

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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12 AT: DEPARTMENT OF COMMUNITY AFFAIRS

13 101 South Broad Street - Room 129

14 Trenton, New Jersey 08625-0819

15 DATE: WEDNESDAY, APRIL 30, 2008

16 TIME: 9:35 A.M. TO 10:59 A.M.

17

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1 COUNCIL MEMBERS:

2 ROBIN BERG TABAKIN, Chairperson

3 DAVID FLEISHER, (financial planner and Executive

4 with the financial services firm

5 of Firstrust Financial

6 Resources, LLC)

7 JANICE L. KOVACH (designee of Acting Commissioner

8 Joseph V. Doria, Jr., Department

9 of Community Affairs)

10 ANTHONY D'ELIA, (representative from the

11 Department of Education)

12 CHARLES RICHMAN (Deputy Commissioner of Community Affairs)

13 COUNCIL PROFESSIONALS:

14 CATHERINE STARGHILL, ESQ., Executive Director

- 15 DEBRA A. ALLEN, ESQ., D.A.G.
- 16 KARYN GORDON, ESQ., (In-House Counsel)
- 17 GINA R. OROSZ, ESQ., (Outside Counsel)
- 18
- 19 FRANK F. CARUSO, (Case Manager)
- 20 DARA LOWNIE, (Senior Case Manager)
- 21 SHERIN KEYS, ESQ., (Case Manager/Staff Attorney)
- 22 JYOTHI PAMIDIMUKKALA, (Resource Manager)
- 23 JOHN E. STEWART, ESQ., (Case Manager/  
24 In Camera Attorney)
- 25 BRIGITTE HAIRSTON, (Council Secretary)

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12 \*N/Q - No Quorum

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1 CHAIRPERSON TABAKIN: Would you all

2 please rise for the pledge of allegiance.

3 (Whereupon, all rise for the Pledge

4 of Allegiance.)

5 CHAIRPERSON TABAKIN: Roll call.

6 We'll call to order.

7 MS. STARGHILL: And then you have to

8 read this.

9 CHAIRPERSON TABAKIN: This meeting

10 was called pursuant to the provisions Open Public

11 Meetings Act. Notices of this meeting were faxed

12 to the Newark Star-Ledger, Trenton Times,

13 Courier-Post of Cherry Hill, the Secretary of

14 State and e-mailed to the New Jersey Foundation

15 for Open Government on April 28th.

16 Proper notice having been given, the

17 Secretary is directed to include this statement

18 in the minutes of this meeting.

19 In the event of a fire alarm

20 activation, please exit the building following

21 the exit signs located within the conference

22 rooms and throughout the building. The exit

23 signs will direct you to two fire evacuation

24 stairways located in the building. Upon leaving,

25 please follow the fire wardens which can be

9

1 located by yellow helmets. Please follow the

2 flow of traffic away from the building.

3 Roll call.

4 MS. HAIRSTON: Robin Berg Tabakin?

5 CHAIRPERSON TABAKIN: Present.

6 MS. HAIRSTON: Janice Kovach?

7 MS. KOVACH: Yes.

8 MS. HAIRSTON: Dave Fleisher?

9 MR. FLEISHER: Here.

10 CHAIRPERSON TABAKIN: We're going to

11 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 public discussion under the Open

19 Public Meetings Act; and

20 WHEREAS, the regular meeting of the  
21 Council will reconvene at that 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

10

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 following matters --

4 MS. STARGHILL: I'm sorry, I just  
5 wanted to direct the Vice Chair to the -- is that  
6 the new...

7 I'm sorry, I apologize.

8 CHAIRPERSON TABAKIN: -- Janon  
9 Fisher v. NJ Department of Law & Public Safety,  
10 Division of Law (2004-55 & 2004-82);  
11 Carlton Levine v. Bergen County  
12 Improvement Authority (2006-96) for an In-camera  
13 review;

14 Paul Bellan-Boyer v. NJ Department  
15 of Community Affairs, Commissioner's Office  
16 (2007-143) for an In-camera review.

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 are issued in  
21 the above cases.

22 Can I have a motion, please?

23 MR. FLEISHER: So moved.

24 MS. KOVACH: Second.

25 MS. HAIRSTON: Robin Berg Tabakin?

11

1 CHAIRPERSON TABAKIN: Yes.

2 MS. HAIRSTON: Janice Kovach?

3 MS. KOVACH: Yes.

4 MS. HAIRSTON: And Dave Fleisher?

5 MR. FLEISHER: Yes.

6 D.A.G. ALLEN: Madam Chair, are you  
7 recusing from the DCA matter?

8 CHAIRPERSON TABAKIN: Yes.

9 D.A.G. ALLEN: Then you won't have a  
10 quorum.

11 MS. STARGHILL: Actually, we're not  
12 even going to discuss it.

13 D.A.G. ALLEN: We won't?

14 MS. STARGHILL: Yeah, if we could  
15 just proceed. That's what we're going to discuss  
16 in closed session. It's being pulled from the  
17 agenda.

18 D.A.G. ALLEN: Okay.

19 CHAIRPERSON TABAKIN: Okay, when  
20 we're in closed session.

21 D.A.G. ALLEN: So we're going to  
22 talk about it?

23 MS. STARGHILL: Well, we are just to  
24 say it's being pulled. So can she not  
25 participate for that?

12

1 D.A.G. ALLEN: There has to be a

2 record where there's a recusal. But then you --

3 but based upon the recusal, unless Mr. D'Elia  
4 shows up, you won't have your quorum to talk  
5 about that matter in closed session.

6 MS. STARGHILL: So then let's strike  
7 it from the closed session. It's being pulled  
8 from the agenda. So that's the Bellan-Boyer vs.  
9 New Jersey Department of Community Affairs,  
10 Commissioner's Office, is being pulled from the  
11 agenda and won't be discussed during closed  
12 session.

13 D.A.G. ALLEN: Right.

14 CHAIRPERSON TABAKIN: We're in  
15 closed session, please.

16 (Whereupon, the Commission goes into  
17 closed session. The time is 9:40 a.m.)

18 (Whereupon, the Commission is back  
19 in open session. The time is 9:52 a.m.)

20 CHAIRPERSON TABAKIN: Back on the  
21 record.

22 Could I have a motion to go back  
23 into open session, please?

24 MR. FLEISHER: So moved.

25 MS. KOVACH: Second.

13

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: Dave Fleisher?

7 MR. FLEISHER: Yes.

8 CHAIRPERSON TABAKIN: Okay.

9 Approval of the minutes.

10 Do we have a quorum for November

11 28th?

12 MS. STARGHILL: We don't have a

13 quorum for any now because Kathryn is not here

14 for March.

15 CHAIRPERSON TABAKIN: Okay. We do

16 not have a quorum to approve the minutes of

17 November 28, 2007; March 26, 2008 closed session

18 minutes; March 26, 2007 open session

19 transcript -- oh, March 26, 2008 open session

20 transcript.

21 MS. STARGHILL: We just need Kathryn

22 here for that who unexpectedly was away.

23 CHAIRPERSON TABAKIN: Okay. Now we

24 will do the Administrative Complaint Council

25 Adjudication. There are eight cases.

14

1 Could I have a motion to approve,

2 please?

3 MS. STARGHILL: It should just be

4 noted that the representative from the Department

5 of Education, Tony D'Elia, is recused from the

6 matter of Eric Taylor v. New Jersey Department of

7 Education (2007-294) of those eight.

8 CHAIRPERSON TABAKIN: Thank you.

9 Could I have a motion?

10 MS. KOVACH: So moved.

11 MR. FLEISHER: Second.

12 CHAIRPERSON TABAKIN: Roll call.

13 MS. HAIRSTON: Robin Berg Tabakin?

14 CHAIRPERSON TABAKIN: Yes.

15 MS. HAIRSTON: Janice Kovach?

16 MS. KOVACH: Yes.

17 MS. HAIRSTON: Dave Fleisher?

18 MR. FLEISHER: Yes.

19 CHAIRPERSON TABAKIN: Okay.

20 Now we are going out of order and

21 Janice you're recusing yourself --

22 MS. KOVACH: I'm leaving.

23 CHAIRPERSON TABAKIN: -- from the

24 next two cases.

25 MS. KOVACH: Three, right?

15

1 MS. STARGHILL: It's just two --

2 yes, it is three, Burdick...

3 (Charles Richman comes up to the

4 panel.)

5 MS. STARGHILL: Tony has also

6 recused himself from Burdick.

7 If you could just stand outside?

8 This will be a quick one. Thank you.

9 D.A.G. ALLEN: Kathryn Forsyth is

10 recused from that and he's standing in for

11 Kathryn.

12 CHAIRPERSON TABAKIN: Okay, George

13 Burdick, Jr. complaint -- George Burdick v.

14 Franklin Township Board of Education

15 (Hunterdon)(2007-74).

16 MS. LOWNIE: The Executive Director

17 respectfully recommends the Council find that:

18 No. 1., Because the Custodian

19 released the requested attendance records labeled

20 "Franklin Township School Staff Attendance

21 Record" of all full-time employees and all

22 members of the administration at Franklin

23 Township School for the period of July 1, 2005 to

24 June 30th, 2006 to the Complainant with

25 appropriate redactions including a detailed

1 lawful basis for said redactions and because the

2 Custodian provided certified confirmation of  
3 compliance, pursuant to N.J. Court Rule 1:4-4, to  
4 the Executive Director, the Custodian has  
5 complied with the Council's January 30th, 2008  
6 Interim Order.

7 No. 2., As previously decided by the  
8 Council on October 31st, 2007 and January 30th,  
9 2008, because the Custodian failed to include the  
10 "Franklin Township School Staff Attendance  
11 Record" as the record responsive to the  
12 Complainant's request in the Custodian's  
13 Statement of Information and because the  
14 Custodian has not carried her burden of proving a  
15 lawful denial of access to the requested  
16 attendance records, it is possible that the  
17 Custodian's actions were intentional and  
18 deliberate, with knowledge of their wrongfulness,  
19 and not merely negligent, heedless or  
20 unintentional.

21 As such, this complaint shall be  
22 referred to the Office of Administrative Law for  
23 determination of whether the Custodian knowingly

24 and willfully violated OPRA and unreasonably  
25 denied access under the totality of the

17

1 circumstances.

2           Should the Custodian's contact  
3 information change prior to the Council's final  
4 determination in this matter, the Custodian shall  
5 so advise the GRC.

6           CHAIRPERSON TABAKIN: Any questions?

7           Motion, please?

8           MR. FLEISHER: So moved.

9           MR. RICHMAN: Second.

10          CHAIRPERSON TABAKIN: Roll call.

11          MS. HAIRSTON: Charles Richman?

12          MR. RICHMAN: Yes.

13          MS. HAIRSTON: Robin Berg Tabakin?

14          CHAIRPERSON TABAKIN: Yes.

15          MS. HAIRSTON: Dave Fleisher?

16          MR. FLEISHER: Yes.

17          (Tony D'Elia steps back in.)

18 CHAIRPERSON TABAKIN: Robert J.

19 Vessio v. New Jersey Department of Community  
20 Affairs, Division of Fire Safety (2007-188).

21 Note that Janice Kovach from the  
22 Department of Community Affairs is recused.

23 MR. CARUSO: The Executive Director  
24 respectfully recommends the Council find that:

25 1. Based upon the Appellate

18

1 Division's decision in New Jersey Builders  
2 Association v. New Jersey Council On Affordable  
3 Housing, 390 N.J. Super. 166 (App. Div. 2007),  
4 the Complainant's voluminous November 2, 2006  
5 OPRA request, a thirteen paragraph request for  
6 numerous records, is not a valid OPRA request  
7 because it bears no resemblance to the record  
8 request envisioned by the Legislature, which is  
9 one submitted on a form that "provide[s] space  
10 for...a brief description of the record sought."  
11 Id. at 179.

12 2. Because the Custodian has

13 certified that fulfillment of the Complainant's  
14 OPRA request would substantially disrupt the  
15 agency's operations, and because the Custodian  
16 made an attempt to reasonably accommodate the  
17 Complainant's request, but received no response,  
18 the Custodian has not unlawfully denied access to  
19 the requested records under N.J.S.A. 47:1A-5.c.  
20 and N.J.S.A. 47:1A-5.g.

21           3. The Custodian's failure to  
22 respond in writing to the Complainant's OPRA  
23 request granting access, denying access, seeking  
24 clarification or requesting an extension of time  
25 within the statutorily mandated seven business

19

1 days, as required by N.J.S.A. 47:1A-5.g. and  
2 N.J.S.A. 47:1A-5.i., results in a "deemed" denial  
3 of the Complainant's OPRA request. Kelley v.  
4 Township of Rockaway, GRC complaint No. 2007-176  
5 (March 2007).

6           4. The Custodian's initial response

7 to Complainant's request was a duplicate of a  
8 previous request to the Complainant's June 22,  
9 2007 request was legally insufficient because the  
10 Custodian has a duty to answer each request  
11 individually. O'Shea v. Township of West  
12 Milford, GRC Complaint No. 2004-17 (April 2005).

13 CHAIRPERSON TABAKIN: Any questions  
14 or comments?

15 Motion?

16 MR. D'ELIA: So moved.

17 MR. FLEISHER: Second.

18 MS. HAIRSTON: Robin Berg Tabakin?

19 CHAIRPERSON TABAKIN: Yes.

20 MS. HAIRSTON: Anthony D'Elia?

21 MR. D'ELIA: Yes.

22 MS. HAIRSTON: Dave Fleisher?

23 MR. FLEISHER: Yes.

24 MS. STARGHILL: Thank you,

25 Mr. D'Elia.

1 Oh, we do have one more.

2 CHAIRPERSON TABAKIN: Kathleen

3 Fallstick v. New Jersey Department of Community

4 Affairs, Division of Local Government Services

5 (2007-264).

6 And again Janice Kovach from the DCA

7 is recused.

8 MR. STEWART: The Executive Director

9 respectfully recommends the Council find that:

10 1. Because the Custodian failed to

11 provide a written response to the Complainant's

12 August the 20th, 2007 OPRA request within the

13 statutorily mandated seven business days either

14 granting access, denying access, requesting an

15 extension or seeking clarification of the

16 request, the Complainant's OPRA request was

17 deemed denied. Therefore, the Custodian violated

18 N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

19 2. Because the Custodian certified

20 that there is no record responsive to the OPRA

21 request that exist for the Haddon Township

22 Housing Authority audit for 2006, the Custodian

23 did not unlawfully deny the Complainant access to  
24 the record pursuant to N.J.S.A. 47:1A-1.1 and  
25 Pusterhofer v. NJ Department of Education, GRC

21

1 Complaint No. 2005-49 (July 2005), Renna v.  
2 County of Union, GRC Complaint No. 2005-89  
3 (October 2005) and Van Pelt v. Edison Township  
4 Board of Education (Middlesex), GRC Complaint No.  
5 2007-179 (January 2008).

6           3. Although the Custodian's failure  
7 to provide a written response to the  
8 Complainant's OPRA request within the statutorily  
9 mandated seven business days resulted in a  
10 "deemed" denial, because the Custodian provided  
11 the Complaint with the existing records  
12 approximately eight business days following the  
13 date of the Complainant's request, it is  
14 concluded that the Custodian's actions do not  
15 rise to the level of a knowing and willful  
16 violation of OPRA and unreasonable denial of  
17 access under the totality of the circumstances.

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

23           CHAIRPERSON TABAKIN: Any comments?

24           Motion?

25           MR. D'ELIA: I move to approve it.

22

1           MR. FLEISHER: Second it.

2           CHAIRPERSON TABAKIN: Roll call.

3           MS. HAIRSTON: Robin Berg Tabakin?

4           CHAIRPERSON TABAKIN: Yes.

5           MS. HAIRSTON: Anthony D'Elia?

6           MR. D'ELIA: Yes.

7           MS. HAIRSTON: Dave Fleisher?

8           MR. FLEISHER: Yes.

9           MS. STARGHILL: Now I think you're  
10 done.

11          MR. D'ELIA: You're welcome. Have a

12 nice day.

13 (Janice Kovach returns to the

14 hearing.)

15 CHAIRPERSON TABAKIN: Okay. Carlton

16 Levine v. Bergen County Improvement Authority

17 (2006-96).

18 MR. STEWART: The Executive Director

19 respectfully recommends the Council dismiss this

20 complaint because the Complainant voluntarily

21 withdrew this complaint in writing to the GRC on

22 April 4, 2008.

23 CHAIRPERSON TABAKIN: Motion?

24 MR. FLEISHER: So moved.

25 MS. KOVACH: Second.

23

1 MS. HAIRSTON: Robin Berg Tabakin?

2 CHAIRPERSON TABAKIN: Yes.

3 MS. HAIRSTON: Janice Kovach?

4 MS. KOVACH: Yes.

5 MS. HAIRSTON: Dave Fleisher?

6 MR. FLEISHER: Yes.

7           CHAIRPERSON TABAKIN: Tina Renna v.  
8 County of Union (2006-124).

9           MS. STARGHILL: The Executive  
10 Director respectfully recommends that the Council  
11 find that no further adjudication is required  
12 because the Complainant withdrew the matter from  
13 OAL in a prehearing conference on June 12, 2007.

14           I just want to point out that the  
15 GRC -- because obviously the date of the  
16 withdrawal was almost a year ago and we're just  
17 now closing it out, because the Office of  
18 Administrative Law never sent over the file and  
19 everything that we normally receive when they  
20 have concluded an adjudication.

21           So I had no idea except that I was  
22 going through an exercise of reviewing all of our  
23 cases over there, what we sent, what we received  
24 back and found out that this one was actually  
25 closed already. So that's why the substantial

1 delay in the final adjudication by this Council.

2 MR. FLEISHER: So moved.

3 MS. KOVACH: Second.

4 MS. HAIRSTON: Robin Berg Tabakin?

5 CHAIRPERSON TABAKIN: Yes.

6 MS. HAIRSTON: Janice Kovach?

7 MS. KOVACH: Yes.

8 MS. HAIRSTON: Dave Fleisher?

9 MR. FLEISHER: Yes.

10 CHAIRPERSON TABAKIN: Anonymous v.

11 Township of Monroe (Middlesex).

12 MS. STARGHILL: There's one above

13 that, Robert Vessio ---

14 CHAIRPERSON TABAKIN: Oh, I crossed

15 it off, I'm sorry. I crossed off the wrong one.

16 Robert Vessio v. Township of

17 Manchester (Ocean) (2006-160).

18 MR. CARUSO: The Executive Director

19 respectfully recommends the Council find that the

20 Custodian has complied with the Council's

21 February 27, 2008 Interim Order by releasing the

22 requested record to the Complainant and providing

23 a subsequent certification to the GRC within five  
24 business days ordered by the GRC.

25 CHAIRPERSON TABAKIN: Motion?

25

1 MS. KOVACH: So moved.

2 MR. FLEISHER: Second.

3 MS. HAIRSTON: Robin Berg Tabakin?

4 CHAIRPERSON TABAKIN: Yes.

5 MS. HAIRSTON: Janice Kovach?

6 MS. KOVACH: Yes.

7 MS. HAIRSTON: Dave Fleisher?

8 MR. FLEISHER: Yes.

9 CHAIRPERSON TABAKIN: Anonymous v.  
10 Township of Monroe (Middlesex)(2006-160).

11 MS. STARGHILL: The Executive  
12 Director respectfully recommends the Council find  
13 that:

14 No. 1., Even though the Custodian  
15 eventually provided the Rules of the Planning  
16 Board to the Complainant on November 9, 2007, the

17 Custodian violated OPRA by denying the  
18 Complainant access to the requested records which  
19 were in fact available at the time of the  
20 request; therefore, the Custodian unlawfully  
21 denied access to the requested Rules of the  
22 Planning Board and failed to bear her burden of  
23 proof that the denial of access was authorized by  
24 law pursuant to Section 6 of OPRA.

25 No. 2., In the prior GRC decision,

26

1 Pusterhofer v. NJ Department of Education, GRC  
2 Complaint No. 2005-49 (Adjudicated July 2005),  
3 the Council held that because the Custodian  
4 certified that the records responsive did not  
5 exist, there was no unlawful denial of access.

6 Therefore, in this complaint before  
7 the Council, the Custodian did not unlawfully  
8 deny access to the requested Rules of the Zoning  
9 Board -- not to be confused with the Rules of the  
10 Planning Board -- because the Custodian has  
11 certified that such records do not exist.

12           3. On the Complainant's original  
13 OPRA request, the Custodian annotated that no  
14 other records exist regarding rules for public  
15 records requests other than those listed on page  
16 2 of the OPRA request form. Additionally, the  
17 Custodian certifies within her Statement of  
18 Information that the Township does not have any  
19 additional rules applicable to this request apart  
20 from those rules stated on the OPRA request form.

21           Therefore, the Custodian did not  
22 unlawfully deny access to the requested Rules of  
23 Public Records Requests. See *Pusterhofer v. NJ*  
24 Department of Education, GRC Complaint No.  
25 2005-49 (Adjudicated July 2005).

27

1           4. Pursuant to N.J.S.A. 47:1A-7.b.,  
2 which delineates the Council's powers and duties,  
3 the GRC does not have the authority to regulate  
4 the manner in which a Township maintains its  
5 files or which records a Township must maintain.

6 See *Kwanzaa v. Department of Corrections*, GRC  
7 Complaint No. 2004-167 (Adjudicated March 2005)  
8 (the GRC does not have authority over the content  
9 of a record); *Gillespie v. Newark Public Schools*,  
10 GRC Complaint No. 2004-105 (Adjudicated November  
11 2004) (the GRC does not have the authority to  
12 adjudicate the validity of a record) and *Katinsky*  
13 *v. River Vale Township*, GRC Complaint No. 2003-68  
14 (Adjudicated November 2003) (the integrity of a  
15 requested record is not within the GRC's  
16 authority to adjudicate); and lastly, *Toscano v.*  
17 *NJ Department of Labor*, GRC Complaint No. 2005-59  
18 (Adjudicated September 2005) (the GRC does not  
19 have authority over the condition of records  
20 provided by a Custodian).

21 Therefore, the GRC does not have the  
22 authority to regulate whether the Township should  
23 maintain the Rules of the Zoning Board.

24 No. 5., Because OPRA provides that a  
25 requestor may submit OPRA requests anonymously,

1 the Complainant is permitted to submit an  
2 anonymous OPRA request pursuant to Section 5.i.  
3 and Section 2 of OPRA.

4 6. Because the Custodian provided  
5 the requested Planning Board Rules to the  
6 Complainant as soon as she realized that her  
7 office mistakenly denied the Complainant's OPRA  
8 request for these records, it is concluded that  
9 the Custodian's actions do not rise to the level  
10 of a knowing and willful violation of OPRA and  
11 unreasonable denial of access under the totality  
12 of the circumstances.

13 However, the Custodian's unlawful  
14 denial of access appears negligent and heedless  
15 since she is vested with the legal responsibility  
16 of granting and denying access in accordance with  
17 the law.

18 CHAIRPERSON TABAKIN: Thank you.

19 Motion?

20 MS. KOVACH: So moved.

21 MR. FLEISHER: Second.

22 MS. HAIRSTON: Robin Berg Tabakin?

23 CHAIRPERSON TABAKIN: Yes.

24 MS. HAIRSTON: Janice Kovach?

25 MS. KOVACH: Yes.

29

1 MS. HAIRSTON: Dave Fleisher?

2 MR. FLEISHER: Yes.

3 CHAIRPERSON TABAKIN: Martin O'Shea

4 v. Wayne Board of Education (Passaic)(2006-173).

5 MR. CARUSO: The Executive Director

6 respectfully recommends the Council find that:

7 1. The Custodian has complied with

8 the Council's March 26, 2008 Interim Order by

9 releasing the requested records to the

10 Complainant and providing a subsequent

11 certification to the GRC within the five business

12 days ordered by the GRC.

13 2. Although the Custodian failed to

14 respond to the Complainant in writing within the

15 statutorily mandated seven business days, the

16 Custodian did provide the redacted records to the

17 Complainant on November 3, 2006, complied with  
18 the Council's September 26, 2007 request for an  
19 in camera inspection and complied with the  
20 Council's March 26, 2008 Interim Order.

21 Therefore, it is concluded that the  
22 Custodian's actions do not rise to a level of a  
23 knowing and willful violation of OPRA and  
24 unreasonable denial of access under the totality  
25 of the circumstances.

30

1 However, the Custodian's actions  
2 appear to be negligent and heedless since he is  
3 vested with the legal responsibility of granting  
4 and denying access in accordance with the law.

5 CHAIRPERSON TABAKIN: Motion?

6 MS. KOVACH: So moved.

7 MR. FLEISHER: Second.

8 MS. HAIRSTON: Robin Berg Tabakin?

9 CHAIRPERSON TABAKIN: Yes.

10 MS. HAIRSTON: Janice Kovach?

11 MS. KOVACH: Yes.

12 MS. HAIRSTON: Dave Fleisher?

13 MR. FLEISHER: Yes.

14 CHAIRPERSON TABAKIN: Chaim Fisher

15 v. Lakewood Board of Education (Ocean)(2006-193).

16 MS. LOWNIE: The Executive Director

17 respectfully recommends that no further

18 adjudication is required because the Complainant

19 failed to appear at the scheduled proceeding on

20 March 13, 2008 at the Office of Administrative

21 Law.

22 CHAIRPERSON TABAKIN: Motion?

23 MS. KOVACH: So moved.

24 MR. FLEISHER: Second.

25 MS. HAIRSTON: Robin Berg Tabakin?

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1 CHAIRPERSON TABAKIN: Yes.

2 MS. HAIRSTON: Janice Kovach?

3 MS. KOVACH: Yes.

4 MS. HAIRSTON: Dave Fleisher?

5 MR. FLEISHER: Yes.

6 CHAIRPERSON TABAKIN: What happened  
7 to Albrecht?

8 MS. STARGHILL: That was pulled  
9 before the meeting date.

10 CHAIRPERSON TABAKIN: I see that  
11 it's not on the agenda, that's why I'm asking the  
12 question.

13 MS. STARGHILL: It's pulled until  
14 next month.

15 CHAIRPERSON TABAKIN: All right.  
16 Michael Pisauro v. Township of Long Branch  
17 (Ocean)(2007-146).

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

20 1. Pursuant to Mid-Atlantic  
21 Recycling Tech v. City of Vineland, the U.S.  
22 District Court for New Jersey stated that the  
23 Federal Court Rules do not preempt or limit a  
24 person's ability to seek documents under OPRA.  
25 See also MAG v. Division of ABC, 375 N.J. Super.

1 534 (App. Div. 2005).

2           Moreover, OPRA contains no exemption  
3 to disclosure for records which are a part of  
4 litigation. Thus, the Custodian unlawfully  
5 denied access to the requested records and has  
6 failed to bear his burden of proof that the  
7 denial of access was authorized by law pursuant  
8 to OPRA Section 6. As such, the Custodian shall  
9 release the requested records to the Complainant.

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

19           3. The Council defers analysis of  
20 whether the Complainant is a "prevailing party"  
21 pursuant to OPRA's Section 6 and entitled to

22 reasonable attorney's fees pending the  
23 Custodian's compliance with the Council's Interim  
24 Order.

25 4. The Council defers analysis of

33

1 whether the Custodian knowingly and willfully  
2 violated OPRA and unreasonably denied access  
3 under the totality of the circumstances pending  
4 the Custodian's compliance with the Council's  
5 Interim Order.

6 CHAIRPERSON TABAKIN: Okay. Any  
7 comments?

8 Motion?

9 MS. KOVACH: So moved.

10 MR. FLEISHER: Second.

11 MS. HAIRSTON: Robin Berg Tabakin?

12 CHAIRPERSON TABAKIN: Yes.

13 MS. HAIRSTON: Janice Kovach?

14 MS. KOVACH: Yes.

15 MS. HAIRSTON: Dave Fleisher?

16 MR. FLEISHER: Yes.

17 CHAIRPERSON TABAKIN: Okay. We're  
18 pulling Faulkner for lack of a quorum.

19 John Bart v. City of Passaic  
20 (Passaic)(2007-162).

21 MS. LOWNIE: The Executive Director  
22 respectfully recommends the Council find that  
23 because the Custodian provided the Complainant  
24 with redacted copies of the requested arrest  
25 reports, lawfully redacted the information

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1 contained on the arrest report which is not  
2 expressly disclosable pursuant to N.J.S.A.  
3 47:1A-3.b., and provided certified confirmation  
4 of compliance, pursuant to N.J. Court Rule 1:4-4,  
5 to the Executive Director within five business  
6 days of receiving the Council's February 27th,  
7 2008 Interim Order, the Custodian has complied  
8 with said Order.

9 CHAIRPERSON TABAKIN: Motion?

10 MS. KOVACH: So moved.

11 MR. FLEISHER: Second.

12 MS. HAIRSTON: Robin Berg Tabakin?

13 CHAIRPERSON TABAKIN: Yes.

14 MS. HAIRSTON: Janice Kovach?

15 MS. KOVACH: Yes.

16 MS. HAIRSTON: Dave Fleisher?

17 MR. FLEISHER: Yes.

18 CHAIRPERSON TABAKIN: Martin O'Shea

19 v. Madison Public School District

20 (Morris)(2007-185).

21 MR. CARUSO: The Executive Director

22 respectfully recommends the Council find that:

23 1. The Custodian complied with the

24 Council's February 27, 2008 Interim Order by

25 initially responding to the Complainant's Counsel

35

1 within the five business days ordered by the GRC

2 and releasing the requested record to the

3 Complainant and providing a subsequent

4 certification to the GRC on March 13, 2008.

5           2. Pursuant to Teeters v. DYFS, 387  
6 N.J. Super. 423 (App. Div. 2006) and the  
7 Council's February 27, 2008 Interim Order, the  
8 Complainant has achieved "the desired result  
9 because the complaint brought about a change  
10 (voluntary or otherwise) in the custodian's  
11 conduct." Id. at 432.

12           Therefore, the Complainant is a  
13 prevailing party entitled to an award of a  
14 reasonable attorney's fee pursuant to N.J.S.A.  
15 47:1A-6 and Teeters, supra. Thus, this complaint  
16 should be referred to the Office of  
17 Administrative Law for the determination of  
18 reasonable prevailing party attorney's fees.

19           CHAIRPERSON TABAKIN: Any questions?

20           Motion?

21           MR. FLEISHER: So moved.

22           MS. KOVACH: Second.

23           MS. HAIRSTON: Robin Berg Tabakin?

24           CHAIRPERSON TABAKIN: Yes.

25           MS. HAIRSTON: Janice Kovach?

1 MS. KOVACH: Yes.

2 MS. HAIRSTON: Dave Fleisher?

3 MR. FLEISHER: Yes.

4 CHAIRPERSON TABAKIN: Allan Johnson

5 v. Borough of Oceanport (Monmouth

6 County)(2007-200).

7 MR. CARUSO: Before I begin, I just

8 wanted to make a note of clarification. There

9 was a question posed last Wednesday and I had to

10 make a change on page 5 in the last paragraph.

11 Where the first sentence reads: "Additionally,

12 the e-mails provided by the Complainant..." I

13 added, "...as part of the denial of access

14 complaint."

15 And that was just to make it clear

16 that it was in fact the Complainant who had

17 submitted additional e-mails along with his

18 denial of access complaint in support of his

19 argument.

20 CHAIRPERSON TABAKIN: All right.

21 Thank you.

22 MR. CARUSO: The Executive Director

23 respectfully recommends the Council find that:

24 1. Because the Custodian responded

25 to the Complainant's July 3, 2007 OPRA request

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1 within the statutorily mandated seven business

2 days providing all records responsive, there is

3 no unlawful denial of access. See Burns v.

4 Borough of Collingswood at GRC Complaint No.

5 2004-190 (April 2005).

6 2. The e-mails provided by the

7 Complainant contain four separate e-mails between

8 Councilwoman Kahle and Greg Schussler. Two of

9 these e-mails fall within the requested time

10 period of May 3rd, 2007 to July 3rd, 2007, but

11 merely discuss the arrangement of a lunch at

12 which the newly hired borough engineer may meet

13 Greg Schussler. Therefore, there is insufficient

14 evidence to determine whether these e-mails are

15 responsive to the Complainant's July 3rd, 2007,

16 OPRA request.

17 CHAIRPERSON TABAKIN: Any comments?

18 Okay, motion as amended?

19 MR. FLEISHER: So moved.

20 MS. KOVACH: Second.

21 MS. HAIRSTON: Robin Berg Tabakin?

22 CHAIRPERSON TABAKIN: Yes.

23 MS. HAIRSTON: Janice Kovach?

24 MS. KOVACH: Yes.

25 MS. HAIRSTON: Dave Fleisher?

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1 MR. FLEISHER: Yes.

2 CHAIRPERSON TABAKIN: Martin O'Shea

3 v. Township of Vernon (Sussex County) (2007-207).

4 MS. LOWNIE: The Executive Director

5 respectfully recommends the Council find that:

6 No. 1., Because the Custodian made

7 the requested records available to the

8 Complainant on compact disc for the actual cost

9 of \$0.40 which does not include labor or other

10 overhead expenses associated with making the copy  
11 and because the Custodian provided certified  
12 confirmation of compliance, pursuant to  
13 New Jersey Court Rule 1:4-4, to the Executive  
14 Director within the ordered five business days,  
15 the Custodian has complied with the Council's  
16 March 28, 2008 Interim Order.

17 No. 2., Although the original  
18 Custodian violated N.J.S.A. 47:1A-5.b. by not  
19 charging the actual cost of the requested audio  
20 recordings, because the original Custodian  
21 provided said records to the Complainant free of  
22 charge after the Complainant filed his denial of  
23 access complaint, as well as because the current  
24 Custodian complied with the Council's March 26th,  
25 2008 Interim Order by making the requested

1 records available to the Complainant for the  
2 actual cost of \$0.40, it is concluded that  
3 neither the original nor the current Custodian's  
4 actions rise to the level of a knowing and

5 willful violation of OPRA and unreasonable denial  
6 of access under the totality of the  
7 circumstances.

8           However, the original Custodian's  
9 violation of N.J.S.A. 47:1A-5.b. appears  
10 negligent and heedless since she is vested with  
11 the legal responsibility of granting and denying  
12 access in accordance with the law.

13           No. 3., Regarding fees for copies,  
14 the GRC is only concerned with whether a  
15 custodian is charging the appropriate fees  
16 pursuant to OPRA because custodians should be  
17 granting and denying access in accordance with  
18 the law. Thus, the fact that the Township of  
19 Vernon amended its ordinance, which sets forth  
20 the fees for copies, has no bearing on this  
21 complaint.

22           Therefore, there is no evidence to  
23 support the Complainant's assertion that the  
24 Township Council knowingly and willfully violated  
25 OPRA and unreasonably denied access under the

1 totality of the circumstances.

2           Additionally, the knowing and

3 willful penalty can only be assessed to an

4 individual or individuals found to have knowingly

5 and willfully violated OPRA, not an agency or

6 entity pursuant to N.J.S.A. 47:1A-11.a. and Paff

7 v. Borough of South Bound Brook, GRC Complaint

8 No. 2006-158 (May 2007).

9           No. 4., The action sought by the

10 Complainant came about due to the Complainant's

11 filing of a denial of access complaint and as

12 such, the Complainant is a prevailing party

13 entitled to an award of a reasonable attorney's

14 fee pursuant to N.J.S.A. 47:1A-6 and Teeters v.

15 DYFS, 387 N.J. Super. 423 (App. Div. 2006).

16 Thus, this complaint should be referred to the

17 Office of Administrative Law for the

18 determination of prevailing party attorney's

19 fees.

20           CHAIRPERSON TABAKIN: I have just

21 one change. On page 4, the last paragraph, first  
22 sentence, I think that should say "Additionally,  
23 the Complainant asks the Council..." instead of  
24 "Custodian"?

25 MS. STARGHILL: Yes. So this would

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1 be an edit versus an amendment which would  
2 substantially change something. And that is true  
3 probably as of the last F.R. where additional  
4 language was added for clarification purposes.

5 CHAIRPERSON TABAKIN: Right, as  
6 added.

7 MS. KOVACH: So moved.

8 MR. FLEISHER: Second.

9 MS. HAIRSTON: Robin Berg Tabakin?

10 CHAIRPERSON TABAKIN: Yes.

11 MS. HAIRSTON: Janice Kovach?

12 MS. KOVACH: Yes.

13 MS. HAIRSTON: Dave Fleisher?

14 MR. FLEISHER: Yes.

15 CHAIRPERSON TABAKIN: Milton Durham  
16 v. New Jersey Department of Corrections  
17 (2007-212).

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

20 No. 1., Item No. 1 of the  
21 Complainant's request is invalid because it is  
22 not a request for identifiable government records  
23 and because the Custodian is not required to  
24 conduct research in response to an OPRA request  
25 pursuant to *MAG Entertainment, LLC v. Division of*

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1 *Alcoholic Beverage Control*, 375 N.J. Super. 534  
2 (March 2005), *New Jersey Builders Association v.*  
3 *New Jersey Council on Affordable Housing*, 390  
4 N.J. Super. 166 (App. Div. 2007), and *Bent v.*  
5 *Stafford Police Department*, 381 N.J. Super. 30  
6 (October 2005). See N.J.S.A. 47:1A-1.1.

7 Additionally, the Custodian properly  
8 requested clarification of the request pursuant  
9 to *Cody v. Middletown Township Public Schools*,

10 GRC Complaint No. 2005-98 (December 2005).  
11 Therefore, the Custodian has not unlawfully  
12 denied access to the requested records at Item  
13 No. 1.  
14 No. 2., Because Item No. 2 of the  
15 Complainant's request did identify the record  
16 sought, said request is not invalid as a broad or  
17 unclear request pursuant to *MAG Entertainment,*  
18 *LLC v. The Division of Alcoholic Beverage*  
19 *Control*, 375 N.J. Super. 534 (March 2005), NJ  
20 *Builders Association v. NJ Council on Affordable*  
21 *Housing*, 390 N.J. Super. 166 (App. Div. 2007),  
22 and *Bent v. Stafford Police Department*, 381 N.J.  
23 *Super 30* (October 2005), and thus the Custodian  
24 has not carried her burden of proving a lawful  
25 denial of access to Item No. 2 of the

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1 Complainant's request pursuant to N.J.S.A.

2 47:1A-6.

3 No. 3., Pursuant to N.J.S.A.

4 47:1A-6, the Custodian has carried her burden of  
5 proving a lawful denial of access to Item No. 3  
6 of the Complainant's request because said records  
7 are exempt from disclosure pursuant to N.J.S.A.  
8 47:1A-9.a., N.J.A.C. 10A:22-3.2(b), the court's  
9 decision in Newark Morning Ledger Co., Publisher  
10 of the Star-Ledger v. Division of the State  
11 Police of the New Jersey Department of Law and  
12 Public Safety, Law Division - Mercer County,  
13 Docket NO. MER-L-1090-05 (July 5, 2005) and  
14 Tillery v. NJ Department of Corrections, GRC  
15 Complaint No. 2007-155 (February 2008).  
16 No. 4., Although the Custodian  
17 unlawfully denied access to Item No. 2 of the  
18 Complainant's request because the Complainant's  
19 request did identify the record sought and thus  
20 said request is not invalid as a broad or unclear  
21 request pursuant to MAG Entertainment, LLC v. The  
22 Division of Alcoholic Beverage Control, 375 N.J.  
23 Super. 534 (March 2005), NJ Builders Association  
24 v. NJ Council on Affordable Housing, 390 N.J.  
25 Super. 166 (App. Div. 2007), and Bent V. Stafford

1 Police Department, 381 N.J. Super. 30 (October  
2 2005), because the Custodian made the records  
3 responsive to said request available to the  
4 Complainant via letter dated October 11, 2007, it  
5 is concluded that the Custodian's actions do not  
6 rise to the level of a knowing and willful  
7 violation of OPRA and unreasonable denial of  
8 access under the totality of the circumstances.

9           However, the Custodian's unlawful  
10 denial of access appears negligent and heedless  
11 since she is vested with the legal responsibility  
12 of granting and denying access in accordance with  
13 the law.

14           CHAIRPERSON TABAKIN: Any questions?

15           Motion?

16           MS. KOVACH: So moved.

17           MR. FLEISHER: Second.

18           MS. HAIRSTON: Robin Berg Tabakin?

19           CHAIRPERSON TABAKIN: Yes.

20 MS. HAIRSTON: Janice Kovach?  
21 MS. KOVACH: Yes.  
22 MS. HAIRSTON: Dave Fleisher?  
23 MR. FLEISHER: Yes.  
24 CHAIRPERSON TABAKIN: Eric Taylor v.  
25 Elizabeth Board of Education (Union

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1 County)(2007-214).

2 MS. LOWNIE: The Executive Director  
3 respectfully recommends the Council find that:  
4 No. 1., The Custodian's failure to  
5 grant access, deny access, seek clarification or  
6 request an extension of time to the Complainant's  
7 OPRA requests in writing within the statutorily  
8 mandated seven business days results in a  
9 "deemed" denial pursuant to N.J.S.A. 47:1A-5.g.,  
10 N.J.S.A. 47:1A-5.i. and Kelley v. Township of  
11 Rockaway, GRC Complaint No. 2007-11 (October  
12 2007).

13 Additionally, pursuant to Cody v.  
14 Middletown Township Public Schools, GRC Complaint

15 No. 2005-98 (December 2005) and Paff v. Bergen  
16 County Prosecutor's Office, GRC Complaint No.  
17 2005-115 (March 2006), the Custodian's verbal  
18 request for an extension of time was improper  
19 under OPRA because said extension was not  
20 requested in writing within the statutorily  
21 mandated seven business days.

22 No. 2., Because the Complainant's  
23 OPRA requests are not requests for identifiable  
24 government records and because the Custodian is  
25 not required to conduct research in response to

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1 an OPRA request, the Complainant's requests are  
2 invalid and the Custodian has not unlawfully  
3 denied access to the requested records pursuant  
4 to MAG Entertainment, LLC v. Division of  
5 Alcoholic Beverage Control, 375 N.J. Super. 534  
6 (March 2005), Bent v. Stafford Police Department,  
7 381 N.J. Super. 30 (October 2005), New Jersey  
8 Builders Association v. New Jersey Council of

9 Affordable Housing, 390 N.J. Super. 166 (App.  
10 Div. 2007), and Schuler v. Borough of Bloomsbury,  
11 GRC Complaint No. 2007-151 (March 2008).

12 CHAIRPERSON TABAKIN: Motion?

13 MR. FLEISHER: So moved.

14 MS. KOVACH: Second.

15 MS. HAIRSTON: Robin Berg Tabakin?

16 CHAIRPERSON TABAKIN: Yes.

17 MS. HAIRSTON: Janice Kovach?

18 MS. KOVACH: Yes.

19 MS. HAIRSTON: Dave Fleisher?

20 MR. FLEISHER: Yes.

21 CHAIRPERSON TABAKIN: Catherine

22 Schneble v. New Jersey Department of

23 Environmental Protection (2007-220).

24 MR. CARUSO: The Executive Director

25 respectfully recommends the Council find that:

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- 1 1. Because the certifications
- 2 provided by the Custodian and Ms. Smith state
- 3 that they performed an inadequate initial search

4 based on the assumption that a JAQ is a DOP  
5 record, and that a proper search yielded other  
6 records responsive to the Complainant's August  
7 30th, 2007 request, the Custodian unlawfully  
8 denied access to the requested records in his  
9 September 10th, 2007 response to the  
10 Complainant's OPRA request. The Custodian has  
11 failed to bear his burden of proof that the  
12 denial of access to the requested records was  
13 authorized by law pursuant to N.J.S.A. 47:1A-6.

14           2. The evidence of record indicates  
15 that although the Custodian's initial response of  
16 no records responsive resulted in a denial of  
17 access, the Custodian did eventually provide all  
18 records responsive to the Complainant's request.

19           Additionally, the evidence of record  
20 shows that both the Custodian and Ms. Smith  
21 misinterpreted the Complainant's OPRA request to  
22 be for only one record: the JAQ.

23           Therefore, it is concluded that the  
24 Custodian's actions do not rise to the level of a

25 knowing and willful violation of OPRA and

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1 unreasonable denial of access under the totality  
2 of the circumstances.

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

8           CHAIRPERSON TABAKIN: Motion?

9           MS. KOVACH: So moved.

10          MR. FLEISHER: Second.

11          MS. HAIRSTON: Robin Berg Tabakin?

12          CHAIRPERSON TABAKIN: Yes.

13          MS. HAIRSTON: Janice Kovach?

14          MS. KOVACH: Yes.

15          MS. HAIRSTON: Dave Fleisher?

16          MR. FLEISHER: Yes.

17          CHAIRPERSON TABAKIN: Martin O'Shea

18 v. Township of Fredon (Sussex County) (2007-255).

19          MR. CARUSO: The Executive Director

20 respectfully recommends the Council find that:

21           1. The Custodian has complied with  
22 the provisions of the Council's February 27th,  
23 2008 Interim Order by disclosing the requested  
24 Executive Session minutes to the Complainant  
25 within the required time frame.

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1           2. Because the Custodian complied  
2 with the Council's February 27, 2008 Interim  
3 Order, it is concluded that the Custodian's  
4 actions do not rise to the level of a knowing and  
5 willful violation of OPRA and unreasonable denial  
6 of access under the totality of the  
7 circumstances.

8           However, the Custodian's actions  
9 appear to be negligent and heedless since she is  
10 vested with the legal responsibility of granting  
11 and denying access in accordance with the law.

12           CHAIRPERSON TABAKIN: Motion?

13           MS. KOVACH: So moved.

14 MR. FLEISHER: Second.

15 MS. HAIRSTON: Janice Kovach?

16 MS. KOVACH: Yes.

17 MS. HAIRSTON: Dave Fleisher?

18 MR. FLEISHER: Yes.

19 CHAIRPERSON TABAKIN: John Paff v.

20 Borough of Roselle (Union) (2007-255).

21 MR. CARUSO: The Executive Director

22 respectfully recommends the Council find that:

23 1. The Custodian's failure to

24 respond in writing to the Complainant's OPRA

25 request granting access, denying access, seeking

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1 clarification or requesting an extension of time

2 within the statutorily mandated seven business

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

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

5 of the Complainant's OPRA request. Kelley v.

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

7 (October 2007).

8 2. The Custodian's denial of access

9 to request Item No. 1, while untimely, is  
10 appropriate pursuant to *Parave-Fogg v. Lower*  
11 *Alloways Creek Township*, GRC Complaint No.  
12 2006-51 (August 2006). The Custodian is not  
13 required to provide this record to the  
14 Complainant.

15 3. Because the Complainant  
16 identifies a type of government record  
17 (resolutions and executive meeting minutes)  
18 within a specific date (the most recent meeting  
19 prior to the Complainant's OPRA request and the  
20 first two meetings after October 1, 2006), *MAG*  
21 *Entertainment, LLC v. Division of Alcoholic*  
22 *Beverage Control*, 375 N.J. Super 534, 546 (App.  
23 Div. 2005) and *Bent v. Stafford Police*  
24 *Department*, 381 N.J. Super. 30, 37 (App. Div.  
25 2005) do not apply to the request relevant to

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1 this complaint. The Custodian's search is not  
2 open-ended, nor does it require research, but

3 rather requires the Custodian to locate the  
4 corresponding meetings and provide resolutions  
5 and meeting minutes.

6 4. The Custodian failed to bear her  
7 burden of proving that the denial of access to  
8 request Item No. 2, No. 3 and No. 4 was  
9 authorized under OPRA, as required by N.J.S.A.  
10 47:1A-6.

11 5. The Custodian shall disclose the  
12 requested records responsive to Item No. 2, No. 3  
13 and No. 4 with appropriate redactions, if any,  
14 and a redaction index detailing the general  
15 nature of the information redacted and the lawful  
16 basis for such redactions as required by N.J.S.A.  
17 47:1A-6 and N.J.S.A. 47:1A-5.g.

18 6. The Custodian shall comply with  
19 Item No. 5 above within five business days from  
20 receipt of the Council's Interim Order with  
21 appropriate redactions, including a detailed  
22 document index explaining the lawful basis for  
23 each redaction and simultaneously provide  
24 certified confirmation of compliance, in

25 accordance with N.J. Court Rule 1:4-4, to the

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1 Executive Director.

2           7. The Council defers analysis of  
3 whether the Custodian knowingly and willfully  
4 violated OPRA and unreasonably denied access  
5 under the totality of the circumstances pending  
6 the Custodian's compliance with the Council's  
7 Interim Order.

8           8. The Council defers analysis of  
9 whether the Complainant is a "prevailing party"  
10 pursuant to N.J.S.A. 47:1A-6 and entitled to  
11 reasonable attorney's fees pending the  
12 Custodian's compliance with the Council's Interim  
13 Order.

14           CHAIRPERSON TABAKIN: Thank you.

15           Any questions?

16           Motion?

17           MR. FLEISHER: So moved.

18           MS. KOVACH: Second.

19 MS. HAIRSTON: Robin Berg Tabakin?

20 CHAIRPERSON TABAKIN: Yes.

21 MS. HAIRSTON: Janice Kovach?

22 MS. KOVACH: Yes.

23 MS. HAIRSTON: Dave Fleisher?

24 MR. FLEISHER: Yes.

25 CHAIRPERSON TABAKIN: Z.T. v.

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1 Bernards Township Board of Education (Somerset  
2 County)(2007-262).

3 MR. CARUSO: The Executive Director  
4 respectfully recommends the Council find that:

5 1. Because the Custodian  
6 inaccurately asserted that the requested record  
7 did not exist, the Custodian has unlawfully  
8 denied access to the requested transcript, thus  
9 violating N.J.S.A. 47:1A-5.i. Additionally,  
10 because the requested record does exist, the  
11 Custodian has failed to bear his burden of proof  
12 that this denial of access was authorized by law  
13 pursuant to N.J.S.A. 47:1A-6.

14           2. The Custodian shall disclose the  
15 requested October 3rd, 2006 transcript with  
16 appropriate redactions, if any, and a redaction  
17 index detailing the general nature of the  
18 information redacted and the lawful basis for  
19 such redactions as required by N.J.S.A. 47:1A-6  
20 and 47:1A-5.g.

21           3. The Custodian shall comply with  
22 Item No. 2 above within five business days from  
23 receipt of the Council's Interim Order and with  
24 the appropriate redactions, including a detailed  
25 document index explaining the lawful basis for

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1 each redaction and simultaneously provide  
2 certified confirmation of compliance, in  
3 accordance with N.J. Court Rule 1:4-4, to the  
4 Executive Director.

5           4. The Council defers analysis of  
6 whether the Custodian knowingly and willfully  
7 violated OPRA and unreasonably denied access

8 under the totality of the circumstances pending  
9 the Custodian's compliance with the Council's  
10 Interim Order.

11 CHAIRPERSON TABAKIN: Motion?

12 MS. KOVACH: So moved.

13 MR. FLEISHER: Second.

14 MS. HAIRSTON: Robin Berg Tabakin?

15 CHAIRPERSON TABAKIN: Yes.

16 MS. HAIRSTON: Janice Kovach?

17 MS. KOVACH: Yes.

18 MS. HAIRSTON: Dave Fleisher?

19 MR. FLEISHER: Yes.

20 CHAIRPERSON TABAKIN: Stephen Jung

21 v. Borough of Roselle (Union County) (2007-299).

22 MS. GORDON: The Executive Director

23 respectfully recommends the Council find that,

24 based on the inadequate evidence in this matter,

25 the GRC is unable to determine whether or not the

1 original Custodian unlawfully denied access to

2 the requested records. Therefore, this complaint

3 should be referred to the Office of  
4 Administrative Law for a hearing to resolve the  
5 facts. Also, this complaint should be referred  
6 to the Office of Administrative Law for  
7 determination of whether the original Custodian  
8 knowingly and willfully violated OPRA and  
9 unreasonably denied access under the totality of  
10 the circumstances.

11 MR. FLEISHER: So moved.

12 MS. KOVACH: Second.

13 MS. HAIRSTON: Robin Berg Tabakin?

14 CHAIRPERSON TABAKIN: Yes.

15 MS. HAIRSTON: Janice Kovach?

16 MS. KOVACH: Yes.

17 MS. HAIRSTON: Dave Fleisher?

18 MR. FLEISHER: Yes.

19 CHAIRPERSON TABAKIN: Joseph

20 O'Halloran v. Borough of Roselle (Union  
21 County)(2007-307).

22 MS. GORDON: The Executive Director  
23 respectfully recommends the Council find that,

24 based on the inadequate evidence in this matter,  
25 the GRC is unable to determine whether or not the

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1 original Custodian unlawfully denied access to  
2 the requested records.

3 Therefore, this complaint should be  
4 referred to the Office of Administrative Law for  
5 a hearing to resolve the facts. Also, this  
6 complaint should be referred to the Office of  
7 Administrative Law for determination of whether  
8 the original Custodian knowingly and willfully  
9 violated OPRA and unreasonably denied access  
10 under the totality of the circumstances.

11 CHAIRPERSON TABAKIN: Motion?

12 MS. KOVACH: So moved.

13 MR. FLEISHER: Second.

14 MS. HAIRSTON: Robin Berg Tabakin?

15 CHAIRPERSON TABAKIN: Yes.

16 MS. HAIRSTON: Janice Kovach?

17 MS. KOVACH: Yes.

18 MS. HAIRSTON: Dave Fleisher?

19 MR. FLEISHER: Yes.

20 CHAIRPERSON TABAKIN: Richard Iorio

21 v. New Jersey Department of Labor, Commissioner's

22 Office (2007-310).

23 MS. GORDON: 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 within the statutorily

2 mandated seven business days resulted in a deemed

3 denial of the Complainant's OPRA request. The

4 Custodian has, therefore, violated OPRA Section

5 5.i. See *Kelley v. Township of Rockaway*, GRC

6 Complaint No. 2007-11 (October 2007).

7 2. The Council should conduct an in

8 camera review of the two-page memorandum dated

9 April 10, 2007 from Maggie Moran and Hope Cooper

10 to Cabinet Members entitled "Management Salary

11 Program: Fiscal Year 2008" in order to verify if

12 the Custodian's claimed executive privilege

13 and/or advisory consultant or deliberate  
14 exemptions are valid pursuant to Paff v.  
15 Department of Labor, 379 N.J. Super. 346, 354-355  
16 (app. Div. 2005).  
17           3. The Custodian must deliver to  
18 the Council in a sealed envelope -- that reads  
19 "six copies," it should read "nine copies" of the  
20 requested unredacted document (see paragraph No.  
21 2 above), a document or redaction index, as well  
22 as a legal certification from the Custodian, in  
23 accordance with New Jersey Court Rule 1:4-4, that  
24 the document provided is the document requested  
25 by the Council for the in camera inspection.

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1 Such delivery must be received by the GRC within  
2 five business days from receipt of the Council's  
3 Interim Order.

4           4. Because the Custodian in this  
5 matter has certified that no records responsive  
6 to the Complainant's OPRA request for the  
7 Department-wide standards referred to in the

8 Memorandum to File attached to the Complainant's  
9 OPRA request, the Custodian has not unlawfully  
10 denied access to this record. Pusterhofer v. New  
11 Jersey Department of Education, GRC Complaint No.  
12 2005-49 (Adjudicated July 2005).

13           5. In his November 28, 2007  
14 response to Complainant's OPRA request, the  
15 Custodian stated that this Item represented a  
16 request for data rather than a request for a  
17 identifiable government record, and that he was  
18 therefore under no obligation to respond to the  
19 request. The Custodian also stated in his  
20 response to the OPRA request that no records  
21 responsive to this request existed.

22           However, the Custodian located a  
23 responsive record during the preparation of the  
24 SOI. The Custodian certified in his Statement of  
25 Information that the responsive record, a

1 one-page e-mail dated April 27, 2007 from the

2 Department of Treasury to Labor and Workforce  
3 Development indicating the OMB calculated dollar  
4 value of Labor and Workforce Development 6  
5 percent pool to fund Fiscal Year 2008 performance  
6 awards, was provided to the Complainant with the  
7 Statement of Information on February 6, 2008.

8 Therefore, although access to the  
9 requested record was untimely, the Custodian has  
10 not unlawfully denied access to the requested  
11 record.

12 6. Because the Complainant's OPRA  
13 request at Items No. 3 and 5 to 9 sought  
14 information, not identifiable government records,  
15 the OPRA request for these items is invalid, *MAG*  
16 *Entertainment, LLC v. Division of Alcoholic*  
17 *Beverage Control*, 375 N.J. Super. 534 (App. Div.  
18 2005). See also *New Jersey Builders Association*  
19 *v. New Jersey Council on Affordable Housing*, 390  
20 N.J. Super. 166 (App. Div. 2007); and *Reda v.*  
21 *Township of West Milford*, GRC Complaint No.  
22 2002-58 (Adjudicated January 2003).

23 The Custodian, therefore, has borne

24 his burden of proof that the denial of access was  
25 authorized by law pursuant to OPRA Section 6.

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1 The Council defers analysis of  
2 whether the Custodian knowingly and willfully  
3 violated OPRA and unreasonably denied access  
4 under the totality of the circumstances pending  
5 the Custodian's compliance with the Council's  
6 Interim Order.

7 CHAIRPERSON TABAKIN: Okay, motion  
8 with the edit in paragraph 3?

9 MS. KOVACH: So moved.

10 MR. FLEISHER: Second.

11 MS. HAIRSTON: Robin Berg Tabakin?

12 CHAIRPERSON TABAKIN: Yes.

13 MS. HAIRSTON: Janice Kovach?

14 MS. KOVACH: Yes.

15 MS. HAIRSTON: Dave Fleisher?

16 MR. FLEISHER: Yes.

17 CHAIRPERSON TABAKIN: Thank you all.

18           Okay. There are no complaints to be  
19 reconsidered.

20           You want to talk about the  
21 complaints adjudicated in Superior Court?

22           MS. GORDON: Well, we received the  
23 Appellate Division's decision in the Janon Fisher  
24 matter. This was approved for publication April  
25 28th, 2008.

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1           Briefly, the issue presented in this  
2 appeal was whether it was reasonable for the  
3 Division of Law to assign responsibility to the  
4 retrieval of certain records that were responsive  
5 to the OPRA request to the Assistant and Deputy  
6 Attorney General who had in fact prepared those  
7 records.

8           Ultimately, the Appellate Division  
9 upheld the Council's determination in this case,  
10 concluded that the Division had reasonably  
11 determined that those attorneys could identify  
12 the records responsive to the OPRA request and

13 any privileged parts of those records more  
14 expeditiously and reliably than clerical staff  
15 could do. And therefore, the special service  
16 charge for production of those records was  
17 properly based on the time expended by the  
18 Assistant and Deputy Attorney General in  
19 reviewing and retrieving those records.

20 CHAIRPERSON TABAKIN: Thank you.

21 Would you like to give your report?

22 MS. STARGHILL: Yes.

23 Well, why don't we vote -- well,  
24 I'll give my report.

25 So we had -- I had an unexpected

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1 move of one of my staff members to another state  
2 agency and I received literally the same day a  
3 new employee who actually has been working with  
4 us two weeks now and contributed to the  
5 administrative disposition to this agenda. So  
6 she hit the road running, Sherin Keys, Tiffany

7 Mayers replacement.

8 And in the audience we have another

9 new employee who went through the regular

10 channel, Elizabeth Ziegeler-Sayer --

11 MS. ZIEGLER-SEARS: -- Sears.

12 MS. STARGHILL: -- Sears, and she

13 will be joining us on Monday. So I've finally

14 got a few new folks. I have one vacancy,

15 technically. They probably would be ripped from

16 me with the new budget. But that's not stopping

17 me from interviewing and putting forth a

18 candidate. I'm crazy. So we're back up to eight

19 with Elizabeth -- nine, I'm sorry, with Elizabeth

20 coming on board.

21 And this agency has normally had a

22 complement of ten staff members. We have been as

23 low as probably five, four in the past two years

24 under my tenure and now we're coming up. I would

25 probably say everyone feels less stress. Whether

1 there's less work, I doubt that, but at least we

2 feel less stressed and that's a good thing.

3 CHAIRPERSON TABAKIN: Good.

4 MS. STARGHILL: And so -- actually,  
5 let's talk about the recommended amendments to  
6 the GRC bylaws.

7 So I received an interesting e-mail  
8 from one of our frequent flyers asking us why we  
9 had not established and adopted our budget at the  
10 December meeting as is required of our bylaw.  
11 That was pretty interesting to me because I know  
12 as most citizens in New Jersey understand given  
13 the recent conflict between the Governor and the  
14 Legislature adopting the State budget, that we  
15 don't establish and adopt a budget. According to  
16 our enabling statute, our budget is established  
17 by the Department of Community Affairs. We are  
18 an agency within the Department of Community  
19 Affairs.

20 And so this whole revelation calls  
21 for an amendment to the bylaws and that was the  
22 major amendment. The other amendments were

23 cleaning up language, really. So now our bylaws  
24 don't mention budget because we have nothing to  
25 do with our budget. We're basically handed our

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1 budget and told to shut up, basically. Take it  
2 and be quiet, be happy you got any money.

3 And so we need to vote to amend the  
4 bylaws to make that change.

5 CHAIRPERSON TABAKIN: Should we vote  
6 now?

7 MS. STARGHILL: Yes.

8 CHAIRPERSON TABAKIN: Okay.

9 So could I have a motion to amend  
10 the bylaws?

11 MR. FLEISHER: So moved.

12 MS. KOVACH: Second.

13 MS. HAIRSTON: Robin Berg Tabakin?

14 CHAIRPERSON TABAKIN: Yes.

15 MS. HAIRSTON: Janice Kovach?

16 MS. KOVACH: Yes.

17 MS. HAIRSTON: Dave Fleisher?

18 MR. FLEISHER: Yes.

19 MS. STARGHILL: Now we need to vote  
20 on officers. As is obvious, besides Kathryn  
21 Forsyth, absent, who is our regular delegate from  
22 the Commissioner Department of Education, we are  
23 down one public member and we're waiting for the  
24 Governor's office to make that appointment. But  
25 in the meantime, we're four months late in our

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1 vote of new officers. So my thinking is that we  
2 would elect a chairman and also a combined  
3 position of chairman/secretary until such time as  
4 we get the third public member, which I'm hoping  
5 the Governor will have an opportunity to appoint  
6 shortly. And that is basically from  
7 perception --

8 CHAIRPERSON TABAKIN: You mean vice  
9 chair?

10 MS. STARGHILL: Vice  
11 Chair/Secretary. And I think that's probably the

12 most prudent manner in which to go, only because  
13 historically the public members have actually  
14 held the position, not the delegates of the  
15 Commissioners of Community Affairs or Education.

16 MR. FLEISHER: I'd like to nominate  
17 Robin Berg Tabakin as chairperson.

18 MS. KOVACH: Second.

19 CHAIRPERSON TABAKIN: Thank you.

20 Roll call.

21 MS. HAIRSTON: Robin Berg Tabakin?

22 CHAIRPERSON TABAKIN: Yes.

23 MS. HAIRSTON: Janice Kovach?

24 MS. KOVACH: Yes.

25 MS. HAIRSTON: Dave Fleisher?

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1 MR. FLEISHER: Yes.

2 CHAIRPERSON TABAKIN: And I'd like

3 to nominate Dave Fleisher as Vice

4 Chairman/Secretary.

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: Dave Fleisher?

12 MR. FLEISHER: Yes.

13 MS. STARGHILL: Thank you.

14 Again, once we get the third

15 appointment of a public member, then Dave can

16 pass on his duties has secretary to that person,

17 of course, through a formal vote.

18 CHAIRPERSON TABAKIN: Now we're

19 ready for public comment.

20 If anyone has a public comment,

21 please step up to the table. In the interest of

22 time, speakers are limited to five minutes. If

23 you have prepared testimony, you need to provide

24 eight copies for the Council.

25 LT. BRUNT: Ladies and gentleman of

1 the Council, good morning. I'm Lt. --

2 CHAIRPERSON TABAKIN: Please state

3 your name.

4 LT. BRUNT: I'm Lt. William Brunt,

5 B-r-u-n-t, Middletown Township Police Department.

6 I'm also the Deputy Custodian for our police

7 department for our records bureau.

8 I just want to make a comment about

9 some of the findings that I've been reading on

10 your website and some of the things that I heard

11 here today.

12 Under Title 47, the standard for

13 determining if a violation of the Public Records

14 Act is a knowing or willful act, and I see that

15 there's a state of you going beyond that and

16 you're publishing on your website that custodians

17 are "negligent and heedless," and I believe this

18 is unnecessarily hostile, for the record, to the

19 custodians.

20 It's not unusual -- I've been in

21 public life, I've been a police officer for 25

22 years, it's not unusual for people to make

23 mistakes. And I know that most people in public  
24 life try to do the right thing and I think it's  
25 unnecessarily hostile for you to go beyond what

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1 the statute says that you need to do to perform  
2 your role to determine whether a custodian is  
3 right or wrong.

4           Everybody makes mistakes. We saw  
5 Ms. Starghill here today had to explain why there  
6 was a file that was gone for a year that wasn't  
7 accounted for. These are the kinds of things  
8 that happen, and I just think that you need to  
9 reconsider going beyond what the statute says to  
10 do in order to perform your function.

11           Thank you.

12           CHAIRPERSON TABAKIN: Thank you very  
13 much.

14           MS. STARGHILL: That language  
15 actually comes from the court decision that  
16 established the legal standard of what "knowing

17 and willful" is. And the one or two -- actually,  
18 there's several court decisions. So OPRA has to  
19 be read in conjunction of the common law with the  
20 court decisions applicable. And for the "knowing  
21 and willful," the Legislature didn't go so far as  
22 to define exactly what constitutes knowing and  
23 willful.

24           However, there are some court  
25 decisions in New Jersey precedent that have

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1 established that. And specifically those court  
2 decisions say there's a difference between  
3 "negligence and heedless" which does not rise to  
4 the same level as "knowing and willful" and  
5 that's effectively why the GRC uses that language  
6 to establish there isn't a very high "knowing and  
7 willful" action on behalf of the custodian which  
8 leads to the monetary penalties, but the actions  
9 of the custodian are nevertheless negligent and  
10 heedless because there was no compliance.

11           So I don't see it as us going beyond

12 our authority. We're just clearly establishing  
13 there is not the knowing and willful in those  
14 instances which we use the language, but there is  
15 the lesser level of action.

16           LT. BRUNT: I think the point in my  
17 bringing this up is that people don't want to go  
18 onto your public website and read bad things  
19 about themselves. Title 47 is perfectly clear  
20 that the cutoff line is "knowing and willful."  
21 And in order -- and you clearly are going beyond  
22 that if you say that they're not knowing and  
23 willful, that should be the end of it. There's  
24 no reason to go on and call them heedless and  
25 negligent or whatever it is you call them. It's

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1 unnecessary is what I'm saying.

2           The custodian is not going to be  
3 fined. The custodian is going to be ordered to  
4 either release the document or not release the  
5 document whether you do that or not. I'm just

6 saying that the custodians look at this and they  
7 see that as unnecessarily hostile to them and  
8 frankly I agree with them.

9 MS. STARGHILL: Thank you for  
10 comments.

11 LT. BRUNT: Thank you.

12 CHAIRPERSON TABAKIN: Can I have a  
13 motion to adjourn, please?

14 MS. ABS: I'd actually like to --  
15 I'm Heidi Abs, the Township Clerk of Middletown  
16 Township, A-b-s.

17 I'm just here actually to find  
18 out -- I know you mentioned the public member to  
19 the board. Does the council make recommendation  
20 as to who that may be?

21 MS. STARGHILL: It's totally the  
22 decision of the Governor.

23 MS. ABS: Do they get a time frame  
24 as to when that needs to be done?

25 MS. STARGHILL: Yeah, I was told

1 back in November it was going to be done shortly.

2 MS. ABS: Can you write a letter to

3 ask or request that member --

4 MS. STARGHILL: Oh, absolutely.

5 It's done through the Commissioner's office of

6 this department and that request was made

7 about -- whenever we get the resignation letter

8 from our prior chairman. So we've been waiting

9 for several months.

10 MS. ABS: And you know that the

11 Clerks Association made a request that we --

12 MS. STARGHILL: I haven't. I

13 welcome that. I just want a third person. I

14 don't care who it is because, again, that

15 decision is up to the Governor.

16 MS. ABS: So you don't know that the

17 Clerks Association of New Jersey has made a

18 request that a retired clerk be on that board?

19 MS. STARGHILL: I had heard that you

20 all were going to do that. I've not been copied

21 on that correspondence to the Governor's office,

22 assuming that's where you all sent it, because

23 that is where it should go.

24 MS. ABS: That's where we sent it.

25 I was curious.

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1 MS. STARGHILL: No. I ask every

2 month, sometimes more than once a month what's

3 going on with that appointment.

4 MS. ABS: I mean, to follow along

5 the same lines as the language that goes into the

6 complaint and to the recommendations to the

7 Council, I know from my own experience that, you

8 know, knowful [sic] and willingly denying a

9 request actually probably has little to do with

10 whether you're negligent. I mean, I think being

11 called negligent for something that we're not

12 getting advice from the GRC regularly because

13 we're not being told what decisions should be

14 made on our -- you know, as custodians of

15 records, we go into this and we're given a

16 request and we go based on all these cases and

17 Superior Court decisions and Supreme Court  
18 decisions and the Appellate Division and we rely  
19 we rely on our attorneys and ultimately the  
20 records custodian has to come to some kind of  
21 decision.

22           And when we do and it's questioned  
23 and -- then we're told by the GRC we have to be  
24 become compliant with your Interim Order, I don't  
25 think that makes us negligent. We're going based

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1 on our experience and our reliance on our  
2 attorney and cases that are out there and cases  
3 of the GRC and the Appellate Division and  
4 Superior Court decisions. And by doing that and  
5 making a decision that might not be correct, does  
6 not make us negligent and heedless.

7           So I'd have to agree that it seems  
8 to be a little bit aggressive, especially when  
9 those cases are published. I just wanted you to  
10 know my feeling on that. Thank you.

11 CHAIRPERSON TABAKIN: Thank you.

12 Anyone else?

13 Okay, could I have a motion for

14 adjournment, please?

15 MS. KOVACH: So moved.

16 MR. FLEISHER: Second.

17 MS. HAIRSTON: Robin Berg Tabakin?

18 CHAIRPERSON TABAKIN: Yes.

19 MS. HAIRSTON: Janice Kovach?

20 MS. KOVACH: Yes.

21 MS. HAIRSTON: Dave Fleisher?

22 MR. FLEISHER: Yes.

23 CHAIRPERSON TABAKIN: We're a

24 adjourned. See everybody next month.

25 (HEARING CONCLUDED AT 10:59 A.M.)

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1 C E R T I F I C A T E

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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: MAY 19, 2008

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