

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

4  
5

6 PUBLIC SESSION

7

8 TRANSCRIPT OF PROCEEDINGS

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10

11

12 AT: DEPARTMENT OF COMMUNITY AFFAIRS

13 101 South Broad Street - Room 129

14 Trenton, New Jersey 08625-0819

15 DATE: WEDNESDAY, FEBRUARY 27, 2008

16 TIME: 10:00 A.M. TO 11:27 A.M.

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19

20 GUY J. RENZI & ASSOCIATES

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1 C O U N C I L M E M B E R S :

2 ROBIN BERG TABAKIN, Chairperson

3 KATHRYN FORSYTH (designee of Commissioner

4 Lucille Davy, Department

5 of Education)

6 JANICE L. KOVACH (designee of Acting Commissioner

7 Joseph V. Doria, Jr., Department

8 of Community Affairs)

9

10 C O U N C I L P R O F E S S I O N A L S :

11 CATHERINE STARGHILL, ESQ., Executive Director

12 DEBRA A. ALLEN, ESQ., D.A.G.

13 KARYN GORDON, ESQ.

14 MICHELLE DUDAS, ESQ.

15

16 FRANK F. CARUSO, Case Manager

17 DARA LOWNIE, Case Manager

18 TIFFANY L. MAYERS, Case Manager

19 JYOTHI PAMIDIMUKKALA, Case Manager

20 JOHN E. STEWART, ESQ., Case Manager

21

22 BRIGITTE HAIRSTON, Council Secretary

23

24

25

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3 Call to Order                   5

4 Meeting Notice               6

5 Roll Call                      7

6 CLOSED SESSION:

7    Closed Session Resolution       7

8 APPROVAL OF MINUTES:

9    November 28, 2007-Closed Session Minutes 9

10   November 28, 2007-Open Session Transcript 9

11   January 30, 2008-Closed Session Minutes 10

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13 Cases Scheduled for Adjudication\*

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15       (TAKEN AS ONE MOTION.)

16    1. Michael Sanfilippo v. Hightstown Police

17       Department (Mercer)(2007-154)       11

18    2. Richard Rivera v. NJ Department of

19       Health & Senior Services (2007-275)   11

20    3. Michael Godoy v. City of Perth Amboy

21       (Middlesex)(2007-276)               11

22    4. U'Bay Lumumba v. Essex County

23       Prosecutor's Office (2008-6)       11

24    5. Alfred M. Sallie, Sr. v. NJ Department

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6 B. INDIVIDUAL COMPLAINT COUNCIL ADJUDICATION:

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8 Manchester (2006-130) 12

9 2. Richard Rivera v. Guttenberg

10 Police Department (2006-154) 17

11 3. Joseph Murray v. Township of

12 Warren (2006-169) 21

13 4. Laurel Kornfeld v. Borough of

14 Highland Park (Middlesex)(2007-109) 23

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16 of Chosen Freeholders (2007-115) 26

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1 CHAIRPERSON TABAKIN: Welcome to the  
2 February 2008 meeting. Sorry the meeting's

3 running a little late.

4 Could we all rise for the Pledge of

5 Allegiance.

6 (All stand in Pledge of Allegiance.)

7 CHAIRPERSON TABAKIN: This meeting

8 was called pursuant to the provisions of the Open

9 Public Meetings Act. Notices of this meeting

10 were faxed to the Newark Star-Ledger, Trenton

11 Times, Courier-Post in Cherry Hill, the Secretary

12 of State, and e-mailed to the New Jersey

13 Foundation for Open Government on February 25th,

14 2008. Proper notice having been given, the

15 Secretary is directed to include the statement in

16 the minutes of the meeting.

17 In the event of a fire alarm

18 activation, please exit the building following

19 the exit signs located within the conference

20 rooms and throughout the building. The exit

21 signs will direct you to the two fire evacuation

22 stairways located in the building. Upon leaving,

23 please follow the fire wardens which can be

24 located by their yellow helmets. Please follow

25 the flow of traffic away from the building.

7

1 Roll call, please.

2 MS. HAIRSTON: Robin Berg Tabakin?

3 CHAIRPERSON TABAKIN: Here.

4 MS. HAIRSTON: Janice Kovach?

5 MS. KOVACH: Here.

6 MS. HAIRSTON: Kathryn Forsyth?

7 MS. FORSYTH: Here.

8 MS. HAIRSTON: Dave Fleisher is not

9 present. He's not here.

10 CHAIRPERSON TABAKIN: Now we're

11 going to go into closed session.

12 WHEREAS, N.J.S.A 10:4-12 permits a

13 public body to go into closed session during a

14 public meeting; and

15 WHEREAS, the Government Records

16 Council has deemed it necessary to go into closed

17 session to discuss certain matters which are

18 exempt from the public under the Open Public

19 Meetings Act; and

20 WHEREAS, the regular meeting of the

21 Council will reconvene at the conclusion of the

22 closed meeting;

23 NOW, THEREFORE, BE IT RESOLVED, that

24 the Council will convene in closed session to

25 receive legal advice and discuss anticipated

8

1 litigation in which the Council may become a

2 party pursuant to N.J.S.A. 10:4-12.b(7) in the

3 follow matters:

4 Ali Morgano v. Essex County

5 Prosecutor's Office (2007-156).

6 BE IT FURTHER RESOLVED, that the  
7 Council will disclose to the public the matters  
8 discussed or determined in closed session as soon  
9 as possible after final decisions are issued in  
10 the above case.

11 Could I have a motion, please?

12 MS. FORSYTH: So moved.

13 CHAIRPERSON TABAKIN: Second?

14 MS. KOVACH: Second.

15 CHAIRPERSON TABAKIN: Okay, we are  
16 now in closed session. For a short period of  
17 time.

18 (Whereupon, the Council goes into  
19 closed session. The time is 10:05 a.m.

20 (Back into open session. The time  
21 is 10:22 a.m.)

22 CHAIRPERSON TABAKIN: Okay, could I  
23 a motion, please, to go back into open  
24 session?

25 MS. FORSYTH: So moved.

9

1 MS. KOVACH: Second.

2 CHAIRPERSON TABAKIN: Roll call.

3 MS. HAIRSTON: Robin Berg Tabakin?

4 CHAIRPERSON TABAKIN: Yes.

5 MS. HAIRSTON: Janice Kovach?

6 MS. KOVACH: Yes.

7 MS. HAIRSTON: Kathryn Forsyth?

8 MS. FORSYTH: Yes.

9 CHAIRPERSON TABAKIN: Now we are  
10 going to approve minutes.

11 Now the November 28th closed session  
12 minutes we still do not have a quorum for that.

13 November 28, 2007 open session  
14 minutes, transcript. Could I have a motion to  
15 approve this?

16 MS. FORSYTH: So moved.

17 CHAIRPERSON TABAKIN: Second?

18 MS. KOVACH: Second.

19 CHAIRPERSON TABAKIN: Roll call.

20 MS. HAIRSTON: Robin Berg Tabakin?

21 CHAIRPERSON TABAKIN: Yes.

22 MS. HAIRSTON: Janice Kovach?

23 MS. KOVACH: Yes.

24 MS. HAIRSTON: Kathryn Forsyth?

25 MS. FORSYTH: Yes.

10

1 CHAIRPERSON TABAKIN: And for the  
2 record, I did read the transcript.

3 All right, January 30, 2008 closed  
4 session minutes. May I have a motion, please?

5 MS. FORSYTH: So moved.

6 MS. KOVACH: Second.

7 CHAIRPERSON TABAKIN: Roll call.  
8 MS. HAIRSTON: Robin Berg Tabakin?  
9 CHAIRPERSON TABAKIN: Yes.  
10 MS. HAIRSTON: Janice Kovach?  
11 MS. KOVACH: Yes.  
12 MS. HAIRSTON: Kathryn Forsyth?  
13 MS. FORSYTH: Yes.  
14 CHAIRPERSON TABAKIN: January 30,  
15 2008 open session transcript.  
16 MS. KOVACH: So moved.  
17 MS. FORSYTH: Second.  
18 CHAIRPERSON TABAKIN: Roll call.  
19 MS. HAIRSTON: Robin Berg Tabakin?  
20 CHAIRPERSON TABAKIN: Yes.  
21 MS. HAIRSTON: Janice Kovach?  
22 MS. KOVACH: Yes.  
23 MS. HAIRSTON: Kathryn Forsyth?  
24 MS. FORSYTH: Yes.  
25 CHAIRPERSON TABAKIN: Now I think

11

1 we'll do the Administrative Complaint Council  
2 Adjudications. Do I have a motion, please, to  
3 accept those?  
4 MS. FORSYTH: So moved.  
5 MS. KOVACH: Second.  
6 (Taken as one motion.)  
7 CHAIRPERSON TABAKIN: Roll call.

8 MS. HAIRSTON: Robin Berg Tabakin?

9 CHAIRPERSON TABAKIN: Yes.

10 MS. HAIRSTON: Janice Kovach?

11 MS. KOVACH: Yes.

12 MS. HAIRSTON: Kathryn Forsyth?

13 MS. FORSYTH: Yes.

14 CHAIRPERSON TABAKIN: And there are

15 four of those cases.

16 MS. STARGHILL: Actually, there's

17 six. John Stewart was the "Little Engine that

18 Could" this month. They kept sending in having

19 dispositions.

20 CHAIRPERSON TABAKIN: Do I have a

21 copy of the revised?

22 MS. STARGHILL: You should in your

23 folder you got this morning.

24 CHAIRPERSON TABAKIN: I do. I stand

25 corrected, there are six.

12

1 Okay. Now we'll go into the

2 Individual Complaint Council Adjudications.

3 All right, Robert Vessio v. Township

4 of Manchester (2006-130).

5 MR. CARUSO: The Executive Director

6 respectfully recommends the Council find that.

7 1. Because the Custodian failed to

8 provide a written response to the Complainant's

9 June 15, 2006 OPRA request within the statutorily  
10 mandated seven business days either granting  
11 access, denying access, requesting an extension  
12 or seeking clarification of the request, the  
13 Complainant's OPRA request was deemed denied.  
14 Therefore, the Custodian violated N.J.S.A.  
15 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

16 2. Requests for records made to the  
17 Judiciary branch of New Jersey state government  
18 are not within the Council's authority to  
19 adjudicate. N.J.S.A. 47:1A-7. Because the  
20 requested tape recordings of the municipal court  
21 proceedings were made, maintained and kept on  
22 file by the Municipal Court Administrator, the  
23 Custodian should have provided a written response  
24 to the Complainant's OPRA request stating that  
25 she possessed no records responsive to this

13

1 request. See N.J.S.A. 47:1A-5.g. and N.J.S.A.  
2 47:1A-5.i.

3 3. Because the request for names,  
4 addresses, and telephone numbers of individuals  
5 relevant to the adjudication of Summons No.  
6 MTC019320 is an invalid OPRA request pursuant to  
7 MAG Entertainment, LLC v. Division of Alcoholic  
8 Beverage Control, 375 N.J. Super. 534 (App. Div.  
9 2005), and because the request for attorney notes

10 and call of witnesses is a request for records  
11 which are exempt from the definition of a  
12 government record under N.J.S.A. 47:1A-1.1, the  
13 Custodian did not unlawfully deny access to these  
14 records.

15 4. The evidence of record further  
16 indicates that access to the requested officers'  
17 notes and reports regarding the incident that led  
18 to Summons No. MTC019320 was provided on August  
19 2, 2007. The Custodian, therefore, did provide  
20 access to these records, although such access was  
21 not within the statutorily mandated seven  
22 business days.

23 5. With regard to the Complainant's  
24 request to inspect the ordinance, certification  
25 and resolution in reference to Summons No.

14

1 MTC0193 -- and that should be a 20 -- the  
2 Custodian certified that no certification or  
3 resolution exists because the motor vehicle  
4 incident which gave rise to the summons occurred  
5 on a county road.

6 The Custodian further certified that  
7 the Police Department provided a copy of the  
8 relevant ordinance on August 2, 2007. The  
9 Custodian, therefore, did provide access to these  
10 records, although such access was not within the

11 statutorily mandated seven business days.

12           6. As previously discussed herein,

13 the availability of records pursuant to discovery

14 or other court rules does not preclude the

15 availability of the same records pursuant to

16 OPRA. *Mid-Atlantic Recycling Technologies, Inc.,*

17 *v. City of Vineland*, 222 F.R.D. 81 (Div. NJ

18 2004). Therefore, the Custodian unlawfully

19 denied access to the disposition of the Municipal

20 Court matter adjudicating Summons No. MTC109320.

21 The Custodian should, therefore provide access to

22 the requested records.

23           The Custodian shall disclose the

24 requested records with appropriate redactions, if

25 any, and a redaction index detailing the general

15

1 nature of the information redacted and the lawful

2 basis for such redactions as required by N.J.S.A.

3 47:1A-6 and 47:1A-5.g.

4           No. 7. The Custodian shall comply

5 with Item No. 6 above within five business days

6 from receipt of the Council's Interim Order and

7 simultaneously provide certified confirmation of

8 compliance, in accordance with N.J. Court Rule

9 1:4-4, to the Executive Director.

10           8. Because the Complainant failed

11 to respond to the Custodian's request for  
12 clarification of the records sought, the  
13 Custodian did not unlawfully deny an access to  
14 the requested records. See Caggiano v. Borough  
15 of Stanhope, GRC Complaint No. 2006-226 (January  
16 2006).

17 9. Because N.J.S.A. 47:1A-10  
18 exempts from disclosure personnel or pension  
19 records, but permits disclosure of certain  
20 limited information, including "an individual's  
21 name, title, position, salary, payroll record,  
22 length of service, date of separation and the  
23 reason therefor, and the amount and type of any  
24 pension received," awards and commendations are  
25 personnel records pursuant to N.J.S.A. 47:1A-10

16

1 and do not fall within any of the types of  
2 records permitted to be disclosed. Therefore,  
3 the Custodian did not unlawfully deny access to  
4 these records.

5 10. Records pertaining to  
6 disciplinary actions are personnel records which  
7 are exempt from disclosure pursuant to N.J.S.A.  
8 47:1A-10. Moreover, to the extent that no  
9 records exist which are responsive to the  
10 Complainant's request for records of OPRA  
11 complaints filed within the last ten years, the

12 Custodian has not unlawfully denied access to  
13 such records. See Pusterhofer v. New Jersey  
14 Department of Education, GRC Complaint No.  
15 2005-49 (July 2005).

16 11. The Council defers analysis and  
17 determination of whether the Custodian knowingly  
18 and willfully violated OPRA and unreasonably  
19 denied access under the totality of the  
20 circumstances pending the Custodian's compliance  
21 with the Council's Interim Order in this matter.

22 CHAIRPERSON TABAKIN: Any questions  
23 or comments?

24 Could I have a motion to approve?

25 MS. KOVACH: So moved.

17

1 CHAIRPERSON TABAKIN: Second?

2 MS. FORSYTH: Second.

3 CHAIRPERSON TABAKIN: Roll call?

4 MS. HAIRSTON: Robin Berg Tabakin?

5 CHAIRPERSON TABAKIN: Yes.

6 MS. HAIRSTON: Janice Kovach?

7 MS. KOVACH: Yes.

8 MS. HAIRSTON: Kathryn Forsyth?

9 MS. FORSYTH: Yes.

10 CHAIRPERSON TABAKIN: Richard Rivera  
11 v. Guttenberg Police Department (2006-154).

12 MS. GORDON: The Executive Director

13 respectfully recommends that the Council find  
14 that the complaint should be referred to the  
15 Office of Administrative Law for a determination  
16 of whether the Custodian knowingly and willfully  
17 violated OPRA and unreasonably denied access  
18 under the totality of the circumstances because:

19           1. Although the Custodian submitted  
20 a response to the Council's October 31st, 2007  
21 Interim Order on December 17th, 2007, within the  
22 30-day extension of time, the Custodian's  
23 response was insufficient to comply with the  
24 Council's Interim Order. The Custodian failed to  
25 provide the Council with a redaction index

18

1 specifically identifying each redacted telephone  
2 call and a legal basis therefor as required in  
3 the October 31, 2007 Interim Order.

4           2. Because the Custodian failed to  
5 provide the Council with a redaction index  
6 specifically identifying each redacted telephone  
7 call and the legal basis therefor, the Custodian  
8 has failed to establish that redaction of the  
9 recordings requested by Complainant was  
10 necessary.

11           3. Because the Custodian did not  
12 provide the Complainant with an opportunity to  
13 review the proposed special service charge and

14 object to the charge prior to it being incurred,  
15 the Custodian may not assess a special service  
16 charge for these functions. N.J.S.A. 47:1A-5.c.

17 4. The Custodian may not charge the  
18 proposed special service charge of \$2,099.41  
19 because it is not reasonable pursuant to N.J.S.A.  
20 47:1A-5.d. Of the special service charge  
21 assessed, only \$973.92, for the eight hours to  
22 listen to the 911 calls and the six hours to  
23 export the audio files from the selected dates  
24 and convert them into a .wav format, is  
25 reasonable.

19

1 However, because the Custodian did  
2 not provide the Complainant with an opportunity  
3 to review and object to the special service  
4 charge prior to it being incurred as is required  
5 by N.J.S.A. 47:1A-5.c., the Custodian may only  
6 charge the Complainant for the actual cost of the  
7 CD-Rom on which the requested telephone calls --  
8 that should be "were recorded." See Libertarian  
9 Party of Central New Jersey v. Murphy, 384 N.J.  
10 Super. 136, 139 (App. Div. 2006.)

11 5. This complaint should be  
12 referred to the Office of Administrative Law for  
13 a determination of whether the Custodian  
14 knowingly and willfully violated OPRA and

15 unreasonably denied access under the totality of  
16 the circumstances.

17 CHAIRPERSON TABAKIN: Could I have a  
18 motion to approve as amended?

19 MS. STARGHILL: It's not an  
20 amendment, really --

21 CHAIRPERSON TABAKIN: Not even just  
22 the words?

23 MS. STARGHILL: Yeah, just edit.

24 CHAIRPERSON TABAKIN: Okay.

25 MS. FORSYTH: I just have one

20

1 comment.

2 I think that this should be one of  
3 the decisions that we do publicize. There are  
4 many agencies out there that have purchased  
5 technology that they themselves cannot use and  
6 they have to import consultants to just work the  
7 technology to provide the simplest of -- to  
8 respond to the simplest of OPRA request and to  
9 undertake the simplest tasks. This is going to  
10 cost them an enormous amount of money when  
11 they've got to provide information to the public.

12 So we should really let people know  
13 that we're ruling this way, that they're going to  
14 have to eat those charges unless they have  
15 trained somebody in their own department or

16 agency to at least operate the technology to  
17 produce the simplest of OPRA requests.  
18 MS. STARGHILL: I can transmit a  
19 brief, you know, synopsis and a link to this  
20 decision on our website once it's published. And  
21 I'll do that over "gov. connect" which will reach  
22 the municipal and I believe county records  
23 custodian, and also through the state records  
24 custodians group. I'll have to investigate what  
25 other avenues I can --

21

1 MS. FORSYTH: If you send it over  
2 the Department of Education, we can circulate it  
3 through our --

4 MS. STARGHILL: Can I send it to  
5 you?

6 MS. FORSYTH: You certainly can.

7 MS. STARGHILL: Good.

8 MS. FORSYTH: We can circulate it  
9 through our distribution system.

10 MS. STARGHILL: Awesome.

11 CHAIRPERSON TABAKIN:

I have  
12 motion to accept this?

13 MS. FORSYTH: So moved.

14 MS. KOVACH: Second.

15 CHAIRPERSON TABAKIN: Roll call.

Could

16 MS. HAIRSTON: Robin Berg Tabakin?

17 CHAIRPERSON TABAKIN: Yes.

18 MS. HAIRSTON: Janice Kovach?

19 MS. KOVACH: Yes.

20 MS. HAIRSTON: Kathryn Forsyth?

21 MS. FORSYTH: Yes.

22 CHAIRPERSON TABAKIN: Joseph Murray

23 v. Township of Warren (2006-169)

24 MR. CARUSO: The Executive Director

25 respectfully recommends the Council find that:

22

1 1. While the Custodian's Counsel  
2 responded in writing to the Complainant's August  
3 14, 2006 OPRA request in a timely manner pursuant  
4 to N.J.S.A. 47:1A-5.g., the Custodian  
5 inaccurately cited to N.J.S.A. 10:4-12(b)(5) as  
6 the reason for denial because OPMA only works to  
7 exempt closed session minutes (and not in their  
8 entirety). However, the Custodian Counsel's  
9 denial of access was lawful pursuant N.J.S.A.  
10 47:1A-5.i. because the requested records are  
11 exempt from disclosure pursuant to N.J.S.A.  
12 47:1A-1.1 as information which, if disclosed,  
13 would give an advantage to competitors or  
14 bidders.

15 2. The Custodian Counsel's  
16 assertion that a custodian does not need to

17 supply a requestor with a detailed denial is  
18 inaccurate pursuant to N.J.S.A. 47:1A-5.g. and  
19 N.J.S.A. 47:1A-6. In order to comply with OPRA,  
20 the statute is clear that a denial must be  
21 specific and must be sufficient to prove that a  
22 custodian's denial is authorized by OPRA.

23 3. The Complainant failed to  
24 achieve the desired result of disclosure of a  
25 requested record since the records are exempt

23

1 from disclosure because they contain information  
2 which, if disclosed, would give an advantage to  
3 competitors or bidders pursuant to N.J.S.A.  
4 47:1A-1.1. The Complainant, therefore, is not  
5 entitled to prevailing party attorney's fees.  
6 See Teeters v. DYFS, 387 N.J. Super. 423 (App.  
7 Div. 2006) and N.J. Builders Association v. N.J.  
8 Council on Affordable Housing, 390 N.J. Super.  
9 166, 175 (App. Div. 2007).

10 CHAIRPERSON TABAKIN: Could I have a  
11 motion?

12 MS. KOVACH: So moved.

13 MS. FORSYTH: Second.

14 CHAIRPERSON TABAKIN: Roll call,  
15 please.

16 MS. HAIRSTON: Robin Berg Tabakin?

17 CHAIRPERSON TABAKIN: Yes.

18 MS. HAIRSTON: Janice Kovach?  
19 MS. KOVACH: Yes.  
20 MS. HAIRSTON: Kathryn Forsyth?  
21 MS. FORSYTH: Yes.  
22 CHAIRPERSON TABAKIN: Laurel  
23 Kornfeld v. Borough of Highland Park  
24 (Middlesex)(2007-109).  
25 MR. CARUSO: The Executive Director

24

1 respectfully recommends the Council find that:

2 1. In considering the meaning of a  
3 public agency as explained by the court in the  
4 Lafayette Yard cases, and all the document  
5 submissions of the Custodian, HPTV is not a  
6 public agency pursuant to N.J.S.A. 47:1A-1.1  
7 Therefore, HPTV is not subject to the provisions  
8 of OPRA and not required to respond to OPRA  
9 requests for records.

10 2. Because HPTV is not a public  
11 agency and is therefore not subject to the  
12 provisions of OPRA, the Custodian did not  
13 unlawfully deny access to the requested record  
14 because the meeting tape was in the possession of  
15 HPTV. The Custodian has, therefore, borne her  
16 burden of proof that the denial of access was  
17 authorized by law pursuant to OPRA.

18 However, the Custodian has violated

19 N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. for  
20 failing to respond in writing granting access,  
21 denying access, seeking clarification or  
22 requesting an extension of time within the  
23 statutorily mandated seven business days.

24 3. In this complaint, although the  
25 Custodian violated N.J.S.A. 47:1A-5.g. and

25

1 N.J.S.A. 47:1A-5.i., there -- should be "is" --  
2 there is no unlawful denial of access because  
3 HPTV is not a public agency subject to OPRA and  
4 the Complainant was also granted access to the  
5 requested record on May 31, 2007.

6 Based on the evidence of record,  
7 therefore, it is concluded that the Custodian's  
8 actions do not rise to the level of a knowing and  
9 willful violation of OPRA and unreasonable denial  
10 of access under the totality of the  
11 circumstances.

12 However, the Custodian's actions  
13 appear to be negligent and heedless since she is  
14 vested with the legal responsibility of granting  
15 and denying access in accordance with the law.

16 CHAIRPERSON TABAKIN: Are there any  
17 questions?

18 Can I have a motion, please?

19 MS. FORSYTH: So moved.

20 MS. KOVACH: Second.  
21 CHAIRPERSON TABAKIN: Roll call.  
22 MS. HAIRSTON: Robin Berg Tabakin?  
23 CHAIRPERSON TABAKIN: Yes.  
24 MS. HAIRSTON: Janice Kovach?  
25 MS. KOVACH: Yes.

26

1 MS. HAIRSTON: Kathryn Forsyth?  
2 MS. FORSYTH: Yes.  
3 CHAIRPERSON TABAKIN: Mike Mathes v.  
4 Burlington County Board of Chosen Freeholders  
5 (2007-115).  
6 MS. LOWNIE: The Executive Director  
7 respectfully recommends the Council find that  
8 this complaint should be dismissed because the  
9 Complainant has voluntarily withdrawn this  
10 complaint in a letter to the GRC dated February  
11 4, 2008.  
12 CHAIRPERSON TABAKIN: Motion?  
13 MS. KOVACH: So moved.  
14 CHAIRPERSON TABAKIN: Second?  
15 MS. FORSYTH: Second.  
16 CHAIRPERSON TABAKIN: Roll call.  
17 MS. HAIRSTON: Robin Berg Tabakin?  
18 CHAIRPERSON TABAKIN: Yes.  
19 MS. HAIRSTON: Janice Kovach?  
20 MS. KOVACH: Yes.

21 MS. HAIRSTON: Kathryn Forsyth?

22 MS. FORSYTH: Yes.

23 CHAIRPERSON TABAKIN: Michelle Ewing

24 v. NJ Department of Law & Public Safety, Division

25 of Consumer Affairs (2007-155).

27

1 MS. MAYERS: The Executive Director

2 respectfully recommends the Council find that:

3 1. Because the Custodian certified

4 that the letter of Assurance of Voluntary

5 Compliance is considered advisory by the Board,

6 the Council should conduct an in camera review of

7 the AVC letter to determine if said document or

8 portions therein are exempt from disclosure as

9 advisory, consultative or deliberative material.

10 No. 2. The Custodian must deliver

11 to the Council in a sealed envelope six copies of

12 the requested unredacted documents (see No. 1

13 above), a document or redaction index detailing

14 the documents and/or each redaction asserted and

15 the Custodian's legal certification under penalty

16 of perjury that the documents provided are the

17 documents requested by the Council for the in

18 camera no later than five business days from the

19 distribution date of the Council's Interim Order.

20 No. 3. The Council defers analysis

21 of whether the Custodian knowingly and willfully

22 violated OPRA and unreasonably denied access  
23 under the totality of the circumstances pending  
24 the Custodian's compliance with the Council's  
25 Interim Order.

28

1 CHAIRPERSON TABAKIN: Can I have a  
2 motion, please?

3 MS. KOVACH: So moved.

4 CHAIRPERSON TABAKIN: Second?

5 MS. FORSYTH: Second.

6 CHAIRPERSON TABAKIN: Roll call.

7 MS. HAIRSTON: Robin Berg Tabakin?

8 CHAIRPERSON TABAKIN: Yes.

9 MS. HAIRSTON: Janice Kovach?

10 MS. KOVACH: Yes.

11 MS. HAIRSTON: Kathryn Forsyth?

12 MS. FORSYTH: Yes.

13 CHAIRPERSON TABAKIN: Major Tillery

14 v. NJ Department of Corrections (2007-155).

15 MR. STEWART: The Executive Director

16 respectfully recommends that the Council find

17 that:

18 No. 1. Because the records

19 requested in Item No. 1 comprising all records

20 used to place the Complainant in the MCU are not

21 readily available and will require research and

22 correlation of records by the Custodian in order

23 to fulfill the Complainant's OPRA request, and  
24 because OPRA does not require custodians to  
25 research files to discern which records may be

29

1 responsive to a request, the Custodian has met  
2 her burden of proof pursuant to N.J.S.A. 47:1A-6  
3 that access to these records was not unlawfully  
4 denied pursuant to the court's decision in *MAG*  
5 *Entertainment, LLC v. Division of Alcoholic*  
6 *Beverage Control*, 375 N.J. Super. 534 (App. Div.  
7 2005).

8 No. 2. Because Items No. 2 through  
9 No. 6, comprising all disciplinary records do not  
10 identify specific records and require the  
11 Custodian to research her files for records  
12 containing the Complainant's name and for records  
13 of New Jersey State Prison inmates with more than  
14 15 misconducts; and because under OPRA, agencies  
15 are required to disclose only identifiable  
16 government records not otherwise exempt and the  
17 Custodian is not required to do research to  
18 provide such records; the Custodian has met her  
19 burden of proof under N.J.S.A. 47:1A-6 that  
20 access to these records was not unlawfully denied  
21 pursuant to the court's decision in *MAG*  
22 *Entertainment, LLC v. Division of Alcoholic*  
23 *Beverage Control*, 375 N.J. Super. 534 (App. Div.

24 2005).

25 No. 3. Because the records

30

1 requested in Item No. 6, comprising all data  
2 records of any inmate who has more than fifteen  
3 misconducts and remains in New Jersey State  
4 Prison, are prohibited from release because an  
5 inmate is not permitted to inspect, examine or  
6 obtain copies of documents concerning any other  
7 inmate pursuant to the Department of Correction's  
8 proposed rule set forth in N.J.A.C.  
9 10A:22-3.2(b), continued in effect pursuant to  
10 Executive Orders No. 21 and No. 26 (McGreevey),  
11 they are exempt from disclosure pursuant to  
12 N.J.S.A. 47:1A-9.a. and the court's decision in  
13 Newark Morning Ledger Co., Publisher of the  
14 Star-Ledger v. Division of the State Police of  
15 the New Jersey Department of Law and Public  
16 Safety. Law Division - Mercer County, Docket No.  
17 MER-L-1090-05 (July 2005).

18 CHAIRPERSON TABAKIN: Okay. Any  
19 questions on this?

20 May have a motion, please?

21 MS. FORSYTH: So moved.

22 MS. KOVACH: Second.

23 CHAIRPERSON TABAKIN: Roll call.

24 MS. HAIRSTON: Robin Berg Tabakin?

25 CHAIRPERSON TABAKIN: Yes.

31

1 MS. HAIRSTON: Janice Kovach?

2 MS. KOVACH: Yes.

3 MS. HAIRSTON: Kathryn Forsyth?

4 MS. FORSYTH: Yes.

5 CHAIRPERSON TABAKIN: Ali Morgano v.

6 Essex County Prosecutor's Office (2007-156).

7 MR. STEWART: The Executive Director

8 respectfully recommends that the Council find

9 that:

10 No. 1. Because the Custodian failed

11 to respond in writing to the Complainant's OPRA

12 request granting access, denying access, seeking

13 clarification or requesting an extension of time

14 within the statutorily mandated seven business

15 days, the Custodian violated N.J.S.A. 47:1A-5.g.

16 and N.J.S.A. 47:1A-5.i. resulting in a "deemed"

17 denial of the Complaint's OPRA requests as

18 consistent with the Council's decision in Tucker

19 Kelley v. Township of Rockaway, GRC Complaint No.

20 2007-11 (October 2007).

21 No. 2. Because the records request

22 in Item No. 1 comprising two entire prosecutor's

23 office files is overbroad and of the nature of a

24 blanket request from a class of various documents

25 rather than a request for a specific government

1 record, and because OPRA does not require  
2 custodians to research files to discern which  
3 records may be responsive to a request, the  
4 Custodian has met the Custodian's burden of proof  
5 that access to these records was not unlawfully  
6 denied pursuant to the Superior Court decisions  
7 in *MAG Entertainment v. Div. Of ABC*, 375 N.J.  
8 Super. 534 (App. Div. 2005), *Bent v. Township of*  
9 *Stafford*, 381 N.J. Super. 30 (App. Div. 2005) and  
10 the Council's decision in *Asarnow v. Department*  
11 *of Labor and Workforce Development*, GRC Complaint  
12 No. 2006-24 (May 2006).

13           No. 3. Because the Custodian  
14 certified that there are no records responsive to  
15 the OPRA request that exist for Items numbered 4,  
16 5, 6, 8, 9, 11 and 13, there was no unlawful  
17 denial of access pursuant to N.J.S.A. 47:1A-1.1.  
18 See *Pusterhofer v. NJ Department of Education*,  
19 GRC Complaint No. 2005-49 (July 2005).

20           No. 4. The record requested in Item  
21 No. 3, a police arrest report, is required to be  
22 maintained or kept on file by the Division of  
23 Archives and Records Management, therefore it is  
24 a government record subject to disclosure  
25 pursuant to N.J.S.A. 47:1A-1.1. Further, this

1 record contains certain information such as the  
2 arrested person's name, age, residence,  
3 occupation, martial status, time and place of  
4 arrest, charges, arresting agency, and other  
5 information which must be disclosed pursuant to  
6 N.J.S.A. 47:1A-3.b.

7           Accordingly, this record must be  
8 released with appropriate redactions. Because  
9 the Council had previously held that an arrest  
10 report was a criminal investigatory record  
11 pursuant to N.J.S.A. 47:1A-1.1., and therefore  
12 was not disclosable, the Custodian did not act  
13 improperly by failing to disclose this record at  
14 this time.

15           No. 5. The Custodian shall comply  
16 with Item No. 4 above within five business days  
17 from receipt of the Council's Interim Order with  
18 appropriate redactions, including a detailed  
19 document index explaining the lawful basis for  
20 each redaction, and simultaneously provide  
21 certified confirmation of compliance, in  
22 accordance with N.J. Court Rule 1:4-4, to the  
23 Executive Director.

24           No. 6. N.J.A.C. 13:59-1.6(c),  
25 applicable to OPRA pursuant to N.J.S.A.

1 47:1A-9.a., prohibits public servants from  
2 permitting any other person to access criminal  
3 history information. Therefore, the Custodian  
4 lawfully denied the Complainant access to Item  
5 No. 7, a criminal history report.

6 No. 7. Because it is unclear what,  
7 if any, OPRA exemptions may apply to Item No. 12,  
8 an administrative dismissal document, the GRC  
9 must conduct an in camera review to decide  
10 whether or not the Custodian has lawfully denied  
11 access to this record.

12 No. 8. The Custodian must deliver  
13 to the Council in a sealed envelope six copies of  
14 the requested unredacted document (see No. 7  
15 above), a document or redaction index, as well as  
16 a legal certification from the Custodian, in  
17 accordance with N.J. Court Rule 1:4-4, that the  
18 document provided is the document requested by  
19 the Council for the in camera inspection. Such  
20 deliver must be received by the GRC within five  
21 business days from receipt of the Council's  
22 Interim Order.

23 No. 9. Because the records  
24 requested in Items numbered 2 and 10, police  
25 department continuation reports and incident

1 reports respectively, are criminal investigatory  
2 records pursuant to N.J.S.A. 47:1A-1.1., the  
3 Superior Court's decision in Daily Journal v.  
4 Police Department of the City of Vineland, 351  
5 N.J. Super. 110 (App. Div. 2002) and the  
6 Council's decisions in Nance v. Scotch Plains  
7 Township Police Department, GRC Complaint No.  
8 2003-125 (January 2005) and Janeczko v. NJ  
9 Department of Law and Public Safety, Division of  
10 Criminal Justice, GRC Complaint Nos. 2002-79 and  
11 2002-80 (June 2004), these records are exempt  
12 from disclosure. Thus, the Custodian did not  
13 unlawfully deny access to these records.

14 No. 10. The Council defers a  
15 decision regarding whether the Custodian's  
16 actions rise to the level of a knowing and  
17 willful violation of OPRA and an unreasonable  
18 denial of access under the totality of the  
19 circumstances pending compliance with the  
20 Council's Interim Order.

21 CHAIRPERSON TABAKIN: Okay. Any  
22 questions?

23 Okay, this case reflects a change in  
24 the way the GRC considers an arrest record. It  
25 is now considered a public -- a government

2 MS. STARGHILL: Some of the

3 information contained in the arrest --

4 CHAIRPERSON TABAKIN: Okay. Some of

5 the information in the arrest report is

6 considered a government record.

7 May I have a motion, please?

8 MS. FORSYTH: So moved.

9 MS. KOVACH: Second.

10 CHAIRPERSON TABAKIN: Roll call.

11 MS. HAIRSTON: Robin Berg Tabakin?

12 CHAIRPERSON TABAKIN: Yes.

13 MS. HAIRSTON: Janice Kovach?

14 MS. KOVACH: Yes.

15 MS. HAIRSTON: Kathryn Forsyth?

16 MS. FORSYTH: Yes.

17 CHAIRPERSON TABAKIN: John Bart v.

18 City of Passaic (Passaic)(2007-162).

19 MS. FORSYTH: I had suggested that

20 we might go into closed session earlier to

21 discuss "Bart" briefly, but the concerns that I

22 had had been resolved.

23 MS. LOWNIE: The Executive Director

24 respectfully recommends the Council find that:

25 1. Pursuant to Mid-Atlantic

1 Technologies v. City of Vineland, 222 F.R.D. 81

2 (D.N.J. 2004), the Custodian's denial of the

3 Complainant's OPRA request, on the grounds that  
4 the Complainant could only obtain the requested  
5 records through discovery, is not a lawful basis  
6 for a denial of access.

7           No. 2. Because the records listed  
8 below relate to a criminal investigation of a  
9 possible violation of N.J.S.A. 2C:35-6 and are  
10 not required by law to be made, maintained or  
11 kept on file, pursuant to N.J.S.A. 47:1A-1.1 and  
12 Janeczko v. NJ Department of Law and Public  
13 Safety, Division of Criminal Justice, GRC  
14 Complaint Nos. 2002-79 and 2002-80 (June 2004),  
15 said records are criminal investigatory records  
16 and are not disclosable under OPRA. As such, the  
17 Custodian has borne the burden of proving a  
18 lawful denial of access to the following records  
19 pursuant to N.J.S.A. 47:1A-6:

20           Passaic Police Investigation Report  
21 dated January 14, 2007, File Control No. 07-2405;  
22 U.S. Currency Seizure Report prepared by the  
23 Passaic Police in conjunction with the record  
24 listed above; and Passaic Police Investigation  
25 Report dated November 18, 2001. File Control No.

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1 01-47009.

2           No. 3. Because arrest reports are  
3 government records pursuant to N.J.S.A. 47:1A-1.1

4 and because N.J.S.A. 47:1a-3.b. delineates the  
5 specific information contained on an arrest  
6 report which must be disclosed to the public, the  
7 Custodian has not borne her burden of proving a  
8 lawful denial of access to the arrest reports and  
9 should release said reports to the Complainant  
10 with -- the letter "a" should be deleted here --  
11 with appropriate redactions including a detailed  
12 document index explaining the legal basis for  
13 each redaction.

14 No. 4. The Custodian shall comply  
15 with Item No. 3 above with five business days  
16 from receipt of the Council's Interim Order and  
17 simultaneously provide certified confirmation of  
18 compliance, in accordance with N.J. Court Rule  
19 1:4-4, including a detailed document index  
20 explaining the lawful basis for each redaction,  
21 if any, to the Executive Director.

22 No. 5. Pursuant to Executive Order  
23 No. 26 (McGreevey 2002), Kamau v. NJ Department  
24 of Corrections, GRC Complaint NO. 2004-175  
25 (February 2005) and Caban v. NJ Department of

1 Corrections, GRC Complaint No. 2007-174 (March  
2 2005), the City of Passaic EMS Division Incident  
3 Report dated November 20, 2001 is exempt from  
4 disclosure as a medical record. As such, the

5 Custodian has borne the burden of proving a  
6 lawful denial of access to said report pursuant  
7 to N.J.S.A. 47:1A-6 despite the fact that the  
8 Custodian failed to provide the specific  
9 provisions of HIPAA and OPRA on which she relied  
10 for the denial of access.

11 No. 6. Because Items No. 1-6 and  
12 No. 9 of the Complainant's OPRA request are not  
13 requests for identifiable government records, the  
14 requests are invalid and the Custodian has not  
15 unlawfully denied access to the requested records  
16 pursuant to *MAG Entertainment, LLC v. Division of*  
17 *Alcoholic Beverage Control*, 375 N.J. Super. 534  
18 (March 2005), *NJ Builders Association v. NJ*  
19 *Council on Affordable Housing*, 390 N.J. Super.  
20 166 (App. Div. 2007), *Bent v. Stafford Police*  
21 *Department*, 381 N.J. Super. 30 (October 2005),  
22 and *Caggiano v. Borough of Stanhope*, GRC  
23 Complaint No. 2005-211 et seq. (January 2006).

24 And No. 7. Although the Custodian  
25 unlawfully denied access to the arrest reports

40

1 responsive to the Complainant's request on the  
2 basis of prior GRC decisions, because the  
3 Custodian carried her burden of proving a lawful  
4 denial of access to some of the requested records  
5 because said records are exempt as criminal

6 investigatory records pursuant to N.J.S.A.  
7 47:1A-1.1 and medical records pursuant to  
8 Executive Order No. 26 (McGreevey 2002), it is  
9 concluded that the Custodian's actions do not  
10 rise to the level of a knowing and willful  
11 violation of OPRA and unreasonable denial of  
12 access under the totality of the circumstances.

13           However, the Custodian's improper  
14 denial of the Complainant's request on the basis  
15 that the Complainant could obtain the requested  
16 records pursuant to discovery appears negligent  
17 and heedless since she is vested with the legal  
18 responsibility of granting and denying access in  
19 accordance with the law.

20           Additionally, the Assistant City  
21 Clerk's inaccurate certification that arrest  
22 reports responsive to the Complainant's request  
23 are not required to be maintained on file appears  
24 negligent and heedless since she is vested with  
25 the legal responsibility of granting and denying

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1 access in accordance with the law.

2           CHAIRPERSON TABAKIN: Any questions?

3           MS. FORSYTH: No.

4           CHAIRPERSON TABAKIN: Okay, motion?

5           MS. KOVACH: So moved.

6           CHAIRPERSON TABAKIN: Second?

7 MS. FORSYTH: Second.  
8 CHAIRPERSON TABAKIN: Roll call?  
9 MS. HAIRSTON: Robin Berg Tabakin?  
10 CHAIRPERSON TABAKIN: Yes.  
11 MS. HAIRSTON: Janice Kovach?  
12 MS. KOVACH: Yes.  
13 MS. HAIRSTON: Kathryn Forsyth?  
14 MS. FORSYTH: Yes.  
15 CHAIRPERSON TABAKIN: Darnell

16 Hardwick v. NJ Department of Transportation  
17 (2007-164).

18 MS. LOWNIE: The Executive Director  
19 respectfully recommends the Council find that:

20 No. 1. Because the Custodian failed  
21 to notify the Complainant in writing within the  
22 statutorily mandated seven business days of when  
23 the requested records would be made available  
24 pursuant to N.J.S.A. 47:1A-5.i., the Custodian's  
25 written response to the Complainant dated June

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1 20, 2007 and request for an extension of time  
2 dated June 29, 2007 are inadequate under OPRA and  
3 the Complainant's request is "deemed" denied  
4 pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A.  
5 47:1A-5.i. and Tucker Kelley v. Township of  
6 Rockaway, GRC Complaint No. 2007-11 (October  
7 2007).

8           No. 2. Because no official meeting  
9 minutes exist for the requested staff meetings  
10 and the personal notes of the attendees, which  
11 are responsive to the request, are informal  
12 memory aids, said records are exempt from  
13 disclosure as advisory, consultative or  
14 deliberative material pursuant to N.J.S.A.  
15 47:1A-1.1 and *Martin O'Shea v. West Milford Board*  
16 of Education, 391 N.J. Super. 534 (App. Div.  
17 2007).

18           Therefore, because the Custodian  
19 provided a lawful basis for the denial of access  
20 at the time of the denial, the Custodian has met  
21 his burden of proving a lawful denial of access  
22 to the personal notes of the meeting attendees  
23 pursuant to N.J.S.A. 47:1A-6. Further, the  
24 Custodian's actions in response to additional  
25 requests which are not the subject of this

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1 complaint have no bearing on said complaint.

2           No. 3. Because the requested  
3 records are not government records because they  
4 are advisory, consultative or deliberative  
5 material pursuant to N.J.S.A. 47:1A-1.1 and  
6 *Martin O'Shea v. West Milford Board of Education*,  
7 391 N.J. Super. 534, 538 (App. Div. 2007), the  
8 Custodian would not have unlawfully denied

9 access.

10           However, the Custodian violated  
11 N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by  
12 providing the Complainant with an inadequate  
13 response under OPRA resulting in a "deemed"  
14 denial. Nevertheless, it is concluded that the  
15 Custodian's actions do not rise to the level of a  
16 knowing and willful violation of OPRA and  
17 unreasonable denial of access under the totality  
18 of the circumstances.

19           However, the custodian's "deemed"  
20 denial of access appears negligent and heedless  
21 since he is vested with the legal responsibility  
22 of granting and denying access in accordance with  
23 the law.

24           CHAIRPERSON TABAKIN: Thank you,  
25 Dara.

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1           May I have a motion, please?

2           MS. KOVACH: So moved.

3           CHAIRPERSON TABAKIN: Second?

4           MS. FORSYTH: Second.

5           CHAIRPERSON TABAKIN: Roll call.

6           MS. HAIRSTON: Robin Berg Tabakin?

7           CHAIRPERSON TABAKIN: Yes.

8           MS. HAIRSTON: Janice Kovach?

9           MS. KOVACH: Yes.

10 MS. HAIRSTON: Kathryn Forsyth?

11 MS. FORSYTH: Yes.

12 CHAIRPERSON TABAKIN: John Paff v.  
13 Warren County Prosecutor's Office (2007-167).

14 MS. LOWNIE: The Executive Director  
15 respectfully recommends the Council find that:

16 No. 1. Because the Custodian failed  
17 to provide the Complainant with a lawful basis  
18 for the denial of access to the redacted portions  
19 of the requested records in writing within the  
20 statutorily mandated seven business days, the  
21 Custodian violated N.J.S.A. 47:1A-5.g. and  
22 N.J.S.A. 47:1A-5.i.

23 Additionally, because the  
24 Custodian's reliance on Perino v. Borough of  
25 Haddon Heights, GRC Complaint No. 2004-128

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1 (November 2004), N.J.S.A. 47:1A-1.1, N.J.S.A.  
2 47:1A-2.2 and N.J.S.A. 52:4B-36 as a lawful basis  
3 for the denial of access to the redacted portions  
4 of the requested records are misplaced, the  
5 Custodian has failed to meet his burden of  
6 proving a lawful denial of access pursuant to  
7 N.J.S.A. 47:1A-6.

8 However, pursuant to N.J.S.A.  
9 47:1A-1, the Custodian did not unlawfully deny  
10 access to the redacted portions of the requested

11 records because the redacted portions are exempt  
12 from disclosure due to privacy concerns.  
13 No. 2. Although the Custodian  
14 failed to meet his burden of proving a lawful  
15 denial of access pursuant to N.J.S.A. 47:1A-6  
16 because the Custodian's reliance on *Perino v.*  
17 *Borough of Haddon Heights*, GRC Complaint No.  
18 2004-128 (November 2004), N.J.S.A. 47:1A-1.1,  
19 N.J.S.A. 47:1A-2.2 and N.J.S.A. 52:4B-36 as a  
20 lawful basis for the denial of access to the  
21 redacted portions of the requested records is  
22 misplaced, pursuant to N.J.S.A. 47:1A-1, the  
23 Custodian did not unlawfully deny access to said  
24 redactions because the redacted portions are  
25 exempt from disclosure due to privacy concerns.

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1 Therefore, it is concluded that the  
2 Custodian's actions do not rise to the level of a  
3 knowing and willful violation of OPRA and  
4 unreasonable denial of access under the totality  
5 of the circumstances.

6 However, the Custodian's failure to  
7 meet his burden of proof appears negligent and  
8 heedless since he is vested with the legal  
9 responsibility of granting and denying access in  
10 accordance with the law.

11 No. 3. The action sought by the  
12 Complainant came about due to the Complainant's  
13 filing of a Denial of Access Complaint and as  
14 such, the Complainant is a prevailing party  
15 entitled to an award of a reasonable attorney's  
16 fee pursuant to N.J.S.A. 47:1A-6 and Teeters v.  
17 DYFS, 387 N.J. Super. 423 (App. Div. 2006).  
18 Thus, this complaint should be referred to the  
19 Office of Administrative Law for the  
20 determination of prevailing party attorney's  
21 fees.

22 CHAIRPERSON TABAKIN: Any questions?

23 Motion, please?

24 MS. FORSYTH: So moved.

25 MS. KOVACH: Second.

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1 CHAIRPERSON TABAKIN: Roll call.

2 MS. HAIRSTON: Robin Berg Tabakin?

3 CHAIRPERSON TABAKIN: Yes.

4 MS. HAIRSTON: Janice Kovach?

5 MS. KOVACH: Yes.

6 MS. HAIRSTON: Kathryn Forsyth?

7 MS. FORSYTH: Yes.

8 CHAIRPERSON TABAKIN: Martin O'Shea

9 v. Madison Public School District

10 (Morris)(2007-185).

11 MR. CARUSO: The Executive Director

12 respectfully recommends the Council find that:

13 1. The Custodian's failure to

14 respond in writing to the Complainant's OPRA

15 request granting access, denying access, seeking

16 clarification or requesting an extension of time

17 within the statutorily mandated seven business

18 days, as required by N.J.S.A. 47:1A-5.g. and

19 N.J.S.A. 47:1A-5.i., results in a "deemed: Denial

20 of the complainant's OPRA request. Kelley v.

21 Township of Rockaway, GRC Complaint No. 2007-11

22 (October 2007).

23 2. Based on the evidence of record,

24 the Custodian has failed to establish sufficient

25 evidence authorizing a special service charge of

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1 \$31.50 to produce one audiotape of a Madison

2 Board of Education meeting. See Libertarian

3 Party of Central Jersey v. Murphy, 384 N.J.

4 Super. 136 (App. Div. 2006). Pursuant to

5 Krisburg v. City of Paterson, Police Department,

6 GRC Complaint No. 2002-55 (December 2002), the

7 Custodian fails to meet the statutory criterion

8 allowing a custodian to charge more than the

9 actual cost of reproduction of a record.

10 Therefore, the Custodian is limited to charging

11 the actual cost of the audiotape or \$1.50.

12 3. The Custodian shall disclose the

13 requested record at the actual cost of \$1.50 with  
14 appropriate redactions, if any, and a redaction  
15 index detailing the general nature of the  
16 information redacted and the lawful basis for  
17 such redactions as required by N.J.S.A. 47:1A-6  
18 and N.J.S.A. 47:1A-5.g.

19           4. The Custodian shall comply with  
20 Item No. 3 above within five business days from  
21 receipt of the Council's Interim Order and  
22 simultaneously provide certified confirmation of  
23 compliance, in accordance with N.J. Court Rule  
24 1:4-4, to the Executive Director.

25           5. Pursuant to *Teeters v. DYFS*, 387

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1 N.J. Super. 423 (App. Div. 2006), the Complainant  
2 has achieved "the desired result because the  
3 complaint brought about a change (voluntary or  
4 otherwise) in the custodian's conduct." *Id.* at  
5 432.

6           Therefore, the Complainant is a  
7 prevailing party entitled to an award of a  
8 reasonable attorney's fee pursuant to N.J.S.A.  
9 47:1A-6 and *Teeters*, *supra*. Thus, this complaint  
10 should be referred to the Office of  
11 Administrative Law for the determination of  
12 reasonable prevailing party attorney's fees.

13           6. Although the Custodian failed to

14 respond in writing within the statutorily  
15 mandated seven business day response time and  
16 failed to establish that a special service charge  
17 for production of the requested record was  
18 warranted pursuant to OPRA, based on the evidence  
19 of record, it is concluded that the Custodian's  
20 actions do not rise to the level of a knowing and  
21 willful violation of OPRA and unreasonable denial  
22 of access under the totality of the  
23 circumstances.

24           However, the Custodian's actions  
25 appear to be negligent and heedless since he is

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1 vested with the legal responsibility of granting  
2 and denying access in accordance with the law.

3           CHAIRPERSON TABAKIN: Thank you.

4           Motion?

5           MS. KOVACH: So moved.

6           CHAIRPERSON TABAKIN: Second?

7           MS. FORSYTH: Second.

8           CHAIRPERSON TABAKIN: Roll call,  
9 please?

10          MS. HAIRSTON: Robin Berg Tabakin?

11          CHAIRPERSON TABAKIN: Yes.

12          MS. HAIRSTON: Janice Kovach?

13          MS. KOVACH: Yes.

14          MS. HAIRSTON: Kathryn Forsyth?

15 MS. FORSYTH: Yes.

16 CHAIRPERSON TABAKIN: Martin O'Shea

17 v. Township of Fredon (Sussex)(2007-251).

18 MR. CARUSO: The Executive Director

19 respectfully recommends the Council find that:

20 1. Although the Custodian responded  
21 in writing granting access to Item's No. 1 and  
22 No. 3 in a timely manner pursuant to N.J.S.A.  
23 47:1A-5.i, the Custodian's response is  
24 insufficient because she failed to specifically  
25 address the Complainant's preference for receipt

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1 of records. Therefore, the Custodian has  
2 violated OPRA pursuant to N.J.S.A. 47:1A-5.g.

3 2. The Custodian has failed to bear  
4 her burden of proof that the denial of access to  
5 the Executive Session minutes was lawful under  
6 N.J.S.A. 47:1A-6. The Custodian shall disclose  
7 the requested records with appropriate  
8 redactions, if any, and a redaction index  
9 detailing the general nature of the information  
10 redacted and the lawful basis for such redactions  
11 as required by N.J.S.A. 47:1A-6 and 47:1A-5.g.

12 However, the Custodian shall not  
13 disclose the requested executive session minutes  
14 if those minutes were not approved by the  
15 governing body prior to the date of this OPRA

16 request because such meeting minutes are exempt  
17 from disclosure as advisory, consultative or  
18 deliberative material pursuant to N.J.S.A.  
19 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek  
20 Township, GRC Complaint No. 2006-51 (August  
21 2006).

22 3. The Custodian shall comply with  
23 Item No. 2 above within five business days from  
24 receipt of the Council's Interim Order and  
25 simultaneously provide certified confirmation of

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1 compliance, in accordance with N.J. Court Rule  
2 1:4-4, to the Executive Director.

3 4. The Council defers a decision  
4 regarding whether the Custodian's actions rise to  
5 the level of a knowing and willful violation of  
6 OPRA and an unreasonable denial of access under a  
7 totality of the circumstances pending compliance  
8 with the Council's Interim Order.

9 CHAIRPERSON TABAKIN: Thank you.

10 Motion?

11 MS. FORSYTH: So moved.

12 MS. KOVACH: Second.

13 CHAIRPERSON TABAKIN: Roll call.

14 MS. HAIRSTON: Robin Berg Tabakin?

15 CHAIRPERSON TABAKIN: Yes.

16 MS. HAIRSTON: Janice Kovach?

17 MS. KOVACH: Yes.  
18 MS. HAIRSTON: Kathryn Forsyth?  
19 MS. FORSYTH: Yes.  
20 CHAIRPERSON TABAKIN: John Bart v.  
21 Passaic County Planning Department, Public  
22 Housing Agency (2007-266).  
23 MR. STEWART: The Executive Director  
24 respectfully recommends the Council find that:  
25 1. The Custodian's failure to

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1 respond in writing to the Complainant's OPRA  
2 request granting access, denying access, seeking  
3 clarification or requesting an extension of time  
4 within the statutorily mandated seven business  
5 days, resulted in a "deemed" denial pursuant to  
6 N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and the  
7 Council's decision in Tucker Kelley v. Township  
8 of Rockaway, GRC Complaint No. 2007-11 (October  
9 2007).

10 No. 2. The Custodian properly  
11 redacted information regarding honorable  
12 discharges, social security numbers, unlisted  
13 telephone numbers and driver license numbers from  
14 the record responsive to the Complainant's  
15 request pursuant to N.J.S.A. 47:1A-1.1. and  
16 N.J.S.A. 47:1A-5.a.

17 No. 3. Based on the evidence in the

18 record, it is possible that the Custodian's  
19 actions were intentional and deliberate, with  
20 knowledge of their wrongfulness, and not merely  
21 negligent and heedless or unintentional. As  
22 such, the complaint should be referred to the  
23 Office of Administrative Law for determination of  
24 whether the Custodian knowingly and willfully  
25 violated OPRA and unreasonably denied access

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1 under the totality of the circumstances.

2 CHAIRPERSON TABAKIN: Thank you.

3 Motion?

4 MS. KOVACH: So moved.

5 CHAIRPERSON TABAKIN: Second?

6 MS. FORSYTH: Second.

7 CHAIRPERSON TABAKIN: Roll call.

8 MS. HAIRSTON: Robin Berg Tabakin?

9 CHAIRPERSON TABAKIN: Yes.

10 MS. HAIRSTON: Janice Kovach?

11 MS. KOVACH: Yes.

12 MS. HAIRSTON: Kathryn Forsyth?

13 MS. FORSYTH: Yes.

14 CHAIRPERSON TABAKIN: John Tousman

15 v. Township of Edison (Middlesex)(2007-269).

16 MR. STEWART: The Executive Director

17 respectfully recommends the Council find that:

18 1. The draft of the Township of

19 Edison 2008 budget and the pre-decisional  
20 worksheets for salaries and wages used to assist  
21 the township in its budgetary decision-making  
22 process are exempt from disclosure under N.J.S.A.  
23 47:1A-1.1 because they constitute advisory,  
24 consultative and deliberative material.  
25 No. 2. The Custodian's compilation,

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1 creation and release of information responsive to  
2 the Complainant's request was not required under  
3 OPRA because a Custodian must only disclose  
4 clearly identifiable records under OPRA, pursuant  
5 to the Superior Court's decision in *MAG*  
6 *Entertainment, LLC v. Division of Alcoholic*  
7 *Beverage Control*, 375 N.J. Super. 534 (March  
8 2005).

9 CHAIRPERSON TABAKIN: Thank you.

10 Motion, please?

11 MS. FORSYTH: So moved.

12 MS. KOVACH: Second.

13 CHAIRPERSON TABAKIN: Roll call.

14 MS. HAIRSTON: Robin Berg Tabakin?

15 CHAIRPERSON TABAKIN: Yes.

16 MS. HAIRSTON: Janice Kovach?

17 MS. KOVACH: Yes.

18 MS. HAIRSTON: Kathryn Forsyth?

19 MS. FORSYTH: Yes.

20 CHAIRPERSON TABAKIN: There are no  
21 complaints to be reconsidered, and -- but there  
22 is something, there is a complaint adjudicated in  
23 Superior Court.

24 MS. STARGHILL: Yes. Darin Hickson  
25 V. NJ Department of Law & Public Safety, Division

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1 of Criminal Justice.

2 This is an appeal of a prior GRC  
3 decision in which the GRC decision was affirmed.

4 We have a pretty good track record.

5 CHAIRPERSON TABAKIN: Okay.  
6 Executive Director's Report and New Business.

7 MS. STARGHILL: Yes. You all  
8 received our proposed responses to public  
9 comments electronically. I hope you've had an  
10 opportunity to review them. I just, you know,  
11 want to take a vote to approve them.

12 We're shooting to submit the  
13 reproposal for adoption for application likely in  
14 the April 21st, maybe the May 5th New Jersey  
15 Register. So we will finally hopefully soon have  
16 promulgated regulations.

17 Did you all have any questions with  
18 the responses? We really didn't have very many  
19 comments, a few. It has taken so long to finish  
20 those. But the few issues raised by some of the

21 commentors really involved matters that are  
22 pending before the judiciary or otherwise  
23 unresolved and I was hesitant to come out with  
24 our response until some of those matters were  
25 resolved because we would have to just

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1 immediately amend to correspond to whatever the  
2 resolution is to the matters.

3 Were there any questions?

4 CHAIRPERSON TABAKIN: I didn't have  
5 any.

6 Do you want to take a vote?

7 MS. STARGHILL: Yeah.

8 CHAIRPERSON TABAKIN: So this would  
9 be a motion to approve the rule reproposal as --

10 MS. STARGHILL: To approve the  
11 public comments that would go into the Notice of  
12 Adoption.

13 CHAIRPERSON TABAKIN: May I have a  
14 motion, please?

15 MS. FORSYTH: So moved.

16 MS. KOVACH: Second.

17 CHAIRPERSON TABAKIN: Roll call.

18 MS. HAIRSTON: Robin Berg Tabakin?

19 CHAIRPERSON TABAKIN: Yes.

20 MS. HAIRSTON: Janice Kovach?

21 MS. KOVACH: Yes.

22 MS. HAIRSTON: Kathryn Forsyth?

23 MS. FORSYTH: Yes.

24 CHAIRPERSON TABAKIN: Is that it?

25 MS. STARGHILL: That's it for me.

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1 CHAIRPERSON TABAKIN: It's now time  
2 for public comment.

3 D.A.G. ALLEN: No, I have one case  
4 to report.

5 If you recall back in December at  
6 the meeting we had said the day before the  
7 meeting that Thomas Caggiano had been named as  
8 co-defendant in a lawsuit -- I'm sorry, the Town  
9 of Stanhope has brought a suit against Thomas  
10 Caggiano and named the Open Records Council as a  
11 co-defendant in that matter. And specifically we  
12 were charged of to send that case with -- you  
13 know, sending all the matters to the OAL for  
14 adjudication, which from the Town's perspective  
15 is problematic because the burden's going to  
16 present for them to have all these legal fees if  
17 there's going to be all these actions.

18 In a nutshell, we were dropped from  
19 that suit as co-defendants. So with respect to  
20 the Thomas Caggiano matters we have had -- we  
21 really don't have any outstanding legal matters

22 with him at this point.

23 MS. STARGHILL: Well, we're probably  
24 pursuing his violation of the restraining order,  
25 so we might --

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1 D.A.G. ALLEN: But currently within  
2 the courts everything has been resolved at this  
3 point. We have that -- we have the TRO again,  
4 that may have been extended, and then we were a  
5 co-defendant in this other matter brought by  
6 Stanhope Township and we were dropped as a  
7 defendant.

8 CHAIRPERSON TABAKIN: Okay good.

9 Okay, now it's time for public  
10 comment.

11 In the interest of time we do limit  
12 public comment to five minutes. Speakers with  
13 prepared testimony should provide eight copies  
14 for the Council. If you have a comment, please  
15 raise you hand and step up to the table, please.

16 MS. STARGHILL: Mr. Burdick, we  
17 would ask you to speak up as well so you can be  
18 recorded properly.

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

20 PUBLIC COMMENT:

21 CHAIRPERSON TABAKIN: Would you  
22 state your name?

23 MR. BURDICK: Yes, I'm sorry.

24 George Burdick, B as in boy,

25 u-r-d-i-c-k; 14 Mathew Drive, Annandale, New

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1 Jersey, Hunterdon County.

2 I have a prepared statement. May I

3 approach?

4 CHAIRPERSON TABAKIN: Yes.

5 MR. BURDICK: (Handing out statement

6 to the Council members.)

7 There are nine copies.

8 CHAIRPERSON TABAKIN: Remember to

9 speak up, please.

10 MR. BURDICK: Thank you.

11 I have three children. Our middle

12 daughter's in the tenth grade and our youngest

13 daughter is in the seventh grade and curiously

14 they're both learning about the federalist and

15 the anti-federalists. So if you see a

16 preponderance of quotes from people of that era

17 now you know why.

18 In 1787, when debating the new

19 Constitution, Patrick Henry said "a contemptible

20 minority can prevent the good of the majority."

21 In the Unabridged Edition of the

22 Random House Dictionary of the English Language,

23 Perjury is defined as "the willful utterance of a

24 false statement under oath or affirmation, before

25 a competent tribunal, upon a point material to a

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1 legal inquiry."

2 I wish to make a comment today to

3 the GRC regarding perjurious or deliberate false

4 statements made by counsel for the custodian in

5 GRC Case No. 2007-74:

6 MS. FORSYTH: Would you excuse me,

7 Mr. Burdick.

8 Should I recused myself on --

9 MS. STARGHILL: These are just

10 public comments.

11 MS. FORSYTH: Just public comments?

12 Thank you.

13 Sorry.

14 MR. BURDICK: That's all right.

15 You have before you copies of the

16 attendance record for five full-time individuals

17 of the Franklin Township School for the school

18 year 2005-2006 that are attached behind the

19 comments.

20 You can see that each is marked

21 "without pay" or "w/o pay," establishing a clear

22 payroll implication.

23 In the matter of Burdick v. Franklin

24 Township Board of Education, GRC Case No.

25 2007-74, Mr. Thomas Johnston of Porzio, Bromberg

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1 & Newman, counsel for the custodian, made the  
2 following deliberate, false statements to the GRC  
3 when describing the records that I now set before  
4 you.

5

6 MS. STARGHILL: Mr. Burdick, you may  
7 continue. I just want to point out, any evidence  
8 that you are presenting here cannot be considered  
9 by the GRC because this is the public comment  
10 segment of our meeting and the GRC does not allow  
11 all testimony except at its discretion, so the  
12 GRC would have to ask you to testify. So this  
13 cannot be considered as evidence into the record.  
14 But, you know, if you just want to make the  
15 public comment, that's fine.

16 MR. BURDICK: Is that acceptable?

17 MS. STARGHILL: Yeah, uh-hum.

18 MR. BURDICK: Okay, thank you.

19 By way of explanation, when  
20 Mr. Johnston or the custodian refer to  
21 "spreadsheets" or "Exhibit B," they mean the  
22 Franklin Township School Staff Attendance Record.

23 June 27, 2007, page 2, quote, The  
24 spreadsheets do not indicate whether a particular  
25 absence was or was not compensated. There is no

1 mention of compensation, monetary or otherwise,  
2 anywhere on any of the spreadsheets, unquote.

3 July 13, 2007, page 5, quote, As you  
4 can see, they (the Franklin Township School Staff  
5 Attendance Record) do not contain any payroll  
6 information nor do they have any payroll  
7 implications at all, unquote.

8 July 13, 2007, page 7, quote, The  
9 Board has submitted undisputed evidence to this  
10 council that this spreadsheet is not maintained  
11 or utilized for the purposes of compensation or  
12 payroll, unquote.

13 July 13, 2007, page 8, quote, ...nor  
14 does his -- meaning George Burdick --  
15 correspondence refute the certification submitted  
16 by Gloria Gross wherein she attested that this  
17 spreadsheet is not utilized for calculating  
18 payroll, unquote.

19 July 13th, 2007, page 10, quote,  
20 Moreover, those documents attached hereto as  
21 Exhibits B (The Franklin Township School Staff  
22 Attendance Record) and C, which contain no  
23 payroll or compensation information and are not  
24 ever utilized for payroll purposes, should not be  
25 produced, unquote.

1 July 13, 2007, page 12, quote,  
2 Mr. Burdick's OPRA request was properly denied  
3 because documents containing attendance  
4 information with no payroll implications are not  
5 exempt from disclosure, unquote.

6 I read that sentence 25 times and I  
7 think he misspoke. I think what he meant to say  
8 was "are exempt from disclosure," but you can ask  
9 him.

10 When an attorney lies or bares false  
11 witness, they act in a contemptible manner to  
12 prevent the good of the majority. As I  
13 understand it, an attorney for a custodian,  
14 operating under a professional appointment, is  
15 exempt from any action by the GRC to admonish  
16 such deliberate, disdainful behavior. I beg the  
17 GRC to take the necessary action to hold such  
18 individuals accountable for their actions, and to  
19 prevent what James Madison described as, "a  
20 popular government without popular information,  
21 or the means of acquiring it, is but a prologue  
22 to a farce or a tragedy or both."

23 Ten thousand thanks to all of you.

24 CHAIRPERSON TABAKIN: Thank you very  
25 much.

1 Does anyone else wish to be heard?

2 Okay, then I will look to entertain

3 a motion for adjournment.

4 MS. FORSYTH: So moved.

5 MS. KOVACH: Second.

6 CHAIRPERSON TABAKIN: Roll call.

7 MS. HAIRSTON: Robin Berg Tabakin?

8 CHAIRPERSON TABAKIN: Yes.

9 MS. HAIRSTON: Janice Kovach?

10 MS. KOVACH: Yes.

11 MS. HAIRSTON: Kathryn Forsyth?

12 MS. FORSYTH: Yes.

13 CHAIRPERSON TABAKIN: We're

14 adjourned. Thank you.

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17 (HEARING CONCLUDED AT TIME 11:27 A.M.)

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I, LINDA P. CALAMARI, a Professional  
Reporter and Notary Public of the State of New  
Jersey, do hereby certify the foregoing to be a  
true and accurate transcript of my original  
stenographic notes taken at the time and place  
hereinbefore set forth.

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LINDA P. CALAMARI

Dated: MARCH 11, 2008.