



**Minutes of the Government Records Council
December 20, 2011 Public Meeting – Open Session**

The meeting was called to order at 1:11 p.m. at the Department of Community Affairs, Conference Room 129, Trenton, New Jersey. The Open Public Meetings Act statement was read by Ms. Tabakin.

The pledge of allegiance was recited while all stood in salute to the American flag.

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

Ms. Lillie called the roll:

Present: Robin Berg Tabakin (Chairwoman), Charles Richman (designee of Department of Community Affairs Commissioner Lori Grifa), and Denise Parkinson Vetti (designee of Department of Education Acting Commissioner Christopher D. Cerf).

GRC Staff In Attendance: Catherine Starghill (Executive Director), Karyn Gordon (In-House Counsel), Brigitte Lillie (Secretary), Dara Lownie (Communications Manager), Frank Caruso (Senior Case Manager), Harlyne Lack (Case Manager), Darryl Rhone (Case Manager), John Stewart (Mediator) and Debra Allen (Deputy Attorney General).

Ms. Tabakin stated that there will be no closed session.

The following meeting minutes requiring Council approval were put to a vote:

November 29, 2011 Open Session Minutes:

A motion was made by Ms. Vetti and seconded by Mr. Richman to approve the open session minutes of the November 29, 2011 meeting. The motion passed by a unanimous vote.

November 29, 2011 Closed Session Minutes:

A motion was made by Mr. Richman and seconded by Ms. Vetti to approve the closed session minutes of the November 29, 2011 meeting. The motion passed by a unanimous vote.

Council Adjudications:

The following complaints requiring individual adjudication were not put to a vote due to the lack of quorum:

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

2. David Hinchcliffe v. NJ Department of Community Affairs, Division of Local Government Services (2007-306)
3. J.C. v. NJ Department of Education, Deputy Commissioner's Office (2008-91)
4. Gertrude Casselle v. NJ Department of Community Affairs, Division on Community Resources (2008-248)
5. Ursula Cargill v. NJ Department of Education (2009-9)
6. Ursula Cargill v. State Ethics Commission (2009-10)
7. Jason Todd Alt (on behalf of The Daily Journal) v. NJ Department of Education (2009-114)
8. William Cimochowski v. NJ Department of Community Affairs, Div. of Codes & Standards, Office of Code Enforcement (2009-261)
9. Michael Pushko v. NJ Department of Community Affairs, Division of Housing & Community Resources (2009-269)

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

1. David H. Weiner v. County of Gloucester (2011-58)
2. Chris Hayes v. Borough of Paramus (Bergen) (2011-143)
3. Rashaun Barkley v. New Jersey Civil Service Commission (2011-203)
4. Ken Schilling v. Township of Little Egg Harbor (Ocean) (2011-292)
5. Keith A. Werner v. New Jersey Department of Treasury (2011-313)
6. Robert R. Scheer III v. Franklin Fire District #1 (Somerset) (2011-341)
7. David Herron v. New Jersey Department of Treasury (2011-352)
8. Darlene R. Esposito v. NJ Department Community Affairs (2011-370)

Prior to the Council's vote, Mr. Stewart introduced a new administrative disposition category entitled, "Unripe Cause of Action." Mr. Stewart stated that this category is utilized in Complaint No. 2011-341 (item number 6 above) because the Complainant verified his Denial of Access Complaint prior to the expiration of the statutorily mandated seven (7) business day response time. Therefore the complaint is materially defective and must be dismissed.

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 Mr. Richman and seconded by Ms. Vetti. The motion passed unanimously.

The following complaints requiring individual adjudication were put to a vote:

Robert A. Verry v. Borough of South Bound Brook (Somerset) (2008-161)

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

Virginia Culver v. Borough of Lawnside (Camden) (2010-15)

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

John Sebastian v. Borough of Ramsey (Bergen) (2010-42)

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

Michelle O'Callaghan v. Lower Township Police Department (Cape May) (2010-44)

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

Robert A. Verry v. Borough of South Bound Brook (Somerset) (2010-105)

Robert A. Verry v. Borough of South Bound Brook (Somerset) (2010-106)

Mr. Caruso informed the Council members that these two complaints have been consolidated into one draft findings and recommendations.

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

Jesse Wolosky v. Township of Mine Hill (Morris) (2010-161)

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

Jesse Wolosky v. Borough of Morris Plains (Morris) (2010-165)

Ms. Lack introduced an amendment to conclusion number 3.

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

Sabino Valdes v. Union City Board of Education (Hudson) (2010-180)

Ms. Lack introduced an edit to page 9 of the draft findings and recommendations.

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

Jesse Wolosky v. Township of Randolph (Morris) (2010-186)

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

Jesse Wolosky v. Borough of Victory Gardens (Morris) (2010-187)

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

Paul S. Kaplan v. Township of Winslow (Camden) (2010-202)

Mr. Rhone introduced an edit to page 4 of the draft findings and recommendations.

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

Richard Rivera v. Town of West New York (Hudson) (2010-208)

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

Jorge Guerrero v. County of Hudson (2010-216)

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

Jesse Wolosky v. Township of Morris (Morris) (2010-227)

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

Robert A. Verry v. Borough of South Bound Brook (Somerset) (2010-248)

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

David Herron v. Montclair Board of Education (Sussex) (2010-268)

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

GRC Complaints on Appeal:

Gatson v. Somerset County Prosecutor's Office, DOCKET No. A-1926-10T4 (App. Div. December 13, 2011). On appeal from GRC Complaint No. 2009-238 (October 2010). .

Gatson v. Cliffside Park Police Department, DOCKET No. A-1927-10T4 (App. Div. December 13, 2011). On appeal from GRC Complaint No. 2009-239 (October 2010). .

Gatson v. Bergen County Prosecutor's Office, DOCKET No. A-1928-10T4 (App. Div. December 13, 2011). On appeal from GRC Complaint No. 2009-240 (October 2010).

Ms. Starghill stated that the Council adjudicated these three (3) separate Denial of Access Complaints at its October 26, 2010 meeting. The Council held in each complaint that the OPRA request was invalid because the request failed to specify identifiable government records and would require the Custodian to conduct research among all of the records maintained by the agency to locate and identify responsive records.

The Complainant appealed all three (3) complaints to the Appellate Division of NJ Superior Court. The court affirmed the Council in all three (3) appeals stating the following:

“[h]ere, after a careful review of the items comprising the record on appeal, we conclude that the determination made by the GRC is ‘supported by sufficient credible evidence on the record as a whole...’ More importantly, the determination is not arbitrary, capricious or unreasonable and is in accord with the mandates of OPRA.”

Complaints Adjudicated in NJ Superior Court & NJ Supreme Court: Ms. Starghill informed the Council of the following two court decisions:

Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., DOCKET NO. A-1810-10T1, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2011 N.J. Super. LEXIS 210, September 14, 2011, Argued, November 30, 2011, Decided, Approved for Publication November 30, 2011.

A reporter employed by the Newark Morning Ledger Co., which publishes *The Star-Ledger*, filed an OPRA request to the NJ Sports and Exposition Authority seeking release of contracts between defendant and event promoters for performances held in the IZOD Center from 2007 to the date of the request, March 19, 2009. Defendant released copies of ninety-eight contracts, however the financial terms in the contracts were redacted. Defendant declined to release the full contracts, claiming the information was exempt from disclosure as proprietary financial information and because its release would create a competitive disadvantage or reveal trade secrets. Defendant also argued plaintiff's request sought confidential information, which was exempt from disclosure under common law.

In the Law Division, the court held that the redacted terms relating to the use of the center did not fall within the scope of trade secrets or proprietary commercial or financial information as used in N.J.S.A. 47:1A-1.1. Further, disclosure of the details regarding the licensing fees and other remunerative arrangements would not afford an advantage to other venues competing for bookings because they were widely known among those involved in that branch of the entertainment industry, defeating the center's claims of confidentiality. The Sports & Exposition Authority appealed.

First, the Appellate Division held that plaintiff's action was not time barred even though plaintiff "failed to file its action within the forty-five day time limit applicable to OPRA challenges." The court cited to Mason v. City of Hoboken, a 2008 Supreme Court decision wherein the court ruled that the forty-five day limitations period appropriately assures citizens receive "swift access to public records," and also provides public bodies with certainty regarding possible disputes regarding the accessibility of records. However, the Mason court also made it clear that trial "courts can enlarge that time period in the interest of justice," coincident with the provisions of Rule 4:69-6(c). Id.

The Appellate Court affirmed the trial court's extension of the 45 day statute of limitations after finding "important public rather than private interests, which require adjudication or clarification." Specifically, Plaintiff's complaint was filed immediately after a brief period utilized for good faith settlement efforts, but six-days beyond the forty-five day limitations period.

Regarding disclosure of the financial portions of the requested contracts, the Appellate Court concluded that defendant fails to identify the detrimental effects of disclosure. A broad assertion that disclosure will result in a loss of bargaining power is unsupported by actual evidence. Like the trial court, the Appellate court concluded defendant's claims fail to show the release of financial terms of the promoter/event contracts would give an advantage to defendant's competitors. The Appellate court also agrees with the trial court's analysis that the financial terms contained in defendant's agreements are neither "trade secrets" nor "proprietary commercial or financial information." The terms are not subject to exclusion.

K.L. v. Evesham Tp. Bd. of Educ., ___ N.J. Super. ___ (App. Div. 2011).

A parent sought school records pertaining to alleged incidents of bullying against his children. Defendant Board of Education declined to provide any records except the children's own school files. It asserted that certain records in its possession are privileged and exempt from disclosure. After plaintiff filed this lawsuit, the Board released one redacted document to plaintiff that reported the disciplining of another student for violent conduct against plaintiff's son.

The trial court determined by written opinion that the requested records were exempt from disclosure under OPRA and the common law because they were protected by the attorney-client and work product privileges. The court further determined that plaintiff had partially prevailed with respect to the one disciplinary referral document that the Board had disclosed after plaintiff filed this lawsuit, and therefore, plaintiff was entitled to his attorney's fees and costs related to that one document.

Plaintiff's attorney submitted an application for attorney's fees and costs. The Board then filed further opposition and argued that the disciplinary form was not released pursuant to OPRA pursuant to FERPA, the federal statute governing confidentiality of student records. The Board argued that FERPA does not provide for shifting of attorney's fees to a prevailing litigant. Persuaded by the Board's new argument, the court rescinded its prior ruling and agreed that

plaintiff was not entitled to attorney's fees and costs. By order dated December 3, 2010, the court dismissed plaintiff's complaint with prejudice.

On appeal, the court concluded that the attorney-client privilege does not apply to the notes because they were not "communications" with the Board's attorneys at the time plaintiff requested access to school records. The evidence, however, amply supports the trial court's conclusion that the notes were attorney work product prepared in anticipation of litigation.

Regarding the award of prevailing party attorney's fees, the Appellate Court held that Plaintiff proved that this OPRA lawsuit was the catalyst for disclosure of the document by showing both "a factual causal nexus between [the] litigation and the relief ultimately achieved [and] that the relief ultimately secured . . . had a basis in law." He is entitled to reasonable attorney's fees and costs for prevailing with respect to the one document released to him. The court remands to the trial court to award reasonable reimbursement of attorney's fees and costs to plaintiff under OPRA for prevailing as to disclosure of the one disciplinary document.

Executive Director's Report and New Business: None.

Public Comment: None.

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

Meeting adjourned at 1:39 p.m.

Respectfully submitted,

Denise Parkinson-Vetti, Secretary

Date Approved: January 31, 2012