



Minutes of the Government Records Council January 26, 2016 Public Meeting – Open Session

I. Public Session:

- **Call to Order**

The meeting was called to order at 1:50 p.m. by Ms. Robin Tabakin at the Department of Community Affairs, Conference Room 129, Trenton, New Jersey.

- **Pledge of Allegiance**

All stood and recited the pledge of allegiance in salute to the American flag.

- **Meeting Notice**

Ms. Tabakin read the following Open Public Meetings Act statement:

“This meeting was called pursuant to the provisions of the Open Public Meeting Act. Notices of this meeting were faxed to the Newark Star Ledger (fax number out of service), Trenton Times, Courier-Post (Cherry Hill), and the Secretary of State on January 21, 2016.”

Ms. Tabakin read the fire emergency procedure.

- **Roll Call**

Ms. Bordzoe called the roll:

Present: Robin Tabakin, Esq. (Chairwoman) Dominic Rota, Esq. (designee of Department of Education Commissioner David C. Hespe), and Jason Martucci, Esq. (designee of Department of Community Affairs Commissioner Charles A. Richman).

Absent: Steven Ritardi, Esq. (Public Member)

GRC Staff in Attendance: Joseph Glover (Executive Director), Dawn SanFilippo (Deputy Executive Director), Rosemond Bordzoe (Secretary), Frank F. Caruso (Communications Specialist/Resource Manager), John Stewart (Mediator), Samuel Rosado (Staff Attorney), Ernest Bongiovanni (Staff Attorney), Husna Kazmir (Staff Attorney), and Deputy Attorney General Debra Allen.

Ms. Tabakin informed the public that copies of the agenda with complaint summaries are available by the conference room door.

II. Executive Director's Report:

Current Statistics:

- Since OPRA's inception in calendar year 2002, the GRC has received 4,219 Denial of Access Complaints. That averages about 311 complaints per a bit over 13.5 program years.
- In the current program year, the GRC has so far received 246 complaints.
- 469 of the 4,219 complaints remain open and active. Of those open cases,
 - 15 complaints are on appeal with the Appellate Division (3.2%);
 - 29 complaints are currently in mediation (6.2%);
 - 38 complaints await adjudication by the Office of Administrative Law (8.1%);
 - 124 complaints are tentatively scheduled for adjudication at an upcoming GRC meeting, which includes the January 2016 meeting (26%); and,
 - 261 complaints are work in progress (56%).
- Since 2004, the GRC has received 24,274 total inquiries. That is an average of about 1,929 inquiries per a bit over 12.5 tracked program years. So far in the current program year, the GRC has received 1,153 inquiries.

III. Closed Session:

Ms. Tabakin read the Closed Session Resolution to go into closed session pursuant to N.J.S.A. 10:4-12(b)(7) to receive legal advice in the following matters:

- Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2013-281)
- Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2013-282)
- Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2013-283)
- Robert A. Verry v. Franklin Fire District No. 1 (Somerset) (2013-287)
- Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2013-328)
- Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2013-329)
- Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2013-330)
- Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2013-331)
- Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2014-137)
- Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2014-138)
- Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2014-266)
- Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2014-267)
- Robert A. Verry v. Franklin Fire District No. 1 (Somerset) (2014-325)

Mr. Rota made a motion to go into closed session, and Mr. Martucci seconded the motion. The Council adopted the motion by a unanimous vote.

The Council met in closed session from 1:55 p.m. until 2:45 p.m.

Mr. Rota made a motion to end the closed session, which was seconded by Mr. Martucci. The Council adopted the motion by a unanimous vote. Open Session reconvened at 2:46 p.m., and Ms. Bordzoe called roll.

Present: Ms. Tabakin, Mr. Rota, Mr. Martucci; Mr. Ritardi was absent.

IV. Approval of Minutes of Previous Meetings:

- **December 15, 2015 Open Session Meeting Minutes**

Mr. Rota made a motion, seconded by Mr. Martucci, to approve the open session minutes of the December 15, 2015 meeting. The motion passed by a majority vote. Mr. Ritardi was absent.

- **December 15, 2015 Closed Session Meeting Minutes**

Mr. Rota made a motion, seconded by Mr. Martucci, to approve the closed session minutes of the December 15, 2015 meeting. The motion passed by a majority vote. Mr. Ritardi was absent.

V. New Business – Cases Scheduled for Adjudication

Ms. Tabakin stated that an “Administrative Complaint Disposition” means a decision by the Council as to whether to accept or reject the Executive Director’s recommendation of dismissal based on jurisdictional, procedural, or other defects of the complaint. The reason for the Administrative Disposition is under each complaint below:

A. Administrative Disposition Adjudications with Recusals (Consent Agenda):

1. **David H. Weiner v. County of Essex (2015-358) (SR Recusal)**

- The complaint is a duplicate of 2015-353.
- Ms. Tabakin called for a motion to accept the recommendations as written in the above Administrative Disposition. Mr. Rota made a motion which was seconded by Mr. Martucci. The motion passed by a majority vote; Mr. Ritardi was absent.

B. Administrative Disposition Adjudications with no Recusals (Consent Agenda):

1. **Aakash Dalal v. NJ Department of Law and Public Safety, Division of Criminal Justice (2015-183)**

- The Custodian received no records request.

2. **David Sirota v. NJ Office of the Governor (2015-225)**

- The parties settled the matter through mediation.

3. **Brian Keith Bragg v. Atlantic County Justice Facility (2015-292)**
 - The Custodian received no records request.
4. **Aakash Dalal v. Borough of Bergenfield (Bergen) (2015-322)**
 - No responsive records exist.
5. **Robert Kovacs v. Monmouth County (2015-355)**
 - The parties settled the matter through mediation.
6. **Paul Cibelli v. Piscataway Police Department (Middlesex) (2015-379)**
 - The Custodian received no records request.
7. **Anthony Walker v. Superior Court of New Jersey – Essex Vicinage (2016-8)**
 - The request is not within the Council's jurisdiction to adjudicate.
8. **Anthony Walker v. Essex County Probation Office (2016-9)**
 - The request is not within the Council's jurisdiction to adjudicate.

Ms. Tabakin called for a motion to accept the recommendations as written in all of the above Administrative Complaint Dispositions. Mr. Rota made a motion, which was seconded by Mr. Martucci. The motion passed unanimously.

**C. Administrative Disposition of Uncontested, Voluntary Withdrawals by Complainant
(No Adjudication of the Council is Required):**

1. **Clarence F. Lear, III v. City of Cape May (Cape May) (2014-427)**
2. **Angelo Fichera v. Somerset County Prosecutor's Office (2015-64)**
3. **Robert McDonnell v. Hillsborough Township Board of Education (Somerset) (2015-105)**
4. **Jeffrey R. Brown v. NJ Department of Law and Public Safety, Office of the Attorney General (2015-359)**
5. **Deborah Glenn v. Highland Park Code Enforcement (Middlesex) (2015-367)**
6. **Harry B. Scheeler, Jr. v. NJ Department of Labor and Workforce Development (2015-374)**
7. **Stanley T. Baker, Jr. v. NJ State Parole Board (2015-378)**
8. **Adam P. Friedman (o/b/o Philadelphia Insurance Company) v. Office of the State Comptroller (2015-387)**
9. **Wayne Smith v. Springfield Township Schools District (Burlington) (2015-389)**
10. **Angelo J. Maimone v. City of Vineland (Cumberland) (2015-403)**
11. **Janet Vogelaar v. Atlantic County (2015-413)**
12. **Randy Bocelle v. Egg Harbor Township Police Department (Atlantic) (2015-421)**
13. **Diane M. Rowe v. Township of Hillside (Union) (2016-2)**

VI. New Business – Cases Scheduled for Individual Complaint Adjudication

A. Individual Complaint Adjudications with Recusals:

A summary of the Executive Director's recommended action is under each complaint:

1. **Shawn G. Hopkins v. Monmouth County Board of Taxation (2014-1) (RBT Recusal)**
2. **Shawn G. Hopkins v. Sussex County Board of Taxation (2014-10) (RBT Recusal)**
3. **Shawn G. Hopkins v. Morris County Board of Taxation (2014-11) (RBT and SR Recusals) Consolidated**
 - Ms. Tabakin raised the issue of a lack of quorum based on her recusal of all 3 complaints and the fact that the doctrine of necessity only applied to GRC Complaint No. 2014-11.
 - *Tabled due to lack of quorum.*
4. **Thomas Caggiano v. Township of Green (Sussex) (2014-418) (RBT Recusal)**
 - *Tabled due to lack of quorum.*
5. **Harry B. Scheeler, Jr. v. NJ Department of Education (2014-123) (DR Recusal)**
 - *Tabled due to lack of quorum.*
6. **G. Harold Christian v. City of Newark (Essex) (2015-11) (SR Recusal)**
 - The Complainant withdrew the complaint subsequent to the Council's December 2015 Interim Order.
 - Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Rota made a motion, and Mr. Martucci seconded the motion. The motion passed unanimously.

B. Individual Complaint Adjudications with no Recusals:

1. **Rotimi Owoh (On behalf of O.R.) v. West Windsor-Plainsboro Regional School District (Mercer) (2012-91)**
 - The Complainant withdrew the complaint subsequent to the Council's January 2013 Interim Order.
 - Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made a motion, and Mr. Rota seconded the motion. The motion passed unanimously.
2. **Rotimi Owoh (On behalf of Delores Nicole Simmons) v. West Windsor-Plainsboro Regional School District (Mercer) (2012-130)**
 - The Complainant withdrew the complaint subsequent to the Council's January 2013 Interim Order.
 - Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made a motion, and Mr. Rota seconded the motion. The motion passed unanimously.

3. **Rotimi Owob (On behalf of O.R.) v. West Windsor-Plainsboro Regional School District (Mercer) (2012-167)**
 - The Complainant withdrew the complaint subsequent to the Council's February 2013 Interim Order.
 - Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made a motion, and Mr. Rota seconded the motion. The motion passed unanimously.
4. **Rotimi Owob (On behalf of O.R.) v. West Windsor-Plainsboro Regional School District (Mercer) (2012-330)**
 - The Complainant withdrew the complaint subsequent to the Council's February 2013 Interim Order.
 - Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made a motion, and Mr. Rota seconded the motion. The motion passed unanimously.
5. **Michael Zahler v. Ocean County College (2013-266)**
 - The Custodian mostly complied with the Council's November 2015 Interim Order but ultimately rectified any outstanding deficiencies in a prompt manner.
 - There is no knowing and willful violation.
 - Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made a motion, and Mr. Rota seconded the motion. The motion passed unanimously.
6. **Harry B. Scheeler, Jr. v. NJ Office of the Attorney General (2014-236)**
 - The Custodian complied with the Interim Order.
 - There is no knowing and willful violation.
 - Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made a motion, and Mr. Rota seconded the motion. The motion passed unanimously.
7. **Keith B. Kemery v. Gloucester Township Fire District No. 4 (Camden) (2014-290)**
 - The Custodian did not fully comply with the Council's second Interim Order because the GRC received his certification one business day after the deadline.
 - The Custodian provided the requested record within the required timeframe.
 - There is no knowing and willful violation.
 - Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made a motion, and Mr. Rota seconded the motion. The motion passed unanimously.
8. **John Paff v. Harrison Township Fire District (Gloucester) (2014-402)**
 - The Custodian failed to establish valid grounds for reconsideration.

- The Complainant did not timely file a request for reconsideration.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made a motion, and Mr. Rota seconded the motion. The motion passed unanimously.

9. Clarence F. Lear, III v. City of Cape May (Cape May) (2014-426)

- The Complainant withdrew the complaint subsequent to the Council's November 2015 Interim Order.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made a motion, and Mr. Rota seconded the motion. The motion passed unanimously.

10. Harry B. Scheeler, Jr. v. Galloway Township (Atlantic) (2015-1)

11. Harry B. Scheeler, Jr. v. Galloway Township (Atlantic) (2015-22) Consolidated

- The Complainant failed to establish valid grounds for reconsideration.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made a motion, and Mr. Rota seconded the motion. The motion passed unanimously.

12. Dennis E. Kleiner v. Ventnor City (Atlantic) (2015-45)

- The Custodian complied with the Interim Order.
- There is no knowing and willful violation.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made a motion, and Mr. Rota seconded the motion. The motion passed unanimously.

13. Jeremy Mawhinney v. Egg Harbor City Police Department (Atlantic) (2015-85)

- The Custodian complied with the Interim Order.
- There is no knowing and willful violation.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made a motion, and Mr. Rota seconded the motion. The motion passed unanimously.

14. Randy George v. NJ Division of Consumer Affairs (2015-130)

- The Custodian did not receive a records request, as the Complainant did not comply with the agency's reasonable submission requirements.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made a motion, and Mr. Rota seconded the motion. The motion passed unanimously.

15. Robert S. Steelman v. City of Summit Parking Services Agency (Union) (2015-140)

- The Custodian's response was insufficient, as it failed to cite a lawful basis for the denial of access.
- The Custodian did not bear the burden of proving that she timely responded to the request, thus resulting in a "deemed" denial.
- The denial of access was lawful because the requested document was in draft form and therefore advisory, consultative, and/or deliberative.
- There is no knowing and willful violation.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made a motion, and Mr. Rota seconded the motion. The motion passed unanimously.

16. Charles Merritt v. NJ Department of Corrections (2015-146)

- The Custodian lawfully denied access, as the record reflects that no responsive records existed at the time of the request.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made a motion, and Mr. Rota seconded the motion. The motion passed unanimously.

17. Luis F. Rodriguez v. Kean University (2015-331)

- On advice of legal counsel, the GRC should table the matter.

18. Harry B. Scheeler, Jr. v. NJ State Police (2015-369)

- The Custodian's request for extension was reasonable, and the Custodian granted access to responsive records within the appropriate timeframe.
- The Custodian failed to prove that a redaction was lawful, but he ultimately disclosed the redacted information to the Complainant.
- There is no knowing and willful violation.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made a motion, and Mr. Rota seconded the motion. The motion passed unanimously.

VII. Court Decisions of GRC Complaints on Appeal:

None

VIII. Complaints Adjudicated in US Supreme Court:

- Paff v. Warren Cnty. Prosecutor's Office, 2015 N.J. Super. Unpub. LEXIS 2834 (App. Div. 2015): Here, Defendants appealed the Law Division's decision requiring disclosure of records relating to the unauthorized personal use of generators during Superstorm Sandy.

Although all of Defendant's appeal arguments focused on the trial court's common law analysis, the Appellate Division reviewed the case *de novo*. In doing

so, the Court held that the trial judge likely considered the criminal investigatory nature of the records prior to ordering disclosure of same with certain redactions. Additionally, the Court was not persuaded by Defendants' argument that the records ordered to be disclosed were subject to the ACD exemption. The Court noted that it believed the trial court "carefully reviewed the documents in camera and determined which material was clearly factual, and which material was subject to the deliberative process privilege." *Id.* at 14.

- Lagerkvist v. Office of the Governor of N.J. & Javier Diaz, 2015 N.J. Super. LEXIS 207 (App. Div. 2015): Here, the Appellate Division affirmed the Law Division's decision dismissing Plaintiff's complaint, which had argued that Defendants unlawfully denied the request as overly broad and further failed to respond to second e-mail contesting the denial.

Plaintiff filed this appeal asserting that Defendants had an obligation to explain their denial of access with enough specificity for a requestor to adequately amend their original OPRA request. Plaintiff also argued that his request was clear and that Defendants' response was unlawful.

The Appellate Division disagreed. First, the Court agreed with the Law Division that Defendants' use of the term "unclear" as opposed to "overbroad" had no effect on whether the request was invalid. Additionally, the Court held that Plaintiff's follow-up e-mail was nothing more than a restatement of the initial request. The Court held that, for this reason, Defendants fulfilled their N.J.S.A. 47:1A-5(g) obligation to initially deny access and did not need to respond a second time "when faced with the same demand." *Id.* at 6.

The Court rejected Plaintiff's argument that Defendants had an obligation to accommodate him in accordance with N.J.S.A. 47:1A-5(g) because Defendants did not assert that responding to the request would cause a substantial disruption of agency operations. The Court went on to determine that Plaintiff's request was actually invalid, reasoning that:

[The] request sought travel records and related documents, such as emails and correspondence, from "2012 to present" for an unknown number of persons for an unknown number of events . . . The custodian in this case would have had to make a preliminary determination as to which travel records correlated to the governor and to his senior officials, past and present, over a span of years. The custodian would then have had to attempt to single out those which were third-party funded events. Next, he would have had to collect all documents corresponding to those events and search to ensure he had accumulated everything, including both paper and electronic correspondence. OPRA does not convert a custodian into a researcher, and that would have been the effect of Lagerkvist's request.

Id. at 9.

- N.J. Firemen's Ass'n Obligation v. Doe, 2015 N.J. Super. LEXIS 208 (App. Div. 2015): Here, the Appellate Division reversed and remanded the Law Division's decision that the NJ Firemen's Association lawfully denied access to responsive records.

This case provides an interesting set of facts. Specifically, within a few weeks of denying access to an OPRA request submitted by Jeff Carter, Plaintiffs filed an action in Superior Court seeking a declaratory judgement as to the validity of their denial and for the court to compel Mr. Carter to narrow his OPRA request as it pertained to relief applications. Thereafter, Mr. Carter filed an answer, counterclaim, third-party complaint against Defendant, and a letter brief arguing against the denial and seeking dismissal of Plaintiffs' action.

The trial court did not rule on the declaratory judgement, but did determine that Plaintiffs lawfully denied access to a number of the records. This appeal ensued.

The Appellate Division first addressed the procedural issue of whether Plaintiffs had standing to file for a declaratory judgement of an OPRA response. In looking to precedential case law providing that statutory process would supercede declaratory judgment laws, the Court determined that custodians have no right to declaratory relief under OPRA. The Court reasoned that:

To do otherwise would allow records custodians to evade the Legislature's intent with respect to enforcement of rights under OPRA, which we discuss below. We recognize that the phrase "private right of action" may appear to be a misnomer when used to define the rights of the Association, which is a public agency under OPRA. Yet, the governing principle is the same. A party that lacks a statutory right of action under OPRA may not obtain declaratory relief regarding its rights or obligations under OPRA.

Id. at 22.

The Court next addressed the issue of whether Mr. Carter could have access to records of relief payments to "John Doe" by *de novo* performing a privacy balancing test. Based on the test, the Court determined that Mr. Carter could obtain, in a limited release, relief payment checks.

The Court also rejected Plaintiff's argument that Mr. Carter's counter-claim was time-barred, reasoning that the declaratory judgement action effectively pre-empted Mr. Carter's ability to utilize the GRC. Finally, the Court determined that the Mr. Carter was a prevailing party entitled to a reasonable fee award.

IX. Public Comment (Second Session):

- Joe Danielsen: Mr. Danielsen initially asked whether it was possible to question the Council during public comments. The Council answered affirmatively, noting that the GRC would not accept testimony or questions about pending adjudications. Mr.

Danielsen provided feedback regarding his inability to hear the Council with the door to the meeting room open. Ms. Tabakin thanked him for bringing the issue to the Council's attention.

X. Adjournment:

Mr. Martucci made a motion to end the Council's meeting, which was seconded by Mr. Rota. The motion passed unanimously.

The meeting adjourned at 3:09 p.m.

Respectfully submitted,

Robin Berg Tabakin, Esq., Chair

Date Approved: February 23, 2016