



Minutes of the Government Records Council June 23, 2009 Public Meeting – Open Session

The meeting was called to order at 9:40 a.m. at the Department of Community Affairs, Conference Room 126, Trenton, New Jersey. The Open Public Meetings Act statement was read.

The pledge of allegiance was recited while standing by all.

The meeting notice and fire emergency procedure was read by Ms. Tabakin.

Ms. Tabakin read the Resolution for Closed Session (Resolution Number 2009-06-23) to go into closed session pursuant to N.J.S.A. 10:4-12.b(7) to receive legal advice and discuss anticipated litigation in which the public body may become a party in the following matters:

1. George Rodgers v. NJ Department of Corrections (2007-311) (*In-Camera review*)

Ms. Hairston called the roll:

Present: Robin Berg Tabakin, Chairwoman, James Souder (designee of Department of Community Affairs Commissioner Joseph V. Doria) and Kathryn Forsyth (designee of Department of Education Commissioner Lucille Davy).

GRC Staff In Attendance: Executive Director Catherine Starghill, In-House Counsel Karyn Gordon, GRC Secretary Brigitte Hairston, Case Managers: Dara Lownie, Frank Caruso, John Stewart, Sherin Keys, IT Specialist Jyothi Pamidimukkala, Designated Outside Counsel Kelley Lake, and Deputy Attorney General Debra Allen.

A motion was made to go into closed session by Ms. Forsyth and seconded by Mr. Souder to go into closed session. The motion was adopted by a unanimous vote. A motion was made by Ms. Kovach and seconded by Ms. Auerswald to end the closed session. The motion was adopted by a unanimous vote. The Council met in closed session from 9:44 a.m. until 9:47 a.m.

Open Session reconvened at 9:52 a.m. and Ms. Hairston called roll.

Present: Ms. Tabakin, Mr. Souder, and Ms. Forsyth.

There was no quorum to vote on the approval of open and closed session minutes from the June 11, 2009 meeting.

Council Adjudication:

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

1. Frank M Miller v. NJ State Parole Board (2007-313)
2. James K Kelley, III v. NJ Department of Environmental Protection (2008-42)
3. Joseph Kelly v. Borough of Brooklawn (Camden) (2009-69)
4. Leonard H Gicas v. Borough of Madison (Morris) (2009-103)
5. Rashaun Barkley v. NJ Civil Service Commission (2009-129)
6. Tony Balewitz v. City of Perth Amboy (Middlesex) (2009-179)
7. Tony Balewitz v. City of Perth Amboy (Middlesex) (2009-180)
8. Sally Damiano v. Victory Garden Board of Education (Morris) (2009-187)
9. Cynthia McBride v. Township of Morris (Morris) (2009-188)

Ms. Tabakin called for a motion to accept the Executive Director's recommendations as written in all of the above Administrative Complaint Dispositions. A motion was made by Ms. Forsyth and seconded by Mr. Souder. The motion passed unanimously.

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

James D'Andrea v. NJ Department of Community Affairs, Division of Local Government Services (2007-64)

This matter was not put to a vote due to the lack of a quorum.

William Gettler v. Wantage Regional Schools, Board of Education (2007-105) (Sussex)

This matter was not put to a vote due to the lack of a quorum.

John Paff v. Borough of Lavallette (Ocean) (2007-209) RBT Recusal

This matter was not put to a vote due to the lack of a quorum.

David Hinchcliffe v. NJ Department of Community Affairs, Division of Local Government Services (2007-306)

This matter was not put to a vote due to the lack of a quorum.

John Bentz v. Borough of Paramus (Bergen) (2008-89)

This matter was not put to a vote due to the lack of a quorum.

Ursula Cargill v. NJ Department of Education (2009-09)

This matter was not put to a vote due to the lack of a quorum.

Ronald Pittore v. University of Medicine & Dentistry of New Jersey (2007-216)

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

The Executive Director respectfully recommends the Council find that this complaint should be referred to the Office of Administrative Law for a full hearing, including an *in camera* examination of the record submitted for said examination, to determine whether

the Custodian unlawfully denied access to the record as attorney-client privileged material, and if so, for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances and whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees.

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

Please note that Robin Berg Tabakin usually recuses herself from matters involving UMDNJ because she is on their vendor list, but in this specific matter, she did not do so specifically because the Council was merely sending the matter to OAL for a hearing.

Richard Rivera v. Borough of Keanburg Police Department (Monmouth) (2007-222)

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

The Executive Director respectfully recommends the Council find:

- I. Based on the evidence of record, it is concluded that Borough Manager Wall did not unlawfully fail to forward the Complainant's OPRA request dated August 28, 2007 to the Custodian because there is no proof that he actually received the request.
- II. This complaint should be referred to the Office of Administrative Law for a full hearing to determine whether the Custodian unlawfully denied access to the requested records, including whether the Attorney General's Internal Affairs Policy & Procedure contained within the Police Management Manual promulgated by the Police Bureau of the Division of Criminal Justice in the New Jersey Department of Law and Public Safety, as discussed in Rivera v. Borough of Roselle Park (Union), GRC Complaint No. 2007-224 (November 2008), applies to the subject records, and if so, for a further determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

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

Beverly Jones v. Trenton Board of Education (Mercer) (2007-282)

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

The Executive Director respectfully recommends the Council find:

1. The Custodian has not complied with the Council's May 28, 2008 Interim Order because the Custodian failed to provide to the Council all of the records set forth in Paragraph 3 of the Interim Order within five (5) business days of receiving the

Council's Interim Order; to wit, the Custodian failed to submit the records and documentation to the GRC in a timely manner.

2. Based on the inadequate evidence presented in this matter; the GRC is unable to determine whether or not the Custodian unlawfully denied access to the records responsive to the Complainant's request. Therefore, this complaint should be referred to the Office of Administrative Law for a full hearing, including an *in camera* examination of the record, to resolve the facts and to determine whether the custodian unlawfully denied access to the record as attorney-client privileged material, and if so, for a further determination of whether the attorney-client privilege was waived, and further, if the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

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

Please note that Kathryn Forsyth usually recuses herself from matters involving the Department of Education because she is employed by that Department, but in this specific matter, she did not do so specifically because the Council was merely sending the matter to OAL for a hearing.

George Rodgers v. NJ Department of Corrections (2007-311)

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

The Executive Director respectfully recommends the Council find:

1. The Custodian has complied with the Council's February 25, 2009 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council's Order.
2. **The *In Camera* Examination set forth in the table below reveals the Custodian has lawfully denied access to, or redacted portions of, the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination ¹
1	SID Incident Report dated April 11, 2006.	Three (3) page incident report prepared by SID personnel addressing allegations of harassment by a prison inmate against prison staff.	OPRA excludes from disclosure any information generated by or on behalf of public employers in connection with any grievance filed against an employee. <u>N.J.S.A. 47:1A-3.b.</u> ²	Examination of the record reveals it contains information generated on behalf of a public employer in connection with a grievance filed against an individual; therefore, the record is exempt from disclosure because it is not a government record pursuant to <u>N.J.S.A. 47:1A-1.1.</u>

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

¹ **Unless expressly identified for non-disclosure or redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

² The Custodian incorrectly cited this section of OPRA. N.J.S.A. 47:1A-3.b. does not contain the language set forth by the Custodian; however, similar verbiage is contained in two other sections of OPRA: N.J.S.A. 47:1A-1.1 and 47: 1A-10. Because the Custodian recites "information" and not "records," § 1.1 is the intended provision, and reads, in relevant part, "[a] government record shall not include...information generated by or on behalf of public employers or public employees in connection with...any grievance filed by or against an individual..."

Larry Kohn v. Township of Livingston (Essex) (2007-320)

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

The Executive Director respectfully recommends the Council find:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. The Custodian responded in writing on August 28, 2007, stating that no records responsive to request Item No. 2 exist and subsequently certified in the Statement of Information that no records which were responsive to request Item No. 2 existed, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to cite a specific lawful basis for denial within the statutorily required seven (7) business days resulting in a deemed denial, the reason for the denial of access is lawful pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Because request Item No. 1 of the Complainant's OPRA request seeks information rather than an identifiable government record, the request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).
4. Although the Custodian failed to respond in writing to the Complainant's August 16, 2007 OPRA request within the statutorily mandated seven (7) business days, request Item No. 1 is a request for information and is therefore an invalid request under OPRA, and the Custodian certified that no records responsive to request Item No. 2 exist (even though this request item is invalid under OPRA requiring research by the Custodian). Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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

Larry Kohn v. Township of Livingston (Essex) (2007-321)

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

The Executive Director respectfully recommends the Council find:

1. Although the Custodian properly responded in writing requesting an extension of one (1) week to respond to the Complainant's October 2, 2007 OPRA request on the fourth (4th) business day after receipt of such request, the Custodian's failure to respond in writing within the extended one (1) week time frame results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.i., and Kohn v. Township of Livingston Library (Essex), GRC Complaint No. 2007-124 (March 2008).
2. Because the Complainant's October 1, 2007 and October 2, 2007 OPRA requests seek information rather than identifiable government records, the requests are invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).
3. Although the Custodian's failure to respond in writing to the Complainant's October 2, 2007 OPRA request within the requested one (1) week extended time frame resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.i., because the Complainant's October 1, 2007 and October 2, 2007 OPRA requests are for information and are therefore invalid requests under OPRA, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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

Larry Kohn v. Township of Livingston (Essex) (2007-322)

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

The Executive Director respectfully recommends the Council find:

1. The Custodian's written response to the Complainant's requests dated November 6, 2007 and November 8, 2007, in which the Custodian requested an extension of time, is inadequate pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008), because the Custodian failed to provide an anticipated deadline date upon which the requested records would be made available. As such, the Complainant's requests are "deemed" denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. While the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. when he requested an extension of time to respond but failed to provide an anticipated date upon which the requested records would be provided, he did not unlawfully deny

access to the record requested in the Complainant's November 6, 2007 OPRA request Item No. 1 because such records do not exist pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

3. Although the Complainant identified types of records in his November 6, 2007 and November 8, 2007 OPRA requests, the requests failed to specify the dates of particular meeting minutes sought; the Custodian is not required to conduct research in response to a request pursuant to Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007). As such, the Complainant's requests are invalid under OPRA and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008). See also Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-70 and 2008-71 (February 2009).
4. The Custodian failed to respond in writing to the Complainant's November 6, 2007 OPRA request within the statutorily mandated seven (7) business days and violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to provide an anticipated date upon which the Custodian would grant or deny access to the requested records pursuant to Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008). However, the Complainant's OPRA request items would require the Custodian to research his files and are therefore invalid under OPRA and the Custodian certified in the Statement of Information that no records responsive to the Complainant's November 6, 2007, OPRA request Item No. 1 exist. Additionally, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., by also failing to provide an anticipated date upon which the Custodian would grant or deny access to the requested records in the Complainant's November 8, 2007 OPRA request pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008); however, the Complainant's OPRA requests would require the Custodian to research his files and are therefore invalid under OPRA. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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

Larry Kohn v. Township of Livingston (Essex) (2007-324)

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

The Executive Director respectfully recommends the Council find:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Although the Complainant identified specific records in his December 4, 2007 OPRA request, the requests failed to specify the dates of particular resolutions or meeting minutes sought; the Custodian is not required to conduct research in response to a request pursuant to Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007). As such, the Complainant's request is invalid under OPRA and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-70 and 2008-71 (February 2009).
3. Based on the contested facts in this complaint, the GRC is unable to determine whether the Custodian's statement that no record exists which is responsive to the Complainant's December 3, 2007 OPRA request is erroneous. Therefore, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts for a determination of whether such Request for Proposal responsive exists and, if the requested record does exist, whether the Custodian's denial to the Request for Proposal was a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

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

J.C. v. Bernards Township Board of Education (Somerset) (2008-18)

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

The Executive Director respectfully recommends the Council find:

1. Because the GRC relied upon the New Jersey Court Rules to determine the computation of time for filing reply exceptions, and because the Custodian filed the reply exceptions within the time period properly computed pursuant to R. 1:3-1, the Custodian's reply to the Complainant's exceptions was submitted to the GRC within the time permitted by law.
2. Because the Complainant's argument set forth in her exceptions is outweighed by the credible evidence adduced during the hearing at the Office of Administrative Law, and because the Complainant has failed to otherwise provide any legal basis for the

GRC to reject the Administrative Law Judge's findings, the Council accepts the Administrative Law Judge's Initial Decision dated March 9, 2009 which concludes:

*"...the fact that Mr. Smith could have done a better job does not mean that his conduct, which unfortunately resulted in a denial of access to certain records, was unlawful, much less that he knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. I therefore find that J.C. has failed to meet her burden of establishing that Mr. Smith willfully and knowingly violated his obligations under OPRA and **CONCLUDE** that her Denial of Access Complaint should be **DISMISSED**. I so **ORDER**."*

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

Alfred Sallie v. NJ Department of Law & Public, Division of Criminal Justice (2008-21)

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

The Executive Director respectfully recommends the Council find:

1. Because the Custodian certified that the records responsive to the request were provided to the Complainant by letter dated January 23, 2008 and there is no evidence in the record to the contrary, and because this date is within the statutorily mandated response time, the Custodian complied with the provisions of N.J.S.A. 47:1A-5.g.
2. Because OPRA does not limit the number of times a requestor may ask for the same record, the Custodian's failure to disclose or make available to the Complainant all of the records responsive to the Complainant's request, including those records previously provided, violates the provisions of N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-6. and the Council's decision in Caggiano v. Borough of Stanhope, GRC No. 2005-211 et al. (January 2006). **Therefore, the Custodian must disclose all of the records responsive to the Complainant's request, irrespective of their disclosure in response to any previous OPRA request(s).**
3. **The Custodian shall comply with item # 2 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, including a detailed redaction index explaining the legal basis for each redacted portion of the requested records to the Executive Director.**
4. Although the Custodian failed to disclose or make available to the Complainant all of the records responsive to the Complainant's request, because the Custodian re-inspected the files and disclosed additional documents to the Complainant, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the

circumstances. However, the Custodian's failure to comply with the provisions of OPRA appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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

Lewis Springer, Jr. v. NJ Department of Treasury, Division of Casino Control Commission (2008-45)

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

The Executive Director respectfully recommends the Council find:

1. Because the Custodian released the requested e-mails to the Complainant in redacted form within five (5) business days as ordered by the Council and provided certified confirmation of compliance to the GRC's Executive Director, the Custodian has complied with the Council's March 25, 2009 Interim Order.
2. Although the Custodian unlawfully denied access to portions of the three (3) specific e-mails requested by the Complainant, the Custodian lawfully denied access to the remaining portions of said e-mails. Additionally, the Custodian properly responded to the Complainant's OPRA request, did not unlawfully deny access to the Complainant's broad and unclear request, and complied with the Council's December 18, 2008 and March 25, 2009 Interim Orders. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful denial of access to portions of the three (3) specific e-mails requested by the Complainant appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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

Robert Verry v. Borough of South Bound Brook (Somerset) (2008-48)

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

The Executive Director respectfully recommends the Council find that this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts for a determination of whether the Custodian failed to fully comply with the Council's March 25, 2009 Interim Order and, if so, whether such noncompliance was a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

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

John Paff v. Township of Springfield (Union) (2008-77)

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

The Executive Director respectfully recommends the Council find:

1. Although both the Custodian and the Custodian's Counsel provided written responses to the Complainant's OPRA request dated February 1, 2008 requesting an extension of time within the statutorily mandated seven (7) business days, said responses are inadequate pursuant to N.J.S.A. 47:1A-5.i. and Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008) because they fail to provide an anticipated deadline date upon which the requested records will be provided.
2. The Custodian's failure to respond in writing to the Complainant's February 1, 2008 OPRA request for the Fico, Gerson and Institute of Forensic Psychology contracts either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days, as well as the Custodian's failure to grant or deny access to said records within the Complainant's offered extension of time results in a "deemed" denial of the Complainant's requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). Further, the Custodian violated N.J.S.A. 47:1A-5.e. by failing to provide immediate access to the requested contracts or an immediate response to the Complainant's request for contracts.
3. The Custodian's failure to respond in writing to the Complainant's February 18, 2008 OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). Further, the Custodian violated N.J.S.A. 47:1A-5.e. by failing to provide an immediate response to the Complainant's request for Dr. Gerson's contract.
4. Because the Custodian certified that there are no records responsive to the Complainant's request for the Affidavit of Publication regarding Peter A. Fico's contract and there is no credible evidence in the record to refute the Custodian's certification, the Custodian would have borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian responded in writing within the statutorily mandated seven (7) business day response time.

5. Because the Custodian certified that the requested Fireman's Mutual Benevolent Association records relate to the Township's final bargaining position to be taken by the Township during ongoing negotiations and that no final agreement or contract exists, the requested Fireman's Mutual Benevolent Association records are not government records subject to public access pursuant to N.J.S.A. 47:1A-1.1. Thus, the Custodian has carried her burden of proving a lawful denial of access to said records pursuant to N.J.S.A. 47:1A-6.
6. Because the Custodian certified that there are no records responsive to the Complainant's request for the Affidavit of Publication regarding Dr. Michael Gerson's contract, the Custodian would have borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian responded in writing within the statutorily mandated seven (7) business days.
7. Because the Custodian's Counsel certified that the Township's outside counsel also does not maintain a contract for Dr. Michael Gerson, the Council need not address whether the Township's outside counsel is "an officer, commission or agency or authority of" the Township whose records are government records subject to public access under OPRA.
8. Because the primary purpose of the investigatory report authored by Bruce Seidman, Esq., was not prepared for the purpose of preparing for litigation or providing legal advice, but rather for some other reason, the attorney-client privilege does not apply pursuant to Payton v. NJ Turnpike Authority, 148 N.J. 524 (1997), Cooper Hospital/University Med. Ctr. v. Sullivan, 183 F.R.D. 119 (D.N.J. 1998), and N.J.S.A. 47:1A-1.1.
9. Because the text of the report authored by Bruce Seidman, Esq., is purely factual and does not contain any advice or recommendations, said report is not exempt as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1.
10. Because the requested report authored by Bruce Seidman, Esq., pertained to an ongoing investigation conducted by the Township, and because the Complainant submitted his OPRA request while said investigation was ongoing, as well as because said report could not have been subject to public access prior to the investigation since said report was created after the Township commenced its investigation, said report is exempt from public access pursuant to N.J.S.A. 47:1A-3.a.
11. Because the Custodian denied access to the report authored by Bruce Seidman, Esq., in her written response to the Complainant's request on the basis that said report constituted attorney-client privilege, and because the attorney-client privilege does not apply to the requested report since the primary purpose of said report was not prepared for the purpose of preparing for litigation or providing legal advice, but rather for some other reason, pursuant to Payton v. NJ Turnpike Authority, 148 N.J. 524 (1997), Cooper Hospital/University Med. Ctr. v. Sullivan, 183 F.R.D. 119 (D.N.J. 1998), and N.J.S.A. 47:1A-1.1, the Custodian's response to the Complainant's OPRA request is insufficient pursuant to N.J.S.A. 47:1A-5.g. and

N.J.S.A. 47:1A-6 since she failed to identify the proper legal basis for said denial. However, the Custodian did not unlawfully deny access to said report because said report is exempt from disclosure pursuant to N.J.S.A. 47:1A-3.a. because of the Township's ongoing investigation at the time of the request

12. Because the Custodian certified that there are no records responsive to the Complainant's request for The Institute of Forensic Psychology records, the Custodian would have borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian responded in writing within the statutorily mandated seven (7) business days.
13. Because the Custodian certified that there are no records responsive to the Complainant's request for Dr. Michael Gerson's contract, the Custodian would have borne her burden of proving that this denial of access to the Complainant's OPRA request dated February 18, 2008 was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian responded in writing within the statutorily mandated seven (7) business day response time.
14. The Custodian failed to carry her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6, to the requested letter proposal referred to by Resolution No. 2007-49. As such, the Custodian shall release said record to the Complainant with appropriate redactions, if any.
15. **The Custodian shall comply with item # 14 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4³, to the Executive Director. If no record responsive exists, the Custodian must certify to this fact.**
16. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
17. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

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

Eliane Schiano v. Township of Lower (Cape May) (2008-90)

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

The Executive Director respectfully recommends the Council find:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Pursuant to N.J.S.A. 47:1A-6. and Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008), the Custodian unlawfully denied the Complainant access to the record responsive to Request Item No. 2 because the Custodian mistakenly informed the Complainant that there were no records responsive to her request due to the Custodian insufficient search. See also Oskay v. New Jersey State Parole Board, GRC Complaint No. 2008-53 (March 2009).
3. Because the Custodian, the Planning Director (William Gleastok), the Township Manager (Joseph Jackson), and the Township Engineer (Raymond Roberts), have all certified that they are not in possession of any record that may be responsive to Request Item No. 1 of the Complainant's OPRA request, and there is no credible evidence in the record to refute these certifications, the Custodian has not unlawfully denied the Complainant access to records responsive to Request Item No. 1 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian violated N.J.S.A. 47:1A-5.i. by failing to respond in writing within seven (7) business days of receipt of the Complainant's OPRA request, granting access, denying access, requesting clarification or requesting an extension of time, thereby resulting in a "deemed" denial of the Complainant's OPRA request, and conducted an insufficient search in response to the Complainant's request, the Custodian provided the Complainant with all records responsive to the request as soon as a record responsive to Request Item No. 2 of the Complainant's OPRA request was located. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's "deemed" denial of access and insufficient search appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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

Walter Oberwanowicz v. Branchberg Township Board of Education (Somerset) (2008-113)

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

The Executive Director respectfully recommends the Council find that because the Complainant failed to identify with reasonable clarity the records sought, and because the Complainant's request requires an open-ended search of the Board of Education's files, said request is invalid and as such, the original Custodian, the Superintendent and Mr. Altmire have not unlawfully denied access to the Complainant's OPRA request pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

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

Greg Badini v. County of Hunterdon (2008-122)

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

The Executive Director respectfully recommends the Council find:

1. Because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of a specific date when the Custodian would respond to the Complainant's April 1, 2008 OPRA request, the Custodian's written response to the Complainant's OPRA request is inadequate under OPRA pursuant to Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), and the Complainant's April 1, 2008, OPRA request is "deemed" denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of all memoranda responsive to the Complainant's April 1, 2008, OPRA request in order to determine the validity of the Custodian's assertion that the records constitute the exemptions cited by the Custodian pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see No. 2 above), a document or redaction index⁵, as well as a legal certification from the Custodian, in**

⁴ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁵ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

accordance with N.J. Court Rule 1:4-4,⁶ that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

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

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

Antwone Fosque v. NJ Department of Corrections (2008-185)

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

The Executive Director respectfully recommends the Council find:

1. The Custodian has lawfully denied access to the requested security threat affiliation form because it is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1, N.J.S.A. 47:1A-9.a., Executive Order No. 26 (McGreevey 2002) and N.J.A.C. 10A:22-3.2 (a)(27). See Ortiz v. New Jersey Department of Corrections, GRC Complaint No. 2007-101 (November 2008).
2. Based on the evidence of record, Ortiz v. New Jersey Department of Corrections, GRC Complaint No. 2007-101 (November 2008), and the cited exemptions pursuant to N.J.S.A. 47:1A-9.a. Executive Order No. 21 (McGreevey 2002), Executive Order No. 26 (McGreevey 2002) and N.J.A.C. 10A:22-3.2 (a)(27), the July 12, 2008 inspection of the record responsive to Item No. 1 of the Complainant's May 29, 2008 OPRA request is a reasonable substitute for copies of the requested records.
3. Because request Item No. 2 of the Complainant's May 29, 2008 OPRA request seeks information rather than an identifiable government records, the request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).

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

Randy George v. NJ Department of Environmental Protection, Nature & Historic Resources, Division of Parks & Forestry, Office of Leases, Manor of Skyland (2008-206)

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

The Executive Director respectfully recommends the Council find:

1. Ms. Fleming's failure to respond in writing to the Complainant's July 16, 2008 OPRA request for on-site inspection of caterer's lease at the Manor of Skylands either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). Further, Ms. Fleming violated N.J.S.A. 47:1A-5.e. by failing to provide immediate access to the requested contract or an immediate response to the Complainant's request for a contract.
2. Because Ms. Fleming failed to forward the Complainant's July 16, 2008 OPRA request to the Custodian or direct the Complainant to submit the OPRA request directly to the Custodian, Ms. Fleming has violated N.J.S.A. 47:1A-5.h. and N.J.S.A. 47:1A-5.i. See Kossup v. City of Newark Police Department, GRC Complaint No. 2006-174 (February 2007)(holding that Lt. Caroline Clark violated OPRA by failing to forward the request or direct the requestor to the proper Custodian of record pursuant to N.J.S.A. 47:1A-5.h.).
3. Because Ms. Fleming verbally replied on July 28, 2008, stating that Ms. Green would fulfill the Complainant's request upon her return from vacation, and because the Complainant was provided with the requested caterer's lease on August 7, 2008, the Complainant's July 18, 2008 OPRA request is a valid OPRA request pursuant to Spaulding v. Hudson County Register, GRC Complaint No. 2006-157 (July 2007).
4. Although Ms. Fleming's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, the failure to respond immediately to the request for a contract resulted in a violation of N.J.S.A. 47:1A-5.e. and the failure to forward the request to the proper custodian of record or direct the Complainant to submit the OPRA request directly to the Custodian resulted in a violation of N.J.S.A. 47:1A-5.h., because the Complainant was provided with the requested caterer's lease on August 22, 2008 or fourteen (14) business days following the agency's receipt of the Complainant's request, it is concluded that Ms. Fleming's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, Ms. Fleming's unlawful "deemed" denial of access and violation of N.J.S.A. 47:1A-5.e. and N.J.S.A. 47:1A-5.h. appears negligent and heedless.

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

Randy George v. NJ Department of Environmental Protection, Nature & Historic Resources, Division of Parks & Forestry, Office of Leases, Manor of Skyland (2008-209)

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

The Executive Director respectfully recommends the Council find:

1. Ms. Green's failure to respond in writing to the Complainant's August 22, 2008 OPRA request either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because Ms. Green failed to forward the Complainant's August 22, 2008 OPRA request to the Custodian or direct the Complainant to submit the OPRA request directly to the Custodian, Ms. Green has violated N.J.S.A. 47:1A-5.h. and N.J.S.A. 47:1A-5.i. See Kossup v. City of Newark Police Department, GRC Complaint No. 2006-174 (February 2007)(holding that Lt. Caroline Clark violated OPRA by failing to forward the request or direct the requestor to the proper Custodian of record pursuant to N.J.S.A. 47:1A-5.h.).
3. Because Ms. Green attempted to fulfill the Complainant's request by providing the Complainant with all records responsive on September 8, 2008 and September 20, 2008, the Complainant's August 22, 2008 OPRA request is considered a valid OPRA request pursuant to Spaulding v. Hudson County Register, GRC Complaint No. 2006-157 (July 2007).
4. Although Ms. Green's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and failure to forward the request to the proper custodian of record or direct the Complainant to submit the OPRA request directly to the Custodian resulted in a violation of N.J.S.A. 47:1A-5.h., because Ms. Green certified that all records responsive to the Complainant's August 22, 2008 OPRA request, were provided on September 8, 2008 and September 20, 2008, it is concluded that Ms. Green's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, Ms. Green's unlawful "deemed" denial of access and violation of N.J.S.A. 47:1A-5.e. and N.J.S.A. 47:1A-5.h. appears negligent and heedless.

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

Jacqueline Andrews v. Township of Irvington (Essex) (2008-232)

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

The Executive Director respectfully recommends the Council find:

1. Because the Custodian failed and refused to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council's February 25, 2009 Interim Order, and because the Custodian has failed and refused to provide to the GRC certified confirmation of compliance with the Council's Order in accordance with N.J. Court Rule 1:4-4, the Custodian has not complied with the terms of the Council's February 25, 2009 Interim Order and is therefore in contempt of said Order.
2. Because the Custodian failed and refused to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council's February 25, 2009 Interim Order, the GRC shall immediately commence an enforcement proceeding in New Jersey Superior Court against the Custodian in accordance with N.J. Court Rule 4:67-6.
3. Based on the evidence in the record, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. This matter will be transmitted to the Office of Administrative Law after the enforcement proceeding concludes.

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

Jacqueline Andrews v. Township of Irvington (Essex) (2008-243)

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

The Executive Director respectfully recommends the Council find:

1. Because the Custodian failed and refused to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council's March 25, 2009 Interim Order, and because the Custodian has failed and refused to provide to the GRC certified confirmation of compliance with the Council's Order in accordance with N.J. Court Rule 1:4-4, the Custodian has not complied with the terms of the Council's March 25, 2009 Interim Order and is therefore in contempt of said Order.
2. Because the Custodian failed and refused to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council's March 25, 2009 Interim Order, the GRC shall immediately commence an enforcement proceeding in New

Jersey Superior Court against the Custodian in accordance with N.J. Court Rule 4:67-6.

3. Based on the evidence in the record, it is possible that the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances. This matter will be transmitted to the Office of Administrative Law after the enforcement proceeding concludes.

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

James Osman v. NJ Department of Law & Public Safety, Division of Alcoholic Beverage Control (2009-32)

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

The Executive Director respectfully recommends the Council find that because the requested database was created under the Attorney General Law Enforcement Directive 2007-2 to be used as an investigatory tool to enforce *N.J.A.C. 13:2-23.1(b)*, the Custodian did not unlawfully deny access to the requested database because it is exempt from disclosure pursuant to *N.J.S.A. 47:1A-9.a.*, *N.J.A.C. 13:2-29.2* and *Frizell v. Division of Alcoholic Beverage Control*, GRC Complaint No. 2004-113 (December 2004).

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

Georgina Shanley v. City of Wildwood (Cape May) (2009-58)

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

The Executive Director respectfully recommends the Council find:

1. Because the Custodian failed to immediately grant or deny access to the requested invoice responsive to request Item No. 1, request additional time to respond or request clarification of the request, the Custodian has violated *N.J.S.A. 47:1A-5.e.*
2. The Custodian failed to respond immediately in writing to the Complainant's February 4, 2009 OPRA request for the invoice responsive to request Item No. 1, thus violating *N.J.S.A. 47:1A-5.e.* However, Ms. Pinto responded to the Complainant on February 13, 2009, stating that no records responsive to the Complainant's request exist, the Custodian subsequently certified in the Statement of Information that no records which are responsive to the request exist and there is no credible evidence in

the record to refute the Custodian's certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.e., he did not unlawfully deny access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

3. Although the Custodian's failure to respond immediately to the Complainant's February 4, 2009, OPRA request for an invoice resulted in a violation of N.J.S.A. 47:1A-5.e., the Custodian did respond in writing on the sixth (6th) business day following the Complainant's request stating that no records responsive to the Complainant's request exist and subsequently certified in the Statement of Information that no records responsive exist. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's violation of N.J.S.A. 47:1A-5.e. appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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

Eddie Dixon, Jr. v. Township of Hamilton (Mercer) (2009-63)

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

The Executive Director respectfully recommends the Council find:

1. Because the Custodian forwarded the Complainant's OPRA request to the proper custodian of the court records requested and directed the Complainant to the custodian, she complied with N.J.S.A. 47:1A-5.h and did not unlawfully deny access to the requested records.
2. Requests for records made to the Judicial Branch of New Jersey State Government are not within the Council's authority to adjudicate. N.J.S.A. 47:1A-7.g. See Vessio v. Township of Manchester, GRC Complaint No. 2006-130 (April 2008). Because the records requested by the Complainant were made, maintained and kept on file by the Municipal Court, the Council does not have jurisdiction to adjudicate the request after it was forwarded by the Custodian.

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

Complaints on Appeal: None.

Complaints Adjudicated on NJ Superior Court & NJ Supreme Court: None.

Executive Director's Report and New Business: None.

Public Comment: None.

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

Meeting adjourned at 10:50 a.m.

Respectfully submitted,

Robin Berg Tabakin, Chairwoman

Date Approved: September 30,2009