



Minutes of the Government Records Council December 18, 2012 – Closed Session

The Council convened in closed session at 10:43 a.m. in Conference Room 129 of the Department of Community Affairs, Trenton, New Jersey. In attendance were: Robin Berg Tabakin, Esq. (Chairwoman), Dana M. Lane, Esq. (designee of Department of Community Affairs Commissioner Richard E. Constable, III), Denise Parkinson Vetti, Esq. (designee of Department of Education Acting Commissioner Christopher D. Cerf), and Steven Ritardi, Esq. (public member).

Also in attendance were GRC Staff: Karyn Gordon (Acting Executive Director), Brigitte Lillie (Secretary), Dara L. Barry (Communications Manager), Frank Caruso (Senior Case Manager), Harlynn Lack (Case Manager), Debra Allen (Deputy Attorney General)¹ and Brian Tipton, Esq. (Designated Outside Counsel).²

Ms. Vetti made a motion and Mr. Ritardi seconded the motion to go into closed session. The Council adopted the motion by a unanimous vote.

The Council met in 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:

Steve Hyman v. City of Jersey City (Hudson) (2007-118)

Mr. Ritardi is recused from adjudicating this complaint and exited the room during the following discussion.

Ms. Gordon stated that the Appellate Division remanded this complaint back to the Council and stated the Council has three (3) options for an in camera review. Mr. Caruso indicated that an appeal may be pending in this complaint because the attorney involved believes the Council should redo the in camera review and that the Council will lose on appeal. Ms. Gordon recommended that the Council refer this in camera to the Office of Administrative Law (OAL). Ms. Allen agreed with Ms. Gordon's recommendation. The Council agreed to put the draft Findings and Recommendations of the Executive Director to a vote during open session.

Jesse Wolosky v. Township of Sparta (Sussex) (2008-219)

Jesse Wolosky v. Township of Sparta (Sussex) (2008-277) (discussed together)

Ms. Gordon stated that there were appeals of both complaints in the Appellate Division regarding the award of prevailing party attorney's fees. Ms. Gordon stated that the court reduced fees in both complaints to \$500 each, formerly about \$5,000 and \$6,000. Ms. Allen stated that it is not a common occurrence for the courts to invoke original jurisdiction rather than remand the case for

¹ The Deputy Attorney General is present for all discussions, with the exception of matters involving State agencies.

² The Designated Outside Counsel is present only for discussions of matters involving State agencies.

further proceedings. Ms. Allen stated that the Council was affirmed on its decision to deny the fee enhancements and that she understands the Complainant is not appealing these decisions.

Mark Lagerkvist v. New Jersey Department of Treasury, Division of Pensions & Benefits (2011-110)

Ms. Gordon informed the Council that the Department of Treasury appealed the Council's Interim Order, which ordered an in camera review of the records, and the Appellate Division denied the appeal. Ms. Gordon recommends referring this complaint to OAL to develop the record and have a third party conduct the in camera review due to the sensitive nature of the request.

Mr. Ritardi questioned whether the Council would take heat for ordering the in camera review but not conducting said review. Ms. Gordon stated that the Council will likely take heat no matter which option it chooses. Ms. Gordon stated that the Appellate Court in *Steve Hyman v. City of Jersey City (Hudson) (2007-118)* held that the Council has the ability to send in cameras to OAL. Ms. Tabakin questioned how many hours it will take to complete this in camera review. Mr. Caruso stated that he was not sure, but that there are 27 records at issue. Mr. Ritardi asked what happens to the complaint after it is referred to OAL. Ms. Gordon stated that an Administrative Law Judge will take testimony, conduct a hearing, complete the in camera review, and write an Initial Decision for the Council to accept, reject or modify. Ms. Gordon states that this process provides the parties a venue to make motions, which she anticipates in the complaint, and states that the Council is not equipped for such a process.

Mr. Ritardi asks whether the draft Findings and Recommendations of the Executive Director can be amended to support the finding that the Council does not have the resources to adjudicate this complaint at this point because the Council anticipates contested issues. Ms. Gordon affirmed. The Council agreed to amend the draft Findings and Recommendations of the Executive Director during open session.

David B. Popkin v. Englewood Board of Education (Bergen) (2011-261)

Ms. Gordon requested advice from Ms. Allen regarding this complaint. Ms. Allen stated that the Attorney General's office believes that the record is a student record and that a person could infer who the student is by reading the rest of the record. Ms. Vetti agreed with Ms. Allen. The Council agreed to put the draft Findings and Recommendations of the Executive Director to a vote during open session.

John Paff request for advisory opinion

Ms. Gordon stated that Mr. Paff asked the Council for an advisory opinion in October regarding:

“Does a civil complaint that has been filed with the court but which identifies a student by name constitute a ‘student record’ within the definition of N.J.A.C. 6A:32-2.1 which is subject to the confidentiality provisions of N.J.A.C. 6A:32-7.5?”

Ms. Vetti stated that there are many issues with the anti-bullying law and the Federal Educational Rights and Privacy Act (FERPA) regarding the release of information from schools, which is all unsettled law right now. Mr. Ritardi stated that Mr. Paff should file a Denial of Access Complaint. Ms. Gordon recommended declining to issue the advisory opinion and that pursuant to N.J.S.A. 47:1A-7.b., the Council may issue advisory opinions at its own discretion. The Council agreed to decline.

Richard Rivera v. City of Newark (Essex) (2010-274)

Mr. Ritardi is recused from adjudicating this complaint and exited the room during the following discussion.

Ms. Gordon stated that this complaint is currently on appeal. Ms. Allen stated that she has to file a submission with the Appellate Division. Ms. Allen stated that a recent court decision, Burke v. Brandes, 2012 N.J. Super. LEXIS 187, (App. Div. December 7, 2012), is on point with the Rivera complaint. Ms. Allen stated that the OPRA request is invalid, but the Custodian responded to the request and identified records so the Council is unable to hold that the request is overly broad or unclear since records were identified. Ms. Allen stated that the court in Burke held that “the fact that the custodian of records in this case actually performed a search and was able to locate and identify records responsive to plaintiff’s request belies any assertion that the request was lacking in specificity or was overbroad.” Ms. Gordon recommended that the Council remand the complaint and reconsider it in light of the Burke decision.

Change in Finding & Recommendations format

Ms. Gordon stated that staff shortened the background section of the draft Findings and Recommendations of the Executive Director to help streamline the adjudication process and adjudicate complaints faster. Ms. Gordon stated that the example appears in the Messinger complaint and asks the Council for their input. The Council unanimously agreed to the new format.

Ms. Vetti made a motion and Ms. Lane seconded the motion to end the closed session. The Council adopted the motion by a unanimous vote.

The closed session meeting concluded at 11:45 a.m.

Respectfully Submitted:

Steven Ritardi, Esq., Secretary

Date Approved: January 29, 2013