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STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL MEETING  
\* \* \* \*  
Wednesday, November 19, 2008  
Trenton, New Jersey  
\* \* \* \*

BOARD MEMBERS PRESENT:  
ROBIN BERG-TABAKIN, Chairwoman  
KATHRYN FORSYTH  
DAVID FLEISHER

ALSO PRESENT:  
ELIZABETH ZIEGER-SEARS, ESQUIRE  
SHERIN KEYS, ESQUIRE  
JOHN STEWART, ESQUIRE  
BRIGITTE HAIRSTON, Secretary  
KARYN GORDON, ESQUIRE  
DEBRA ALLEN, ESQUIRE  
GINA OROSZ, ESQUIRE  
BRIGITTE HAIRSTON, Secretary  
JYOTHI PAMIDIMUKKALA  
FRANK CARUSO  
DARA LOWNIE

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HELD AT:  
101 South Broad Street  
Trenton, New Jersey

REPORTED BY:  
Molly Hallinan, Shorthand Reporter

CLASS ACT REPORTING AGENCY  
Registered Professional Reporters  
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(whereupon, the proceedings commenced at  
approximately 9:43 a.m.)  
CHAIRWOMAN BERG-TABAKIN: Good morning,  
could we all please rise for the Pledge?  
(whereupon, the Pledge of Allegiance was  
said.)

CHAIRWOMAN BERG-TABAKIN: This meeting was  
called pursuant to the provisions of the Open Public  
Meetings Act. Notice of this meeting was faxed to the  
Newark Star-Ledger, Trenton Times, Courier-Post of  
Cherry Hill, the Secretary of State, and e-mailed to the  
New Jersey Foundation for Open Government on November  
17, 2008. Proper notice having been given, the  
secretary is directed to include the statement in the  
minutes of this meeting.

16 In the event of a fire alarm evacuation,  
17 please exit the building following the exit signs  
18 located within the conference room and throughout the  
19 building. The exit signs will direct you to the two  
20 fire evacuation stairways located in the building. Upon  
21 leaving, please follow the fire wardens, which can be  
22 located by yellow helmets. Please follow the flow of  
23 traffic away from the building.

24 Roll call?

25 MS. HAIRSTON: Robin Berg-Tabakin?

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1 CHAIRWOMAN BERG-TABAKIN: Yes.

2 MS. HAIRSTON: Kathryn Forsyth?

3 MS. FORSYTH: Here.

4 MS. HAIRSTON: David Fleisher?

5 MR. FLEISHER: Yes, here.

6 CHAIRWOMAN BERG-TABAKIN: Resolution for  
7 closed session; whereas N.J.S.A. 10:4-12 permits a  
8 public body to go into closed session during a public  
9 meeting; and whereas the Government Records Council has  
10 deemed it necessary to go into closed session to discuss  
11 certain matters which are exempt from public discussion  
12 under the Open Public Meetings Act; and whereas the  
13 regular Council -- meeting of the Council will reconvene  
14 at the conclusion of the closed meeting.

15 Now, therefore, be it resolved that the  
16 Council will convene in closed session to receive legal  
17 advice and to discuss anticipated litigation in which  
18 the Council may become a party pursuant to N.J.S.A.  
19 10:4-12.b(7) in the following matters: Request for  
20 advisory opinion from Thomas O. Johnston, Esquire,  
21 Porzio, Bromberg & Newman P.C. and Walter Luers'  
22 request.

23 Be it further resolved that the Council will  
24 disclose to the public the matters discussed or  
25 determined in closed session as soon as possible after

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1 final decisions are issued in the above cases.

2 Could I have a motion, please?

3 MR. FLEISHER: So moved.

4 MS. FORSYTH: Second.

5 MS. HAIRSTON: Robin Berg-Tabakin?

6 CHAIRWOMAN BERG-TABAKIN: Yes.

7 MS. HAIRSTON: Kathryn Forsyth?

8 MS. FORSYTH: Yes.

9 MS. HAIRSTON: David Fleisher?

10 MR. FLEISHER: Yes.

11 CHAIRWOMAN BERG-TABAKIN: Okay, we're in  
12 closed session now.

13 (Whereupon, Council went into closed

14 session.)

15 CHAIRWOMAN BERG-TABAKIN: Could I have a  
16 motion to move back into open session?

17 MS. FORSYTH: So moved.

18 MR. FLEISHER: Second.

19 MS. HAIRSTON: Robin Berg-Tabakin?

20 CHAIRWOMAN BERG-TABAKIN: Yes.

21 MS. HAIRSTON: Kathryn Forsyth?

22 MS. FORSYTH: Yes.

23 MS. HAIRSTON: David Fleisher?

24 MR. FLEISHER: Yes.

25 CHAIRWOMAN BERG-TABAKIN: At this time, I'd

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1 like a motion to approve the closed session minutes for  
2 October.

3 MS. FORSYTH: So moved.

4 MR. FLEISHER: Second.

5 MS. HAIRSTON: Robin Berg-Tabakin?

6 CHAIRWOMAN BERG-TABAKIN: Yes.  
7 MS. HAIRSTON: Kathryn Forsyth?  
8 MS. FORSYTH: Yes.  
9 MS. HAIRSTON: David Fleisher?  
10 MR. FLEISHER: Yes.  
11 CHAIRWOMAN BERG-TABAKIN: I want to note on  
12 the record that the transcript for the October session  
13 has not yet been received, and our copy -- we have not  
14 had time to review it; therefore, we cannot approve it  
15 at this time.  
16 Administrative Complaint Council  
17 Adjudications; could I have a motion to approve the 12  
18 cases listed on the meeting notice?  
19 MR. FLEISHER: So moved.  
20 MS. FORSYTH: Second.  
21 MS. HAIRSTON: Robin Berg-Tabakin?  
22 CHAIRWOMAN BERG-TABAKIN: Yes.  
23 MS. HAIRSTON: Kathryn Forsyth?  
24 MS. FORSYTH: Yes.  
25 MS. HAIRSTON: David Fleisher?

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1 MR. FLEISHER: Yes.  
2 CHAIRWOMAN BERG-TABAKIN: Individual  
3 complaints; Edwin Ortiz versus New Jersey Department of  
4 Corrections, Special Investigation Division, 2007-101.  
5 MR. STEWART: The Executive Director  
6 respectfully recommends that the Council find that:  
7 One; because the Custodian certifies record  
8 number one, a security threat group member validation  
9 form, is designated as a confidential document by the  
10 Department of Corrections' proposed regulation, N.J.A.C.  
11 10A:22-3.2(a)(27); and because the Custodian certifies  
12 that records number two through number four, letters to  
13 the Complainant containing references to security threat  
14 groups, the possession or exhibition of which by an  
15 inmate is prohibited under proposed regulation N.J.A.C.  
16 10A:4-4.1; and because the Custodian certifies the  
17 records cannot be redacted without risk of posing a  
18 safety and security threat within the correctional  
19 facility; and because the proposed regulations are  
20 continued in effect pursuant to Executive Orders Number  
21 21 and Number 26 -- McGreevey -- and the Court's  
22 decision in Newark Morning Ledger Company, Publisher of  
23 the Star-Ledger versus the Division of the State Police  
24 of the New Jersey Department of Law and the Public  
25 Safety, the Law Division, Mercer County, Docket Number

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1 MER-L-1090-05, July 5, 2005, records number one through  
2 five are exempt from disclosure under OPRA Section 9-A.  
3 The Custodian has lawfully denied access to these  
4 requested records.  
5 Number two; because the Custodian certified  
6 that she will disclose copies of records number five,  
7 number six, and number seven to the Complainant upon the  
8 Complainant's payment of a \$4.50 copy fee; and because  
9 the Custodian is not required to release the requested  
10 records until payment is received pursuant to OPRA  
11 Section 5-B and the Council's decision in Paff versus  
12 the City of Plainfield, GRC Complaint Number 2006-54,  
13 July 2006; the Custodian has not unlawfully denied the  
14 Complainant access to said records.  
15 MR. FLEISHER: So moved.  
16 CHAIRWOMAN BERG-TABAKIN: No, edit.  
17 On number one, the last sentence you read  
18 into the record, "Numbers -- record numbers one through  
19 five are exempt from disclosure," I believe that's one  
20 through four.

21 MR. STEWART: That's been changed. I forgot  
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22 to change it on my copy.  
23 CHAIRWOMAN BERG-TABAKIN: For the record,  
24 it's one through four.  
25 A motion, please?

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1 MR. FLEISHER: So move as amended.  
2 MS. FORSYTH: Second.  
3 CHAIRWOMAN BERG-TABAKIN: Edited.  
4 MS. HAIRSTON: Robin Berg-Tabakin?  
5 CHAIRWOMAN BERG-TABAKIN: Yes.  
6 MS. HAIRSTON: Kathryn Forsyth?  
7 MS. FORSYTH: Yes.  
8 MS. HAIRSTON: David Fleisher?  
9 MR. FLEISHER: Yes.  
10 CHAIRWOMAN BERG-TABAKIN: Cynthia Jampel  
11 versus Somerset County Prosecutor's Office, 2007-125.  
12 MS. LOWNIE: The Executive Director  
13 respectfully recommends the Council accept the  
14 Administrative Law Judge's Initial Decision, dated  
15 August 20, 2008. No further adjudication is required.  
16 CHAIRWOMAN BERG-TABAKIN: Motion?  
17 MS. FORSYTH: So moved.  
18 MR. FLEISHER: Second.  
19 MS. HAIRSTON: Robin Berg-Tabakin?  
20 CHAIRWOMAN BERG-TABAKIN: Yes.  
21 MS. HAIRSTON: Kathryn Forsyth?  
22 MS. FORSYTH: Yes.  
23 MS. HAIRSTON: David Fleisher?  
24 MR. FLEISHER: Yes.  
25 CHAIRWOMAN BERG-TABAKIN: Randolph Young

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1 versus New Jersey Department of Personnel, 2007-210.  
2 MS. LOWNIE: The Executive Director  
3 respectfully recommends that Council find that:  
4 Number one; the Custodian's failure to  
5 respond in writing to the Complainant's OPRA request  
6 either granting access, denying access, seeking  
7 clarification or requesting an extension of time within  
8 the statutorily mandated seven business days results in  
9 a deemed denial of the Complainant's OPRA request  
10 pursuant to OPRA 5-G, 5-I, and Kelley versus Township of  
11 Rockaway, GRC Complaint Number 2007-11, October of 2007.  
12 Number two; the Council must determine  
13 whether the legal conclusions asserted by the Custodian  
14 are properly applied to the records at issue pursuant to  
15 Paff versus New Jersey Department of Labor, Board of  
16 Review, Appellate Division, 2005. Therefore, the GRC  
17 must conduct an in camera review of the requested record  
18 to determine the validity of the Custodian's assertion  
19 that the record constitutes advisory, consultative or  
20 deliberative material which is exempt from disclosure  
21 pursuant to OPRA Section 1.1.  
22 Number three; the Custodian must deliver to  
23 the Council in a sealed envelope nine copies of the  
24 requested unredacted document -- see number two above --  
25 a document or redaction index, as well as a legal

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1 certification from the Custodian, in accordance with New  
2 Jersey Court Rule 1:4-4, that the document provided is  
3 the document requested by Council for the in camera  
4 inspection. Such delivery must be received by the GRC  
5 within five business days from receipt of the Council's  
6 Interim Order.  
7 Number four; the Council defers analysis of  
8 whether the Custodian knowingly and willfully violated  
9 OPRA and unreasonably denied access under the totality  
10 of the circumstances pending the outcome of the in  
11 camera review.

12 CHAIRWOMAN BERG-TABAKIN: Motion?  
13 MS. FORSYTH: So moved.  
14 MR. FLEISHER: Second.  
15 MS. HAIRSTON: Robin Berg-Tabakin?  
16 CHAIRWOMAN BERG-TABAKIN: Yes.  
17 MS. HAIRSTON: Kathryn Forsyth?  
18 MS. FORSYTH: Yes.  
19 MS. HAIRSTON: David Fleisher?  
20 MR. FLEISHER: Yes.  
21 CHAIRWOMAN BERG-TABAKIN: Richard Rivera  
22 versus Borough of Roselle Park, Union, 2007-224.  
23 MR. STEWART: The Executive Director  
24 respectfully recommends that Council find that:  
25 Number one; the Custodian's failure to grant

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1 access, deny access, seek clarification or request an  
2 extension of time in writing within the statutorily  
3 mandated seven business days results in a deemed denial  
4 pursuant to OPRA Section 5-G and OPRA Section 5-I and  
5 Kelley versus Township of Rockaway, GRC Compliant Number  
6 2007-11, October 2007.

7 Two; because the Roselle Park Police  
8 Department complied with the provisions of N.J.S.A.  
9 40A:14-181 by promulgating policy consistent with the  
10 Attorney General's Internal Affairs Policy and  
11 Procedure, and because that statute is a law that  
12 contains provisions not abrogated by OPRA pursuant to  
13 OPRA Section 9-A, the confidentiality provisions of the  
14 IAPP governing index reports within the Police  
15 Department's policy restricts public access to the  
16 requested records. Accordingly, the Custodian lawfully  
17 denied the Complainant access to the index reports.

18 Three; the Custodian's failure to respond in  
19 writing to the Complainant's OPRA request within the  
20 statutorily mandated seven business days resulted in a  
21 deemed denial of said request; however, the Custodian  
22 subsequently did provide the Complainant with the  
23 records deemed to be disposable and lawfully denied the  
24 Complainant access to those records exempt from  
25 disclosure.

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1 It is concluded that the Custodian's actions  
2 do not rise to the level of a knowing and willful  
3 violation of OPRA and unreasonable denial of access  
4 under the totality of the circumstances; however, the  
5 Custodian's unlawful deemed denial of access appears  
6 negligent and heedless since she is vested with the  
7 legal responsibility of granting and denying access in  
8 accordance with the law.

9 CHAIRWOMAN BERG-TABAKIN: Thank you.  
10 Motion?

11 MS. FORSYTH: So moved.  
12 MR. FLEISHER: Second.  
13 MS. HAIRSTON: Robin Berg-Tabakin?  
14 CHAIRWOMAN BERG-TABAKIN: Yes.  
15 MS. HAIRSTON: Kathryn Forsyth?  
16 MS. FORSYTH: Yes.  
17 MS. HAIRSTON: David Fleisher?  
18 MR. FLEISHER: Yes.

19 CHAIRWOMAN BERG-TABAKIN: Martin O'Shea  
20 versus Township of Stillwater, Sussex, 2007-253.

21 MS. LOWNIE: The Executive Director  
22 respectfully recommends that Council find that:  
23 One; because items number one and two of the  
24 Complainant's request identify a type of record within a  
25 specific date, the Custodian has not carried her burden

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1 of proving a lawful denial of access pursuant to OPRA

2 Section Six and Paff versus Borough of Roselle, Union  
3 County, GRC Compliant Number 2007-255, April 2008.  
4 Thus, the Custodian shall release the requested records  
5 to the Complainant with the appropriate redactions, if  
6 any, including a document index identifying the specific  
7 legal basis for any redacted portions pursuant to OPRA  
8 Section 5-G.

9 Number two; because item number three of the  
10 Complainant's request is not a request for an  
11 identifiable government record, and because the  
12 Custodian is not required to conduct research in  
13 response to an OPRA request, said request is invalid and  
14 the Custodian has carried her burden of proving a lawful  
15 denial of access to the requested records pursuant to  
16 MAG Entertainment, LLC versus Division of Alcoholic  
17 Beverage Control, Appellate Division 2005; Bent versus  
18 Stafford Police Department, Appellate Division 2005; and  
19 New Jersey Builder's Association versus New Jersey  
20 Council of Affordable Housing, Appellate Division 2007.

21 Number three; the Township's OPRA request  
22 form is in violation of OPRA Section 5-F because it  
23 fails to include the following required information:

24 A. Specific directions and procedures for  
25 requesting records.

0015 1 B. A statement as to whether a prepayment  
2 of fees or a deposit is required.

3 C. A statement informing requestors of the  
4 time period in which the Custodian must respond pursuant  
5 to OPRA.

6 D. A statement of the requestor's right to  
7 challenge a denial of access and the procedure for  
8 filing an appeal.

9 As such, the Township must amend its OPRA  
10 request form to include all the required information  
11 pursuant to OPRA Section 5-F.

12 Number four; the Custodian shall comply with  
13 items number one and number three above within five  
14 business days from receipt of the Council's Interim  
15 Order and simultaneously provide certified confirmation  
16 of compliance, in accordance with the New Jersey Court  
17 rule 1:4-4, to the Executive Director.

18 Number five; the Council defers analysis of  
19 whether the Custodian knowingly and willfully violated  
20 OPRA and unlawfully denied access under the totality of  
21 the circumstances pending the Custodian's compliance  
22 with the Council's Interim Order.

23 CHAIRWOMAN BERG-TABAKIN: Is this the first  
24 time we've seen the Stillwater Township OPRA request  
25 form?

0016 1 MS. GORDON: I think so.

2 CHAIRWOMAN BERG-TABAKIN: Motion?

3 MR. FLEISHER: So moved.

4 MS. FORSYTH: Second.

5 MS. HAIRSTON: Robin Berg-Tabakin?

6 CHAIRWOMAN BERG-TABAKIN: Yes.

7 MS. HAIRSTON: Kathryn Forsyth?

8 MS. FORSYTH: Yes.

9 MS. HAIRSTON: David Fleisher?

10 MR. FLEISHER: Yes.

11 CHAIRWOMAN BERG-TABAKIN: John Paff versus  
12 Berkeley Heights Township, Union, 2007-271.

13 MR. CARUSO: The Executive Director  
14 respectfully recommends that Council find that:

15 One; the Custodian's failure to respond in  
16 writing within seven business days of receipt of the  
17 Complainant's September 10, 2007 OPRA request

18 specifically granting access, denying access for a  
19 lawful reason, seeking clarification or requesting an  
20 extension of time within the statutorily mandated seven  
21 business days, as required by Section 5-G of OPRA and  
22 Section 5-I of OPRA, results in a deemed denial of the  
23 Complainant's OPRA request, Kelley versus Township of  
24 Rockaway, GRC Complaint Number 2007-11, October 2007.

25 Two; although the Custodian did respond in  
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1 writing to the Complainant's OPRA request stating that  
2 the records responsive to items number two, number  
3 three, and number four were not available, and to  
4 requested item number five directing the Complainant to  
5 see exhibits, the Custodian's response to the  
6 Complainant's OPRA request is insufficient because the  
7 Custodian failed to cite a specific basis for her denial  
8 as required by Section 5-G of OPRA. See Paff versus  
9 City of Plainfield, GRC Complaint Number 2006-103,  
10 February 2007.

11 Three; the Custodian provided all records  
12 responsive to requested items number one and number six  
13 on October 5, 2007 at a cost of \$12.50. The Custodian's  
14 Counsel also states in the SOI that there were no  
15 executive meetings held on May 8, 2007 or July 24, 2007.  
16 Although the Custodian's failure to respond in writing  
17 within the statutorily mandated timeframe resulted in a  
18 deemed denial of access, no further action is required  
19 because the records responsive to the requested items  
20 number one and number six were made available to the  
21 Complainant.

22 Four; the Custodian's response to the  
23 Complainant's OPRA request item number two was  
24 insufficient because she failed to specifically state  
25 that the requested executive session minutes were not

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1 yet approved by the governing body at the time of the  
2 Complainant's request pursuant to Section 5-G of OPRA  
3 and Paff versus City of Plainfield, GRC Complaint Number  
4 2006-103, February 2007. Although the Custodian failed  
5 to respond to the Complainant's OPRA request  
6 specifically stating that the requested executive  
7 session meeting minutes responsive to item number two  
8 were not yet approved by the governing body at the time  
9 of the Complainant's September 10, 2007 OPRA request,  
10 the requested, unapproved draft executive minutes  
11 constitute inter-agency or intra-agency advisory,  
12 consultative or deliberative material and thus are not  
13 government records pursuant to the definition of a  
14 government record and are exempt from disclosure  
15 pursuant to Section 1.1 of OPRA and Parave-Fogg versus  
16 Lower Alloways Creek Township, GRC Complaint Number  
17 2006-51, August 2006.

18 Five; the Custodian's response to the  
19 Complainant's request is insufficient because she failed  
20 to timely respond in writing to the Complainant's OPRA  
21 request and failed to specifically state that no records  
22 responsive to items number three and number four exist,  
23 as required by Section 5-G of OPRA and Paff versus City  
24 of Plainfield, GRC Complaint Number 2006-103, February  
25 of 2007. Nevertheless, the Custodian did not unlawfully

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1 deny access to the requested records because the  
2 Custodian certified that records responsive to requested  
3 items number three and number four did not exist. See  
4 Pusterhofer versus New Jersey Department of Education,  
5 GRC Complaint Number 2005-49, July of 2005.

6 Six; the types of records requested by the  
7 Complainant in items number three, number four, and

8 number five are not explicitly stated as those which may  
9 be disclosed under Section 10 of OPRA; therefore, the  
10 requested records in items number three, number four,  
11 and number five relating to police disciplinary actions  
12 are exempt from disclosure pursuant to Section 10 of  
13 OPRA and Merino versus Borough of Ho-Ho-Kus, GRC  
14 Complaint Number 2003-110, July of 2004.

15 Seven; because the Custodian had a duty to  
16 forward items number three, number four, and number five  
17 to the proper Custodian of record or direct the  
18 Complainant to the proper Custodian of record and failed  
19 to do so, the Complainant has violated Section 5-H of  
20 OPRA.

21 Eight; the Custodian failed to respond in  
22 writing to the Complainant's OPRA request within the  
23 statutorily mandated seven business days, resulting in a  
24 deemed denial of the Complainant's September 10, 2007  
25 OPRA request. Also, the Custodian's response to items

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1 number two, number three, number four, and number five  
2 was insufficient. The Custodian violated Section 5-H of  
3 OPRA by failing to forward items number three, number  
4 four, and number five to the proper Custodian of record;  
5 however, the Custodian did provide access to requested  
6 items number one and number six on October 5, 2007  
7 pending payment of copying fees and the Custodian's  
8 denial of access to requested items number two, number  
9 three, number four, and number five was supported by  
10 law.

11 Therefore, it is concluded that the  
12 Custodian's actions do not rise to a level of knowing  
13 and willful violation of OPRA and unreasonable denial of  
14 access under the totality of the circumstances; however,  
15 the Custodian's deemed denial, insufficient response,  
16 and failure to forward part of the request to the proper  
17 Custodian appears negligent and heedless since she is  
18 vested with the legal responsibility of granting and  
19 denying access in accordance with the law.

20 Nine; because the Complainant failed to  
21 achieve the desired result of disclosure of the  
22 requested records because the records responsive to item  
23 number two are exempt from disclosure as ACD material  
24 pursuant to Section 1.1 of OPRA and Parave-Fogg versus  
25 Lower Alloways Creek Township, GRC Complaint Number

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1 2006-51, August 2006, the Custodian certifies that  
2 records responsive to items number three and number four  
3 do not exist and that the records responsive to item  
4 number five are exempt from disclosure pursuant to  
5 Section 10 of OPRA and Merino versus Borough of  
6 Ho-Ho-Kus, GRC Complaint Number 2003-110, July of 2004.

7 The Complainant is not entitled to  
8 prevailing party attorney fees. See Teeters versus  
9 DYFS, 387 N.J. Super Number 423, Appellate Division  
10 2006; New Jersey Builders Association versus New Jersey  
11 Council on Affordable Housing on N.J. Super 166, 175,  
12 Appellate Division 2007.

13 CHAIRWOMAN BERG-TABAKIN: Any questions?

14 (No response.)

15 Thank you very much.

16 MR. FLEISHER: So moved.

17 MS. FORSYTH: Second.

18 MS. HAIRSTON: Robin Berg-Tabakin?

19 CHAIRWOMAN BERG-TABAKIN: Yes.

20 MS. HAIRSTON: Kathryn Forsyth?

21 MS. FORSYTH: Yes.

22 MS. HAIRSTON: David Fleisher?

23 MR. FLEISHER: Yes.

24 CHAIRWOMAN BERG-TABAKIN: Tina Renna versus  
25 Township of Warren, Somerset, 2008-40.

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1 MS. LOWNIE: The Executive Director  
2 respectfully recommends that Council find that:  
3 Number one; although the Engineering  
4 Department Inspector provided a written response to the  
5 Complainant's request within the statutorily mandated  
6 seven business days granting access to the requested  
7 records, said response does not address the  
8 Complainant's preferred method of receiving said records  
9 in electronic format and as such, the response is  
10 insufficient. Thus, pursuant to O'Shea versus Township  
11 of Fredon, Sussex County, GRC Complaint Number 2007-251,  
12 April of 2008, the Custodian has violated OPRA Section  
13 5-G.

14 Number two; because the specific language of  
15 OPRA at section 5-C does not mandate that a Custodian  
16 put a special service charge in writing, the Council  
17 declines to find the Custodian in violation of OPRA;  
18 however, best practices dictate that Custodians should  
19 provide requestors with an estimated special service  
20 charge in writing based on the Council's interpretation  
21 of the word "review."

22 Number three; based on the information  
23 provided by the Custodian, specifically that only two  
24 employees had the authority to convert the requested  
25 records to the medium requested and such conversion

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1 required three hours of the Engineering Inspector's  
2 time, a reasonable 81 seconds per file, a special  
3 service charge is warranted in this matter pursuant to  
4 OPRA Section 5-C.

5 Number four; pursuant to OPRA Section 5-C  
6 and Loder versus County of Passaic, GRC Complaint Number  
7 2005-161, January of 2006, a special service charge must  
8 only reflect the hours spent providing the actual copies  
9 and the hourly rate -- minus the fringe benefits -- of  
10 appropriate personnel applied. As such, the actual  
11 direct cost of Engineering Department Inspector's time  
12 is \$26.16 per hour.

13 Number five; the Custodian provided the  
14 Complainant with an inaccurate estimate and was  
15 obligated to reassess the special service charge when  
16 the charge exceeded the estimated amount because all  
17 limitations on access shall be construed in favor of the  
18 public pursuant to OPRA Section One.

19 Number six; pursuant to OPRA Section 5-B and  
20 the Libertarian Party of Central New Jersey versus  
21 Murphy, Appellate Division 2006, the Custodian may only  
22 charge the actual cost of the CD-ROM.

23 Number seven; the Custodian shall disclose  
24 the requested records to the Complainant upon payment of  
25 the actual direct cost of the special service charge,

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1 \$26.16, and the actual cost of the CD-ROM.

2 Number eight; the Custodian shall comply  
3 with item number seven above within five business days  
4 from receipt of the Council's Interim Order with  
5 appropriate redactions, including a detailed document  
6 index explaining the lawful basis for each redaction,  
7 and simultaneously provide certified confirmation of  
8 compliance, in accordance with New Jersey Court Rule  
9 1:4-4, to the Executive Director.

10 Number nine; the Council defers analysis of  
11 whether the Custodian knowingly and willfully violated  
12 OPRA and unreasonably denied access under the totality  
13 of the circumstances pending the Custodian's compliance

14 with the Council's Interim Order.  
15 Number 10; the Council defers analysis of  
16 whether the Complainant is a prevailing party pending  
17 the Custodian's compliance with the Council's Interim  
18 Order.

19 CHAIRWOMAN BERG-TABAKIN: Thank you.

20 Motion?

21 MR. FLEISHER: So moved.

22 MS. FORSYTH: Second.

23 MS. HAIRSTON: Robin Berg-Tabakin?

24 CHAIRWOMAN BERG-TABAKIN: Yes.

25 MS. HAIRSTON: Kathryn Forsyth?

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1 MS. FORSYTH: Yes.

2 MS. HAIRSTON: David Fleisher?

3 MR. FLEISHER: Yes.

4 CHAIRWOMAN BERG-TABAKIN: David Walker  
5 versus New Jersey Department of Treasury, Division of  
6 Purchase and Property, 2008-44.

7 MR. CARUSO: The Executive Director  
8 respectfully recommends that Council find that:  
9 Number one; the Custodian has violated  
10 Section 5-F of OPRA by failing to direct the Complainant  
11 to NJDOT's official OPRA request form upon receipt of  
12 Complainant's January 30, 2008 letter specifically  
13 referencing OPRA pursuant to Barron versus Essex County  
14 Superintendent of Registration, GRC Complaint Number  
15 2006-95, April of 2007; and Spaulding versus Hudson  
16 County Register, GRC Complaint Number 2006-157,  
17 September of 2007. See, also, Brewer versus New Jersey  
18 Department of Law and Public Safety, Division of New  
19 Jersey State Police, GRC Complaint Number 2006-204,  
20 October 2007.

21 Two; although the Custodian failed to direct  
22 the Complainant to NJDOT's official OPRA request form  
23 upon receipt of the Complainant's January 30, 2008  
24 letter referencing OPRA, the evidence of record shows  
25 that it was unclear to the Custodian as to whether the

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1 letter was intended as a request for records pursuant to  
2 OPRA or whether it should have been treated as an OPRA  
3 request.

4 Therefore, it is concluded that the  
5 Custodian's actions do not rise to the level of a  
6 knowing and willful violation of OPRA and unreasonable  
7 denial of access under the totality of the  
8 circumstances; however, the Custodian's unlawful denial  
9 of access by not directing the Complainant to the  
10 agency's official OPRA request form appears negligent  
11 and heedless since she is vested with the legal  
12 responsibility of granting and denying access in  
13 accordance with the law.

14 CHAIRWOMAN BERG-TABAKIN: Motion?

15 MR. FLEISHER: So moved.

16 MS. FORSYTH: Second.

17 MS. HAIRSTON: Robin Berg-Tabakin?

18 CHAIRWOMAN BERG-TABAKIN: Yes.

19 MS. HAIRSTON: Kathryn Forsyth?

20 MS. FORSYTH: Yes.

21 MS. HAIRSTON: David Fleisher?

22 MR. FLEISHER: Yes.

23 CHAIRWOMAN BERG-TABAKIN: Michael Boyle  
24 versus Princeton Borough Police Department, Mercer,  
25 2008-78.

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1 MR. STEWART: The Executive Director  
2 respectfully recommends that Council find that because  
3 the Custodian certified that the records responsive to

4 the Complainant's request are subject to an Order of  
5 Expungement, and because the provisions of N.J.S.A.  
6 2C:52-15 prohibit disclosure of expunged records and  
7 said provisions have not been abrogated by OPRA pursuant  
8 to OPRA Section 9-A, the Custodian lawfully denied the  
9 Complainant access to the requested records.

10 CHAIRWOMAN BERG-TABAKIN: Motion?

11 MS. FORSYTH: So moved.

12 MR. FLEISHER: Second.

13 MS. HAIRSTON: Robin Berg-Tabakin?

14 CHAIRWOMAN BERG-TABAKIN: Yes.

15 MS. HAIRSTON: Kathryn Forsyth?

16 MS. FORSYTH: Yes.

17 MS. HAIRSTON: David Fleisher?

18 MR. FLEISHER: Yes.

19 CHAIRWOMAN BERG-TABAKIN: Dudley Burdge  
20 versus New Jersey Department of State, New Jersey Public  
21 Broadcasting Authority, 2008-109.

22 MS. LOWNIE: The Executive Director  
23 respectfully recommends that Council find that because  
24 the Custodian certified that he forwarded the  
25 Complainant's OPRA request to the appropriate Custodian

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1 on April 24, 2008 and notified the Complainant in  
2 writing of such on the same date, the Custodian has not  
3 unlawfully denied access to the Complainant's OPRA  
4 request and properly forwarded said request to the  
5 appropriate Custodian pursuant to OPRA Section 5-H.

6 CHAIRWOMAN BERG-TABAKIN: Motion?

7 MS. FORSYTH: So moved.

8 MR. FLEISHER: Second.

9 MS. HAIRSTON: Robin Berg-Tabakin?

10 CHAIRWOMAN BERG-TABAKIN: Yes.

11 MS. HAIRSTON: Kathryn Forsyth?

12 MS. FORSYTH: Yes.

13 MS. HAIRSTON: David Fleisher?

14 MR. FLEISHER: Yes.

15 CHAIRWOMAN BERG-TABAKIN: Thank you very  
16 much.

17 There are no complaints to be considered and  
18 no complaints adjudicated in Superior Court.

19 Do you have the report?

20 MS. GORDON: I just wanted to inform you  
21 that on the 7th, I appeared as part of a Panel to the  
22 Mercer County Bar Association on Open Public Records  
23 requests, both before the GRC and before the Superior  
24 Court. Judge Fineman was part of that Panel. That went  
25 very well, it was attended by about 40 people.

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1 Tomorrow I am going to be down at the League  
2 of Municipalities as part of a Panel and talking about  
3 OPRA issues.

4 CHAIRWOMAN BERG-TABAKIN: Wonderful.

5 Now, it's time for public comment. In the  
6 interest of time, speakers are limited to five minutes.  
7 would anyone like to step up to the table to  
8 make a comment?

9 (No response.)

10 CHAIRWOMAN BERG-TABAKIN: Well, could I have  
11 a motion to close, please?

12 MR. FLEISHER: So moved.

13 MS. FORSYTH: Second.

14 MS. HAIRSTON: Robin Berg-Tabakin?

15 CHAIRWOMAN BERG-TABAKIN: Yes.

16 MS. HAIRSTON: Kathryn Forsyth?

17 MS. FORSYTH: Yes.

18 CHAIRWOMAN BERG-TABAKIN: David Fleisher?

19 MR. FLEISHER: Yes.

20 (whereupon, the proceedings concluded at  
21 approximately 10:37 a.m.)  
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CERTIFICATE

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I, MOLLY HALLINAN, Shorthand Reporter,  
4 certify that the foregoing is a true and accurate  
5 transcript of the proceedings which were held at the  
6 time, place and on the date herein before set forth.

7

I further certify that I am neither attorney  
8 nor counsel for, not related to or employed by any of  
9 the parties to the action in which these proceedings  
10 were taken; further, that I am not a relative or  
11 employee of any attorney or counsel employed in this  
12 case, nor am I financially interested in this action.

13

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MOLLY HALLINAN

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Shorthand Reporter

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