



**Minutes of the Government Records Council
November 15, 2016 Public Meeting – Open Session**

I. Public Session:

- **Call to Order**

The meeting was called to order at 1:35 p.m. by Mr. Steven Ritardi 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**

Mr. Ritardi 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 November 10, 2016.”

Ms. Tabakin read the fire emergency procedure.

- **Roll Call**

Ms. Bordzoe called the roll:

Present: Christopher Huber, Esq. (designee of Department of Education Commissioner David C. Hespe), Paul Urbish, Esq. (designee of Department of Community Affairs Commissioner Charles A. Richman), and Steven Ritardi, Esq. (Public Member).

Absent: Robin Tabakin, Esq. (Chairwoman)

GRC Staff in Attendance: Joseph Glover (Executive Director), Rosemond Bordzoe (Secretary), Frank F. Caruso (Communications Specialist/Resource Manager), Samuel Rosado (Staff Attorney), Husna Kazmir (Staff Attorney), and Deputy Attorney General Debra Allen and Deputy Attorney General Brian Kerr.

Mr. Ritardi informed the public that copies of the agenda are available by the conference room door.

II. Executive Director's Report:

- Since OPRA's inception in calendar year 2002, the GRC has received 4,489 Denial of Access Complaints. That averages a bit more than 311 complaints per slightly less than 14.5 program years.
- In the current program year, the GRC has so far received 119 complaints.
- 497 of the 4,489 complaints remain open and active. Of those open cases,
 - 17 complaints are on appeal with the Appellate Division (3.4%);
 - 20 complaints are currently in mediation (4.0%);
 - 41 complaints await adjudication by the Office of Administrative Law (8.2%);
 - 86 complaints are tentatively scheduled for adjudication at an upcoming GRC meeting, which includes the November 2016 meeting; (17%) and
 - 325 complaints are work in progress (65%).
- Since PY 2004, the GRC has received 25,901 total inquiries. That is an average of about 1,931 inquiries per a bit fewer than 13.5 tracked program years. So far in the current program year, the GRC has received 755 inquiries.

III. Closed Session:

Mr. Ritardi 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:

- Eric M. Aronowitz, Esq. (o/b/o Middlesex County Board of Social Services) v. NJ Department of Human Services, Division of Medical Assistance and Health Services (2015-113)

Mr. Ritardi called for a motion to go into closed session. Mr. Huber made a motion and Mr. Urbish seconded the motion. The Council adopted the motion by a unanimous vote.

The Council met in closed session from 1:40 p.m. until 1:48 p.m.

Mr. Ritardi called for a motion to end the closed session minutes. Mr. Urbish made a motion, which was seconded by Mr. Huber. The Council adopted the motion by a unanimous vote. Open Session reconvened at 1:50 p.m., and Ms. Bordzoe called roll.

Present: Mr. Ritardi, Mr. Huber and Mr. Urbish.

IV. Approval of Minutes of Previous Meetings:

- **October 25, 2016 Open Session Meeting Minutes**

Mr. Ritardi called for a motion to approve the open session minutes of October 25, 2016 meeting. Both Mr. Huber and Mr. Urbish noted that they confirmed the accuracy of the minutes with Ms. Gatti and Mr. Martucci, respectively. The motion passed by a unanimous vote. Mr. Huber made a motion, seconded by Mr. Urbish.

- **October 25, 2016 Closed Session Meeting Minutes**

Mr. Ritardi called for a motion to approve the closed session minutes of October 25, 2016 meeting. Both Mr. Urbish and Mr. Huber noted that they confirmed the accuracy of the minutes with Mr. Martucci and Ms. Gatti, respectively. Mr. Urbish made a motion, seconded by Mr. Huber. The motion passed by a unanimous vote.

V. New Business – Cases Scheduled for Adjudication

Mr. Ritardi 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): None.

B. Administrative Disposition Adjudications with no Recusals (Consent Agenda): None.

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

1. Harry B. Scheeler, Jr. v. NJ Schools Insurance Group (2015-82)
2. Harry B. Scheeler, Jr. v. City of Vineland (Cumberland) (2015-118)
3. Harry B. Scheeler, Jr. v. NJ Department of Education (2015-131)
4. Harry B. Scheeler, Jr. v. NJ Department of Education (2015-135) Consolidated
5. Harry B. Scheeler, Jr. v. NJ Department of Education (2015-175)
6. Harry B. Scheeler, Jr. v. Township of Upper (Cape May) (2015-177)
7. Harry B. Scheeler, Jr. v. City of Trenton (Mercer) (2015-197)
8. Harry B. Scheeler, Jr. v. City of Ocean City (Cape May) (2015-213)
9. Joseph Montgomery (o/b/o Luis Bernardo) v. Freehold Regional School District (Monmouth) (2015-253)
10. Charles Street v. North Arlington School District (Bergen) (2015-314)
11. Charles Street v. North Arlington Board of Education (Bergen) (2015-385)
12. Harry B. Scheeler, Jr. v. Ocean County Prosecutor’s Office (2016-13)
13. Harry B. Scheeler, Jr. v. Ocean County Prosecutor’s Office (2016-14) Consolidated
14. Charles Street v. North Arlington School District (Bergen) (2016-32)
15. Charles Street v. North Arlington School District (Bergen) (2016-38) Consolidated
16. Charles Street v. North Arlington School District (Bergen) (2016-66)
17. Charles Street v. North Arlington School District (Bergen) (2016-184)

VI. New Business – Cases Scheduled for Individual Complaint Adjudication

A. Individual Complaint Adjudications with Recusals: None.

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

B. Individual Complaint Adjudications with no Recusals:

1. Robert A. Verry v. Franklin Fire District No. 1(Somerset) (2013-287)

- The Council awards \$4,500 in prevailing party attorney's fees.
- Mr. Ritardi called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Mr. Ritardi called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Huber made a motion, and Mr. Urbish seconded the motion. The motion passed by a unanimous vote.

2. Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2013-328)

3. Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2013-329)

4. Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2013-330)

5. Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2013-331) Consolidated

- The Council reconsiders its decision in part and amends its previous award of prevailing party's attorney's fees to \$7,770, up from \$7,320.
- Mr. Ritardi called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Mr. Ritardi called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Urbish made a motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

6. Harry B. Scheeler, Jr. v. Borough of West Cape May (Cape May) (2014-143)

- The Complainant withdrew the Complaint subsequent to the Council's Interim Order.
- Mr. Ritardi called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Mr. Ritardi called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Huber made a motion, and Mr. Urbish seconded the motion. The motion passed by a unanimous vote.

7. Gregory W. Kasko v. Town of Westfield (Union) (2014-389)

- Counsel's application does not conform to the requirements of N.J.A.C. 5:105-2.13(b), and Counsel fails to justify either an hourly rate or a fee. Therefore, the Council awards no fee.
- Mr. Ritardi called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Mr. Ritardi called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Huber made a motion, and Mr. Urbish seconded the motion. The motion passed by a unanimous vote.

8. **John Paff v. Harrison Township Fire District (Gloucester) (2014-402)**
 - The Council awards \$2,370 in prevailing party attorney's fees.
 - Mr. Ritardi called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Mr. Ritardi called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Urbish made a motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.
9. **Regino De La Cruz, Esq. v. City of Union City (Hudson) (2015-14)**
 - On the advice of legal counsel, the Council tabled the matter for further legal review.
 - Mr. Ritardi called for a motion to table the above matter. Mr. Urbish made a motion and Mr. Huber seconded the motion. The motion passed by a unanimous vote.
10. **Susan Fleming v. Greenwich Township (Warren) (2015-18)**
 - The Council tabled the matter because a quorum could not be achieved.
11. **Harry B. Scheeler, Jr. v. Burlington Township (Burlington) (2015-93)**
 - The Complainant failed to establish valid grounds for reconsideration.
 - Mr. Ritardi called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Mr. Ritardi called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Huber made a motion, and Mr. Urbish seconded the motion. The motion passed by a unanimous vote.
12. **Eric M. Aronowitz, Esq. (o/b/o Middlesex County Board of Social Services) v. NJ Department of Human Services, Division of Medical Assistance and Health Services (2015-113)**
 - The Custodian complied with the Interim Order.
 - The Custodian must comply with the Council's *in camera* findings.
 - The knowing and willful and prevailing party analyses are deferred pending the Custodian's compliance.
 - Mr. Ritardi called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Mr. Ritardi called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Huber made a motion, and Mr. Urbish seconded the motion. The motion passed by a unanimous vote.
13. **Eric Richard v. NJ Department of Treasury, Division of Pensions and Benefits (2015-117)**
 - The Custodian timely responded to the OPRA request, and her two extensions of time were reasonable and warranted.
 - The Complaint is materially defective and must be dismissed because the Complainant verified the Complaint before the statutory time for response had expired.

- Mr. Ritardi called for any discussion on the Executive Director’s findings and recommendations as written. Hearing none, Mr. Ritardi called for a motion to accept the Executive Director’s findings and recommendations as written. Mr. Huber made a motion, and Mr. Urbish seconded the motion. The motion passed by a unanimous vote.

14. **Jody Street v. North Arlington Board of Education (Bergen) (2015-137)**

- The Complainant withdrew the Complaint subsequent to the Council’s Interim Order.
- Mr. Ritardi called for any discussion on the Executive Director’s findings and recommendations as written. Hearing none, Mr. Ritardi called for a motion to accept the Executive Director’s findings and recommendations as written. Mr. Urbish made a motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

15. **Luis F. Rodriguez v. Kean University (2015-150)**

- Legal counsel needs more time to review the matter and asked that the Council table the matter.
- Mr. Ritardi called for a motion to table the above matter. Mr. Urbish made a motion and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

16. **Richard B. Henry, Esq., v. Township of Hamilton Police Department (Atlantic) (2015-155)**

- The Custodian did not timely comply with the Interim Order.
- The Council should refer the matter to the Office of Administrative Law to determine whether the Custodian unlawfully denied access and determine whether the Complainant is a prevailing party and calculate an award of reasonable attorney’s fees as might be appropriate.
- Mr. Ritardi called for any discussion on the Executive Director’s findings and recommendations as written. Hearing none, Mr. Ritardi called for a motion to accept the Executive Director’s findings and recommendations as written. Mr. Urbish made a motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

17. **Robert A. Verry v. West Milford Board of Education (Passaic) (2015-156)**

- The Complainant withdrew the Complaint subsequent to the Council’s Interim Order.
- Mr. Ritardi called for any discussion on the Executive Director’s findings and recommendations as written. Hearing none, Mr. Ritardi called for a motion to accept the Executive Director’s findings and recommendations as written. Mr. Huber made a motion, and Mr. Urbish seconded the motion. The motion passed by a unanimous vote.

18. **Theodore Allen Shaw v. Palisades Interstate Parkway Police Department (Bergen) (2015-157)**

- The Custodian did not timely respond, thus resulting in a “deemed” denial.

- The Council need not order disclosure because the record reflects that the Custodian released all responsive records.
- There is no knowing and willful violation.
- Mr. Ritardi called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Mr. Ritardi called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Urbish made a motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

19. **Luis F. Rodriguez v. Kean University (2015-203)**

- The Complainant did not establish valid grounds for reconsideration.
- Mr. Ritardi called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Mr. Ritardi called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Huber made a motion, and Mr. Urbish seconded the motion. The motion passed by a unanimous vote.

20. **Randy L. Farkas v. Borough of Milltown (Middlesex) (2015-226)**

- The Custodian lawfully denied access because the records pertained to an ongoing investigation at the time of the request.
- Mr. Ritardi called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Mr. Ritardi called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Urbish made a motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

21. **David Deegan v. Township of Franklin (Gloucester) (2015-233)**

- The Custodian did not comply with the Interim Order.
- The Complaint should be referred to the Office of Administrative Law to determine the facts of the case and whether the Custodian unlawfully denied access.
- The knowing and willful analysis is deferred, pending OAL's review.
- Mr. Ritardi called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Mr. Ritardi called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Urbish made a motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

22. **Susan Noto v. Bergen County (2015-245)**

- The Custodian's failure to respond results in a "deemed" denial.
- The Custodian did not unreasonably deny access because he made the records publicly available on the Internet and the Complainant was able to access those records online.
- There is no knowing and willful violation.
- Mr. Ritardi called for any discussion on the Executive Director's findings and recommendations. Mr. Caruso noted that the GRC added a footnote on page 4 and included some additional case discussion on page 8. Mr. Caruso also noted that these

additions did not affect the proposed findings and recommendations. Mr. Ritardi called for a motion to accept the Executive Director's findings and recommendations as amended. Mr. Huber made a motion, and Mr. Urbish seconded the motion. The motion passed by a unanimous vote.

23. **Woo Jin Hwang v. Ridgewood Police Department (Bergen) (2015-305)**

- There is no unlawful denial of access. The request is invalid because it fails to identify specific governmental records.
- The Custodian lawfully denied access to the Complainant's request for a "list," because she certified that no responsive records existed and the Complainant provided no competent, credible evidence to refute the Custodian's certification.
- Mr. Ritardi called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Mr. Ritardi called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Urbish made a motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

VII. Court Decisions of GRC Complaints on Appeal:

- Johnson v. Borough of Oceanport (Monmouth), 2016 N.J. Super. Unpub. LEXIS 2337 (App. Div. 2016): Here, the Appellate Division affirmed the Council's decision to deny former Councilman Hugh Sharkey's request for reconsideration, where "he waited over two years after receiving the decision in the second case to seek reconsideration of the final decision in the first case." Id. at 3.

It is important to note that of 79 closed appeals (16 additional appeals are currently pending), the GRC's success rate on appeal is very strong. Of those 77, the Appellate Division reversed 7 decisions (3 in the 1st 2 years). 28 of the appeals were either dismissed, withdrawn, denied, or in a few instances the GRC had no record. 3 appeals were a mixed bag (affirmed in part, reversed in part, and remanded). The Courts have granted the GRC's request for remand 8 times. In one instance, the party re-appealed after remand and the GRC was affirmed. The GRC has been affirmed 33 times, which includes the re-appeal previously discussed. This ultimately amounts to a near 78% success rate, with only 1 mixed bag decision in the last 35 appeals. This is in no small part to the GRC's long time representation from DAG Allen, who has overseen appeals for most of the agency's history to date.

VIII. Complaints Adjudicated in NJ Superior Court & NJ Supreme Court:

- N. Jersey Media Group v. Twp. of Nutley, 2016 N.J. Super. Unpub. LEXIS 2166 (App. Div. 2016): Here, the Appellate Division affirmed the trial court's holding that N.J.S.A. 47:1A-3(a) supersedes N.J.S.A. 39:4-131 when an accident is under investigation. Additionally, the Court reversed the trial court's holding that defendants (the Township of Nutley ("Township") and Essex Cnty. Prosecutor's Office ("ECPO")) violated OPRA in response to cross-appeals filed by each.

In determining that OPRA superseded N.J.S.A. 39:4-131, the Court reasoned that:

There is a conflict between N.J.S.A. 39:4-131 and N.J.S.A. 47:1A-3(a) because the former statute mandates prompt public access to a CIR, whereas the latter statute allows a government agency to deny access to governmental records that pertain to an ongoing investigation and disclosure would be “inimical to the public interest.” N.J.S.A. 39:4-131 was enacted before N.J.S.A. 47:1A-3(a). Since the later-enacted statute is the most recent expression of the Legislature's intent regarding public access to records that pertain to an ongoing agency investigation, that statute supersedes the mandate for prompt public access to CIRs in the earlier-enacted legislation.

Id. at 17 (citations omitted).

The Court also determined that both defendants properly responded providing a specific lawful basis for denying access. Based on the cross-appeal reversals, the Court determined that plaintiffs’ fee award should also be reversed.

- Collingswood Bd. of Educ. v. McLoughlin, 2016 N.J. Super. Unpub. LEXIS 2307 (App. Div. 2016): Here, the Appellate Division reversed the trial court’s denial of defendants’ motion for summary judgement and remanded back to the trial court for a determination of defendants’ attorney’s fees.

The defendants’ and amici supporters argued that "trial court's endorsement of a custodian's [Declaratory Judgments Act (“DJA”)] action as compatible with a requestor's rights under OPRA, including a partial denial of attorney's fees, is error." Id. at 7. The Court agreed, reasoning that OPRA requires a custodian to determine whether or not it must disclose a requested record by relying on legal advice, as well as precedential court and GRC cases. Further, the Court pointed out that OPRA does not afford the agency with the ability to file a DJA. The Court also remanded the case back to the trial court for a determination on whether to adjust defendant’s fee award.

IX. Public Comment: None

X. Adjournment:

Mr. Ritardi called for a motion to end the Council meeting. Mr. Huber made a motion which was seconded by Mr. Urbish. The motion passed unanimously.

The meeting adjourned at 2:15 p.m.

Respectfully submitted,

Robin Berg Tabakin, Esq., Chair

Date Approved: December 13, 2016