for records (most of which include

68

1 requests for multiple records spanning many
2 years), including requests for copies of
3 drawings, numerous contracts spanning a period of
4 12 years, e-mails, letters, memoranda,
5 photographs, site plans, requests, fines, notes,
6 reports, complaints, and attachments to minutes.

7 The Custodian's timely written
8 response noted that she required additional time
9 to respond to the voluminous OPRA request. The
10 Custodian stated that in an effort to provide
11 records as soon as possible, the Custodian
12 provided the records to the Complainant as they
13 were retrieved from various departments and from
14 storage or archives.

15 And again there were about 15 of
16 those itemized requests that were requests for

17 information all answers are broad and unclear.

18 Further, the Custodian certifies
19 that she advised the Complainant that she cannot
20 reasonably keep up with his ongoing submission of
21 OPRA requests without substantially disrupting
22 the functioning of her office. The Custodian
23 also certifies that she asked that they reach a
24 mutually-agreeable solution to balance the
25 Complainant's right to access government records

69

1 with the Custodian's need to manage her job
2 responsibilities without a substantial disruption
3 to her office for the requests subject of this
4 complaint, as well as all outstanding records
5 requests with the Borough.

6 Because OPRA does not require
7 custodians to research files or compile records
8 which do not otherwise exist, and because the
9 Custodian requested additional time to respond to
10 the Complainant's OPRA request within the
11 required seven business days pursuant to 5.i.,

12 it appears the Custodian has met her burden of
13 proof that access to the records request, the 15
14 or so, that were broad and unclear was not
15 unlawfully denied.

16 I'll just go onto the
17 recommendations.

18 The Executive Director respectfully
19 recommends the Council fine that:

20 1. Because OPRA does not require
21 custodians to research files or compile records
22 which do not otherwise exist, and because the
23 Custodian requested additional time to respond to
24 the Complainant's OPRA request within the
25 required seven business day period pursuant to

70

1 5.i., it appears the Custodian has met her burden
2 of proof that access to the records request in
3 items, 25, 28, 29, 30, 31, 32, 33, 34, 39, 50,
4 51, 53, and 55 was not unlawfully denied pursuant
5 to Section 6 of OPRA, as well as MAG

6 Entertainment v. Division of Alcohol Beverage
7 Control, Appellate Division decision of 2005.
8 No. 2, Based on the Custodian's
9 certification that granting access to the
10 voluminous records requested by the Complainant
11 in his seven-page, 59 itemized request spanning
12 over 12 years, would result in a substantial
13 disruption to the agency's operations -- that of
14 a town of less than 5,000 residents -- and the
15 Custodian's efforts to reach a reasonable
16 solution with the Complainant that accommodates
17 the interests of the requestor and the agency,
18 and the voluminous nature of the request, the
19 Custodian's denial is authorized by 5.i., and
20 consistent with the GRC's decision in Robert
21 Vissio v. New Jersey Department of Community
22 Affairs, Division of Fire Safety, as well as New
23 Jersey Builders Association, Appellate Division
24 decision.

25 CHAIRMAN MALTESE: Well, I assume

1 you'll agree with me that our findings here with
2 respect to substantial disruption are particular
3 to this case.

4 MS. STARGHILL: And very limited.

5 CHAIRMAN MALTESE: And we want to
6 make sure that custodians do not walk away from
7 our holding in this case thinking that they can
8 carte blanche deny access to a request even
9 though they may be voluminous. This particular
10 case and the facts that it entails suggests to us
11 that the request, the nature of the requests were
12 unreasonable, the breath and scope of the
13 requests were unreasonable, and we accept
14 Custodian's certification that the attempt to
15 honor this request would create substantial
16 disruption to this particular community.

17 Do we have any other comments from
18 members of the Council?

19 MS. STARGHILL: Mr. Chairman, if I
20 may.

21 We have created an analytical

22 framework for which to determine whether an OPRA
23 request will cause a substantial disruption to a
24 facility or facility operation very similar to
25 the 14-point analysis of analytical framework

72

1 that created to evaluate special service charges.
2 This analytical framework, 16 questions, will be
3 posted to our website under the tap "OPRA for
4 Record's Custodian" so that custodians can refer
5 to anytime they want to deny access to a request
6 using this provision of OPRA. And the custodian
7 would be required to answer these questions as a
8 preliminary review for themselves to determine if
9 the request at issue really does fall or is
10 applicable for this particular provision in OPRA
11 which allows custodians to lawfully deny access
12 to a request because of substantial disruption
13 and only after the custodian has made attempts to
14 reach a reasonable resolution that accommodates
15 both the Requestor and the Custodial Agency.

16 CHAIRMAN MALTESE: And you say that

17 as an aside. You did not use that --

18 MS. STARGHILL: We did not use that
19 in this case because, again, we believe that the
20 findings in this particular complaint are very
21 narrowly construed because Stanhope is one of
22 those small municipalities for which the
23 Legislature allows limited OPRA hours, as well as
24 the very nature of the request.

25 I have to say in my tenure with the

73

1 GRC total, I don't believe I've ever seen this,
2 you know, extensive OPRA request before.
3 Fifty-nine individual items, most of them
4 requesting multiple records within the 59
5 spanning like you said over 12 years.

6 CHAIRMAN MALTESE: Okay. Anything
7 else?

8 Motion?

9 MS. KOVACH: So moved.

10 CHAIRMAN MALTESE: Thank you.

11 Second?

12 MS. BERG TABAKIN: Second.

13 CHAIRMAN MALTESE: Roll call.

14 MS. HAIRSTON: Vince Maltese?

15 CHAIRMAN MALTESE: Yes.

16 MS. HAIRSTON: Robin Berg Tabakin?

17 MS. BERG TABAKIN: Yes.

18 MS. HAIRSTON: Janice Kovach?

19 MS. KOVACH: Yes.

20 MS. HAIRSTON: Kathryn Forsyth?

21 MS. FORSYTH: Yes.

22 MS. STARGHILL: Mr. Chairman, we

23 before we go on to talk about the complaints

24 adjudicated in Superior Court, it's brought to my

25 attention by the DAG that we have not --

74

1 actually, we didn't take a vote on the Closed

2 Session minutes which actually have two edits.

3 CHAIRMAN MALTESE: Correct, that is

4 correct.

5 MS. STARGHILL: The two edits I

6 might put before you, the Department Attorney
7 General present for the July meeting was Debra
8 Allen, not Andrea Grossa who was present for the
9 June meeting, and Ms. Kovach did not recuse
10 herself from the Johnson matter.

11 CHAIRMAN MALTESE: All right, I'll
12 entertain a motion to accept the Closed Session
13 minutes for the July 25, 2007 meeting as amended?

14 MS. BERG TABAKIN: So moved.

15 CHAIRMAN MALTESE: Thank you.
16 Second?

17 MS. KOVACH: Second.

18 CHAIRMAN MALTESE: Thank you.
19 Roll call, please.

20 MS. HAIRSTON: Vince Maltese?

21 CHAIRMAN MALTESE: Yes.

22 MS. HAIRSTON: Robin Berg Tabakin?

23 MS. BERG TABAKIN: Yes.

24 MS. HAIRSTON: Janice Kovach?

25 MS. KOVACH: Yes.

1 MS. HAIRSTON: Kathryn Forsyth?

2 MS. FORSYTH: Yes.

3 CHAIRMAN MALTESE: Thank you very
4 much for bringing that to my attention from.

5 Tina Renna v. County of Union,
6 complaints adjudicated in Superior Court.

7 MS. STARGHILL: This was not a
8 matter that was determined by the GRC and then
9 appealed to the Appellate Division. This is
10 actually a matter that was heard in trial
11 division, so the GRC never received this denial
12 of access complaint. But It was a challenge to
13 the requirement of an OPRA request form by our
14 Requestors, which is articulated in the GRC
15 Advisory Opinion 2006-1. And --

16 CHAIRMAN MALTESE: Is it 2006-1 or
17 2005-1?

18 MS. FORSYTH: 2006.

19 MS. STARGHILL: 2006.

20 This matter was decided September 5,
21 2007 in which the trial division upheld the

22 requirement of the form. I will defer, I guess,
23 to Miss Allen to discuss oral arguments. But she
24 used a great analogy, I thought, in oral
25 arguments that probably was --

76

1 MS. ALLEN: When we litigated the
2 case --

3 When we litigated the case, the case
4 it was before Judge Catherine Brock, who's the
5 OPRA judge in Union County, and she was taking a
6 very pragmatic approach. I mean, we were
7 obviously arguing the letter of the law that OPRA
8 requires the use of the form. But she was
9 looking at more from a practical standpoint as
10 to -- I mean, how is it that the Custodian is
11 required to submit a denial of access reason on
12 the form if the Requestor hasn't submitted that
13 form? You know, it's a bit cumbersome, it
14 doesn't make sense practically speaking.

15 With respect to whether or not it

16 was a restraint on the rights and limitation on
17 access, I mean, obviously in the Government, you
18 know, there are processes and there are
19 standarized forms that many people need to fill
20 out in order to proceed with a matter. And I
21 gave the example of voting where every person in
22 this country who's over 18 and is a citizen has a
23 constitutional right to vote. However, you can't
24 go into any polling place on Election Day if
25 you're not a resident of that particular ward or

77

1 district. And, in fact, you know, even if you
2 have gone into the proper district and you
3 haven't registered to vote within the appropriate
4 time period, you still would not be allowed to
5 vote on that given date.

6 So I mean, there are obviously
7 reasonable controls which is why the forms are
8 required. And that was the analogy that we gave
9 to the Court and then the Press had quoted that.

10 CHAIRMAN MALTESE: And so the

11 holding --

12 MS. ALLEN: The holding is that OPRA

13 does mandate the use of the official request form

14 as created.

15 MS. STARGHILL: The news reports

16 have stated that this matter -- that there are no

17 plans to appeal the matter so stay tune for the

18 Appellate Division --

19 CHAIRMAN MALTESE: That's the way we

20 make case law and move forward.

21 MS. STARGHILL: That's right.

22 CHAIRMAN MALTESE: Anything else?

23 MS. ALLEN: I just wanted to speak

24 on one issue you asked me to speak on.

25 MS. STARGHILL: Yeah, why don't

78

1 you --

2 MS. ALLEN: The Executive Director

3 in charge asked me to speak to you about the

4 Windish appeal, some facts related to copying

5 cost under OPRA.

6 Just so you know that we filed our

7 brief in the Appellate Division in July and it

8 normally takes about six months or so for the

9 oral argument to come once the papers are filed.

10 So we anticipate some type of notice probably in

11 November/December of a January or February in our

12 argument. That's what's going on in that case.

13 MS. STARGHILL: That's a very

14 important decision because there are a lot of

15 trial division decisions around the state

16 mandating that custodial agencies charge the

17 actual cost because the statute very clearly

18 states the actual cost for paper copies of

19 records requested under OPRA shall apply not to

20 exceed the enumerated rate.

21 And so again, not to beat a dead

22 horse, but of our own volition we reconsidered

23 the Windish matter in which we upheld the

24 Custodian charging the enumerated rate over the

25 Complainant objection that the Complainant felt

1 actual costs should be charged. That holding was
2 consistent with our prior GRC decision, but to
3 acknowledge these trial division decisions, we
4 simply explained why we felt the enumerated rate
5 should be charged instead of actual cost because
6 of legislative interpretation -- statutory
7 interpretation.

8 Of course, Mr. Windish appealed the
9 decision and we're looking forward to resolution.

10 I mean, that's a point of law that we want
11 specifically clarified at a level that is
12 applicable across the state versus piecemeal, you
13 know, county by county at trial divisions.

14 CHAIRMAN MALTESE: Okay.

15 MS. STARGHILL: I just want to
16 acknowledge part of New Business that we are in
17 receipt of a letter from Mr. Paff in regards to
18 attorney sanction and we will be responding to
19 him as soon as we have time to renew that with
20 our counsel. I don't think that the GRC and

21 Mr. Paff are far off despite that 2003 advice
22 that we received from Attorney General's office.
23 Just recently in a matter against
24 the City of Irvington, the GRC referred the
25 knowing and willful determination against a

80

1 municipal attorney although he was employed by
2 the municipality not simply a contract returned
3 to OAL. So I don't know that we're letting that
4 advice --

5 CHAIRMAN MALTESE: I think sometime
6 ago --

7 MS. STARGHILL: -- that came from
8 the Attorney General's office --

9 CHAIRMAN MALTESE: I think sometime
10 ago we held that an attorney who simply is
11 providing advice to the Custodian would not be
12 subject to OPRA sanctions; whereas, an attorney
13 who is serving as a Custodian of Records or in
14 any way interferes with the access to those
15 records other than through his advice would be

16 subject to sanction. So I'd be interested in
17 taking a look at this and see what you come up
18 with.

19 Okay, members of the public, if you
20 wish to be heard, please raise your hand, step up
21 to the table.

22 Yes, sir.

23 PUBLIC COMMENT:

24 MR. BURDICK: Hi, George Burdick, 14
25 Mathew Drive, Annandale, New Jersey.

81

1 CHAIRMAN MALTESE: Welcome.

2 MR. BURDICK: Ms. Starghill, am I
3 allowed to speak about our conversation in the
4 hallway.

5 MS. STARGHILL: That I informed
6 Mr. Burdick before we came back into Open Session
7 that his complaint would not be heard this month
8 because of lack of a quorum.

9 Anything else you want to share, I

10 guess you can.

11 MR. BURDICK: Well, I have a
12 question regarding my case.

13 MS. STARGHILL: We would not
14 address -- I can't --

15 CHAIRMAN MALTESE: You can say
16 anything you want. If you're looking for a
17 response to us, if we haven't decided your
18 case, we --

19 MS. STARGHILL: You would do better
20 to write a letter to us or to your case manager
21 about your specific concerns in regard to your
22 complaint and we would then be obligated to
23 respond.

24 MR. BURDICK: Okay. But at this
25 point --

82

1 CHAIRMAN MALTESE: Since there's
2 been no adjudication, it would be probably
3 inappropriate for us to talk about it now.

4 MS. STARGHILL: Yeah, we don't

5 discuss anything --

6 MR. BURDICK: I don't want to delay
7 this any further, so -- but there's a pretty good
8 chance it'll be on next month's agenda?

9 MS. STARGHILL: Oh, absolutely, I'm
10 going to get it done next month.

11 MS. FORSYTH: Mr. Burdick, I just
12 wanted to say that I was the last person who had
13 to recuse themselves, and I just found out about
14 the reason for my recusal last night. So had
15 that not happened it would have been heard today.

16 MR. BURDICK: May I ask what office
17 of the DEO you were in?

18 MS. FORSYTH: I'm the Director of
19 Public Information for the Department.

20 MR. BURDICK: Thank you very much.

21 MS. FORSYTH: And as such I come
22 into contact with a lot of different matters and
23 issues because we have to talk to reporters about
24 them.

25 MR. BURDICK: Thank you, ma'am.

1 Because I don't want to -- I want to give
2 everybody else who needs a chance.

3 Relative to 2005-133, this was an
4 issue that you already voted on. It's over and
5 it's done with. This is Burdick v. Franklin
6 Township.

7 In your initial ruling, let me just
8 say that what I requested I received in totally
9 unredacted form, I'm very happy. But when you
10 gave your final ruling, what you said was
11 although the Custodian did not meet their burden
12 of proof, you -- God bless you acting as their
13 safety net -- then said that they had the right
14 to redact certain comments because they were
15 advisory, consultatory or deliberative.

16 So if I might use another analogy,
17 as -- and I don't know if anyone in this one room
18 has had the opportunity to officiate a wedding.
19 So when I was mayor I had the opportunity to
20 officiate a wedding. And the Bride sent me

21 her -- what they wanted to read or state to each
22 other, and I didn't blink without getting the
23 advice of our municipal attorney, so I passed
24 their vows to him. And he explained to me that a
25 marriage is to his knowledge the only contract

84

1 that is not in writing.

2 Consequently, there must be certain
3 things that must be stated during the ceremony.
4 And since there's not a handshake, there's a kiss
5 or a breaking of a glass that basically
6 acknowledges that the contract has been
7 validated. You could have a blood test, you can
8 have a marriage license, but unless you have that
9 kiss or breaking of a glass, there's no
10 validation of a contract, okay.

11 In this particular case --

12 MS. STARGHILL: Has the time -- the
13 statute of limitations on the 45 days to appeal
14 this decision --

15 MR. BURDICK: No, no, no. I'm
16 not -- please, I'm sorry, I got what I wanted so
17 I'm not appealing.
18 But in this particular case there
19 was no validation of the employment of the
20 individual, so that no action was taken to
21 actually say, Mr. Hartman, we hire you at no
22 cost. So there was no validation, there was no
23 action, there was no memorialization to actually
24 hire him. There was no Letter of Intent. There
25 was no statement of performance. There was no

85

1 action to formally accept his report.

2 So on that basis since there was no
3 kissing or breaking of a glass to actually enjoin
4 him as an expert, how can you claim -- just for
5 the future, philosophical question,
6 hypothetical -- how can you claim in the future
7 ACD when there was no -- if you know what I
8 mean -- no action to basically enjoin him or
9 commit him as an expert?

10 MS. STARGHILL: That, like the
11 comments I imagine you were going to make about
12 the complaint that didn't get adjudicated, if you
13 want specific answers to that, you would have to
14 write something in because we're not going to
15 respond to that. I mean, I don't have the
16 benefit of the files to review everything to make
17 a very informed response for you here.

18 MR. BURDICK: I do wish to thank
19 all --

20 MS. ALLEN: I could address the
21 general ACD issue if you'd like if that's --

22 MS. STARGHILL: I don't want to do
23 that without benefit of -- because I honestly --

24 CHAIRMAN MALTESE: Let Mr. Burdick,
25 if he decides to write something.

86

1 But just to follow-up on your
2 hypothetical, we all know that the prenuptial
3 agreements have to be in writing, right?

4 MR. BURDICK: Absolutely, but that
5 doesn't infer that you're married.

6 Again, I want to thank everyone so
7 very much.

8 CHAIRMAN MALTESE: Thank you.

9 Next?

10 Yes, sir, Mr. Paff?

11 MR. PAFF: My name is John Paff,
12 P-a-f-f. I live at 1605 Amwell Road, Somerset,
13 New Jersey.

14 I just want to comment on the issue
15 that was before Judge Brock, and I want to give
16 my pragmatic assessment of it.

17 The problem that I have is I make
18 records requests all over the state. And the
19 first think I do when I'm going to make a records
20 request say of Lavallette Borough, which is some
21 60 miles away from my home, is I look on their
22 website to see if there is an OPRA request form
23 for me to use. If there is, I will download that
24 form and I will dutifully fill it out completely
25 and submit it via fax or however to the

1 Custodian. I respect them enough to use their
2 form if they make it available to me reasonably.

3 If they don't have it on their
4 website or if they don't have a website at all, I
5 have taken the GRC's model state request form and
6 I have made it into a file that I can, using a
7 menu, I can change the name of the Custodian to
8 say, you know, Lavallette Borough or whatever it
9 is, and I use that form and send it to them. And
10 I have had instances where I will receive five
11 days, business days later, a fax or a letter from
12 the Custodian saying, Based on the GRC's
13 Executive or the Advisory Opinion you have to
14 fill out our form. And they'll send me their
15 form which in many cases, in some cases, nearly
16 identical to the form I sent them.

17 I understand why you don't want to
18 have -- and I think I understand the reason for
19 the Advisory Opinion is that it's hard sometimes,

20 especially if you embody a request within a
21 letterhead correspondence that the person doesn't
22 realize without really analyzing it, the
23 Custodian, I don't even know this is a request,
24 so I don't know if my seven days have started to
25 run.

88

1 But it seems rather dull for me for
2 a Custodian to say, We obviously recognize what
3 you sent is an OPRA request, but we have this
4 opinion that we're now going to use as a sword
5 instead of a shield. And we're going to say,
6 Here you go, Mr. Paff, here's some busy work for
7 you. Redo your request on our form and submit it
8 to us. And, yeah, we've extended now your seven
9 business days for these records to maybe 15
10 business days or whatever by the time we get to
11 this paperwork minuet.

12 MS. STARGHILL: Mr. Paff --

13 MR. PAFF: Yeah.

14 MS. STARGHILL: -- we routinely

15 inform Custodians during our outreach that they
16 should be accepting the model request form
17 because we tell the Requestors to use the model
18 request form if the agency doesn't have their
19 own.

20 MR. PAFF: Well, they do have their
21 own.

22 MS. STARGHILL: But I would love to
23 look --

24 MR. PAFF: Okay.

25 MS. STARGHILL: -- based on the

89

1 facts you presented through out prior decisions
2 to see if we have not ruled that our model
3 request form is sufficient.

4 MR. PAFF: But that would be --

5 MS. STARGHILL: And if we haven't, I
6 would love for you to submit a complaint.

7 MR. PAFF: Well, the idea, I feel if
8 they're on the right side of the ruling, I just

9 disagree with the ruling. So I will be happy to
10 submit a complaint the next time that happens.

11 MS. STARGHILL: Will you couple it
12 with an actual denial that will make it even
13 better.

14 MR. PAFF: Well, I would consider
15 the seven days, the seventh day -- and I know we
16 can't predict what is going to happen, but the
17 seventh day following their receipt of my
18 original request they should be giving me a
19 response not another form to fill out.

20 MS. STARGHILL: But we have to state
21 that and I have to go through the prior
22 decisions. So if there's a denial and we rule on
23 that, and we also rule -- I just went through
24 something similar with Mr. O'Shea trying to set
25 it up -- and we also rule that Custodians are

1 required to accept the model request form, the
2 GRC model request form when their form is not
3 readily available to the public and then that

4 puts everyone on notice.

5 MR. PAFF: Okay.

6 MS. STARGHILL: And we can fight to

7 that decision from now until -- but I'm not so

8 certain that there isn't already something out

9 there, I just can't think of it off the top of my

10 head.

11 MR. PAFF: Well, there is something

12 out there. I don't think it was referenced

13 within the Advisory Opinion.

14 MS. STARGHILL: Agreed.

15 MR. PAFF: So I think that if there

16 is something already out there, perhaps an

17 amendment to the Advisory Opinion to just mention

18 the fact that this is something we've already

19 decided would clarify a lot of things. I mean,

20 I'm not looking to force Custodians -- I'm

21 personally not looking to force them to take my

22 letterhead. I'm willing to accommodate them with

23 a form and I understand. But I feel that they're

24 using this as a sword instead of a shield and

25 they're being almost like they're giggling when

91

1 they're sending this form back, saying I bet you

2 this is really going to tick him off. And it's

3 just a little unsettling. I just thought within

4 the spirit of the Act intended. That's all I

5 have. Thank you.

6 CHAIRMAN MALTESE: Let us revisit

7 that because my recollection is we may have held

8 that the Requestor has the right to use our form

9 when the municipality or agency's form is not

10 readily available. But we may want to revisit

11 that phrase "readily available" because they

12 might have it right on their counter in

13 Lavallette and that's readily available if you

14 walked in. But Mr. Paff's point is I don't want

15 to drive 60 miles to mitigate a request because

16 they don't have it on the website, but only on

17 their counter. So let's take a look at that to

18 see if -- and of we haven't covered it, let's

19 find a way to cover it. Okay.

20 Yes, sir.

21 MR. O'SHEA: Martin O'Shea,
22 O-S-h-e-a; 10 Lake Shore Road East, Stockholm,
23 07460.

24 I didn't come -- I came prepared to
25 say something not necessarily about the forms,

92

1 but I've had John's experience and I think you
2 probably know that I've had John's experience as
3 well. But something -- something that Debra
4 said -- Ms. Allen said, excuse me, about the
5 court and the use of the official form is
6 something that there's another side to that coin
7 and I would like you to consider that.

8 I'd say that since July 7th of 2002
9 I probably have been in contact with a
10 conservative number of custodians and I would
11 place that at a hundred and I would think that it
12 possibly is even more. I have never once had a
13 custodian use the form to respond to me. They've

14 never -- now if you're going to say that a reason
15 to use the form is because custodians -- as the
16 judge apparently did, and I'm not here to argue
17 that case because I have something else I really
18 want to get to.

19 But the fact is, if the onus is on
20 me or anyone else in this room to use the form
21 and there's reasons to understand why that's so,
22 it would be most helpful to have -- and OPRA says
23 this, that the Custodian should responsible in
24 writing.

25 Many, many, many times since 2002, I

93

1 have gotten phone calls from custodians in
2 response to my requests and they try to spin
3 things. They try to avoid put -- a paper trail,
4 that's what they're trying to do they don't want
5 to their things on paper. And I'm going to give
6 you an example of what happened on Friday and
7 then I'd like to move on to why I'm here.
8 There's a town that I've made a request and in

9 their ordinance -- it's up in Sussex County where
10 I now live. And by ordinance they're charged for
11 an audio cassette of a meeting, a \$100.

12 MS. STARGHILL: Did you say a
13 hundred?

14 MR. O'SHEA: I said 100. And if the
15 tape runs more than one meeting, God bless them
16 all, but they give you the second tape for 25.
17 Now, I don't understand -- I've never understood
18 in OPRA the discount for volume. If you decide
19 on -- why are you laughing?

20 The fact is OPRA very clearly says
21 the actual cost of duplicating the record shall
22 be the cost of material and supplies. And where
23 it goes wrong is then it subsequently states a
24 maximum cost per paper. It doesn't say a bloody
25 word about audiotapes, compact disks, floppy

1 disks. I'm sure somebody's created something
2 since I've walked in this room for another way to

3 transmit things and that's all great, that's all

4 great.

5 So this woman clerk calls me on

6 Friday and we're talking and she's trying to get

7 this phone call to be her response to my request

8 and I'm not buying that, I'm simply not buying

9 that. I mentioned the \$100 tape and I said to

10 her, You know, that's really extreme. I was

11 being very nice actually. And she said, Oh,

12 well, we're putting them on compact disks and

13 it's 2.75. And I said, Well, 2.75, are they

14 expensive more than actual cost for a CD, right?

15 And then it comes down to it, they don't have an

16 ordinance doing that. They don't have an

17 ordinance that says they can do that. OPRA says

18 you can get around things that are a cost

19 endeavor as long as it's established in a local

20 ordinance.

21 Well, if you're going to make me use

22 their form, and I have no objection to do that, I

23 wish you would enforcing the custodians to use

24 the form to respond. Never mind the 100 bucks

25 because you'll be getting a complaint for that

95

1 fairly very soon.

2 CHAIRMAN MALTESE: I was just about

3 to ask.

4 MR. O'SHEA: No, no, you knew the

5 answer to that.

6 CHAIRMAN MALTESE: I did know the

7 answer.

8 MR. O'SHEA: Which is why I'm here.

9 I think that -- I was interested in

10 what you said about what the Executive Director

11 said about the cost of the cases that are going

12 around, and I happen to be involved with one or

13 two or three or more. I'll give you an example.

14 Tonight the Council of the Township

15 of West Milford will pass an ordinance

16 establishing actual cost for electronic providing

17 things on records on electronics, such as CD will

18 be a buck, audiocassette is 56 cents and so

19 forth. The Board of Education of West Milford.
20 Cassettes are 60 cents from the Board of Ed. and
21 I suggested that the Council should buy their
22 cassettes from the Board of Ed. because they're
23 cheaper apparently where they're getting it.

24 The fact is that people interpret
25 your form -- I'm talking about with your OPRA

96

1 request form, which only addresses paper copies.
2 It doesn't address anything other than paper
3 copies.

4 MS. STARGHILL: You're right.

5 MR. O'SHEA: I've worked out -- I'm
6 just tinkering a suggestion. And rather than
7 take up anymore time, I would like to pass it to
8 you before you leave and so that way you can
9 reject me in private rather than in public and it
10 will save me some embarrassment.

11 CHAIRMAN MALTESE: The object of
12 which "tinkering" is what, to talk about other,
13 meetings?

14 MR. O'SHEA: I have worked out what
15 I think is an acceptable starting point for your
16 model form. I have copies if you'd like to see
17 them.

18 CHAIRMAN MALTESE: You have what?

19 MR. O'SHEA: I have copies.

20 CHAIRMAN MALTESE: You're going to
21 pass them out?

22 MR. O'SHEA: Yeah, sure.

23 CHAIRMAN MALTESE: Not right now --

24 MR. O'SHEA: I'll will give them to
25 somebody.

97

1 CHAIRMAN MALTESE: I'd appreciate
2 it. Thank you.

3 MR. O'SHEA: And basically what I've
4 done is I put in some sort of wording that I'm
5 sure can be approved, but that people can get a
6 look and say, Well, there is -- just because
7 we're saying that you can charge 75 cents for a

8 single sheet of paper, it doesn't mean to say you

9 can charge \$100 for a damn tape of a meeting.

10 And I think that's always part of

11 one of the problems I have with the Government

12 Records Council, and you know that I'm very kind

13 and careful about the Council. But the fact is,

14 you know, you sit here at these meetings and I

15 know the people who respond to OPRA and we know

16 what happens in the Legislature when you put

17 those things in there.

18 But they didn't envision that the

19 Government Records Council would meet like this

20 what 15 people here and six of you are lawyers

21 and what you do is talk about these things and so

22 forth. And in this hot room today, I have to

23 tell you it was a little difficult staying awake

24 because I understand that those things have to be

25 done, but you're not dealing with things that are

98

1 impacting.

2 The woman I spoke to Friday, the

3 clerk I spoke with on Friday, I talked to her
4 about 75 cents for a single sheet of paper. And
5 she said to me, Well, we're just following what
6 OPRA allows or the Government Records Council
7 allows. That's not explained to them, that's not
8 clear to them and I think that's part of what you
9 should be doing.

10 MS. STARGHILL: It's not clear to us
11 which why of our own volition we reconsidered a
12 case deciding to uphold the Custodian charging
13 the enumerated rates. We're just waiting for the
14 Appellate Division to come down with more
15 specific direction because the statute itself
16 doesn't speak -- well, it's unclear.

17 MR. O'SHEA: It speaks well enough
18 for the lawyers that I've had to oppose in these
19 towns. I've gotten several towns to do this, I
20 just mentioned a couple.

21 MS. STARGHILL: But in order --

22 MR. O'SHEA: And they're reducing
23 it, but not in paper. I'm not going after -- I'm

24 sorry to interrupt you.

25 MS. STARGHILL: That's okay.

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1 MR. O'SHEA: I have a lawsuit
2 pending against West Milford in the Superior
3 Court about the cost of paper. So they did not
4 address that in the ordinance that they're
5 passing tonight.

6 MS. STARGHILL: There's an Appellate
7 Division decision coming out of an appeal of our
8 decision.

9 MR. O'SHEA: There is?

10 MS. STARGHILL: Yes, that's the
11 Windish. That's going to supercede even your --

12 MR. O'SHEA: I'm sure it will.

13 MS. STARGHILL: -- issue with the
14 trial division. That's what we were trying to
15 get at, a higher courts decision to provide
16 consistency throughout the state.

17 MR. O'SHEA: Well, I'll tell you
18 this, if they don't agree with me that it's

19 actual cost, then they're going to have a
20 problem.

21 Now I've taken too much of your
22 time. I'll give you this.

23 MS. STARGHILL: Could you give it to
24 Frank --

25 MR. O'SHEA: Yes, I will.

100

1 CHAIRMAN MALTESE: There's always
2 the Supreme Court.

3 MR. O'SHEA: Yes, there is, but I
4 got turned down there, too.

5 CHAIRMAN MALTESE: Anyone else care
6 to be heard?

7 I'll entertain a motion to adjourn.

8 MS. KOVACH: So moved.

9 CHAIRMAN MALTESE: Second?

10 MS. BERG TABAKIN: Second.

11 CHAIRMAN MALTESE: Thank you very
12 much ladies and gentlemen.

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15 (HEARING CONCLUDED AT 12:10 P.M.)

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1 CERTIFICATE

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3 I, LINDA P. CALAMARI, a Professional

4 Reporter and Notary Public of the State of New

5 Jersey, do hereby certify the foregoing to be a

6 true and accurate transcript of my original

7 stenographic notes taken at the time and place

8 hereinbefore set forth.

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LINDA P. CALAMARI

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16 Dated: OCTOBER 19, 2007.

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