



**Minutes of the Government Records Council
December 13, 2016 Public Meeting – Open Session**

I. Public Session:

- **Call to Order**

The meeting was called to order at 1:34 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 December 8, 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), Jason Martucci, 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), John Stewart (Mediator), Samuel Rosado (Staff Attorney), Husna Kazmir (Staff Attorney), and Deputy Attorney General Debra Allen.

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 4,504 Denial of Access Complaints. That averages a bit more than 310 complaints per approximately 14.5 program years.
- In the current program year, the GRC has so far received 134 complaints.
- 479 of the 4,504 complaints remain open and active. Of those open cases,
 - 17 complaints are on appeal with the Appellate Division (3.5%);
 - 17 complaints are currently in mediation (3.5%);
 - 41 complaints await adjudication by the Office of Administrative Law (8.6%);
 - 61 complaints are tentatively scheduled for adjudication at an upcoming GRC meeting, which includes the December 2016 meeting; (13%) and
 - 333 complaints are work in progress (70%).
- Since PY 2004, the GRC has received 25,999 total inquiries. That averages about 1,926 inquiries per approximately 13.5 tracked program years. So far in the current program year, the GRC has received 853 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:

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| <ul style="list-style-type: none">• Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2014-218)• Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2014-219) Consolidated |
|---|
- Demetrios Damplias v. NJ Department of Corrections (2014-96)
 - Action: Petition on Rulemaking for N.J.A.C. 5:105-2.10(b)

Acknowledging that the Council did not have a quorum to review the Carter consolidated matter, Mr. Ritardi called for a motion to remove it from the Closed Session Resolution. Mr. Martucci made a motion and Mr. Huber seconded the motion. The Council adopted the motion by a unanimous vote.

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

The Council met in closed session from 1:39 p.m. until 2:19 p.m.

Mr. Ritardi called for a motion to end the closed session meeting. Mr. Huber made a motion, which was seconded by Mr. Martucci. The Council adopted the motion by a unanimous vote. Open Session reconvened at 2:20 p.m., and Ms. Bordzoe called roll.

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

IV. Approval of Minutes of Previous Meetings:

- **November 15, 2016 Open Session Meeting Minutes**

Mr. Ritardi called for a motion to approve the open session minutes of the November 15, 2016 meeting. The motion passed by a majority vote. Mr. Huber made a motion, seconded by Mr. Ritardi; Mr. Martucci abstained.

- **November 15, 2016 Closed Session Meeting Minutes**

Mr. Ritardi called for a motion to approve the closed session minutes of November 15, 2016 meeting. Mr. Huber made a motion, seconded by Mr. Ritardi. The motion passed by a majority vote; Mr. Martucci abstained.

V. 2017 Proposed Council Meeting Dates

Mr. Martucci made a motion, seconded by Mr. Huber, to approve the 2017 meeting dates. The motion passed by a unanimous vote.

VI. 2017 Officer Elections

- Mr. Martucci made a motion to re-elect Ms. Tabakin as Chair. Mr. Huber seconded the motion. The motion passed by majority vote; Ms. Tabakin was absent.
- Mr. Huber made a motion to re-elect Mr. Ritardi as Vice Chair/Secretary. Mr. Martucci seconded the motion. The motion passed by majority vote; Ms. Tabakin was absent.

VII. 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):

1. **Benny Cardona (o/b/o City of Newark Public Safety Department, Fire Division) v. NJ Department of Health, Division of Public Health Infrastructure Laboratories and Emergency Preparedness (2016-277) (SR Recusal)**
 - The Council was unable to achieve a quorum.

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

1. **Stephen Sullivan v. Borough of Paramus (Bergen) (2015-399)**
 - The parties settled the matter through mediation.
2. **Art Rittenhouse v. Sayreville Economic Redevelopment Agency (Middlesex) (2016-205)**
 - The parties settled the matter through mediation.
3. **Michael Catalini v. NJ Department of Environmental Protection (2016-231)**
 - The parties settled the matter through mediation.

Mr. Ritardi called for a motion to accept the recommendations as written in all of the above Administrative Complaint Dispositions. Mr. Martucci made a motion, which was seconded by Mr. Huber. The motion passed by a unanimous vote.

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

1. **Stanley Baker, Jr. v. NJ State Parole Board (2016-136)**
2. **Charles P. Cohen v. City of East Orange (Essex) (2016-285)**

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:

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| <ol style="list-style-type: none">1. <u>Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2014-218) (JM Recusal)</u>2. <u>Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2014-219) Consolidated</u><ul style="list-style-type: none">• The Council was unable to achieve a quorum. |
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3. **Susan Fleming v. Greenwich Township (Warren) (2015-18) (SR Recusal)**
 - The Council was unable to achieve a quorum.
 4. **Michael I. Inzelbuch v. NJ Office of Administrative Law (2015-78) (CH Recusal)**
 - The Council was unable to achieve a quorum.
 5. **Robert A. Verry v. Borough of South Bound Brook (Somerset) (2015-133) (SR Recusal)**
 - The Council was unable to achieve a quorum.
 6. **Terri L. Howell v. Greenwich Township (Warren) (2015-194) (SR Recusal)**
 - The Council was unable to achieve a quorum.

7. **Terri L. Howell v. Township of Greenwich (Warren) (2015-249) (SR Recusal)**
 - The Council was unable to achieve a quorum.
8. **Terrence T. McDonald v. City of Jersey City (Hudson) (2015-274) (SR Recusal)**
 - The Council was unable to achieve a quorum.
9. **Andre Herd v. City of Newark (Essex) (2016-50) (SR Recusal)**
 - The Council was unable to achieve a quorum.

B. Individual Complaint Adjudications with no Recusals:

1. **Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2013-281)**
2. **Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2013-282)**
3. **Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2013-283) Consolidated**

- The Complainant failed in part to establish valid grounds for reconsideration.
- The Complainant established in part that the Council should reconsider its Interim Order that disallowed charges related to the fee application.
- The Council should amend Conclusion No. 2 to restore 1.3 hours at a rate of \$300, thereby increasing the total award to \$10,500, an increase of \$390.
- The Complainant or Complainant's Counsel shall submit an updated fee application, based on the limited scope of fees awarded.
- 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. Martucci seconded the motion. The motion passed by a unanimous vote.

4. **Demetrios Damplias v. NJ Department of Corrections (2014-96)**
 - On legal advice, the Council held the matter in abeyance, pending additional information from the Custodian.
 - Mr. Ritardi called for a motion to hold this matter in abeyance pending further information from the Custodian. Mr. Huber made a motion, and Mr. Martucci seconded the motion. The motion passed by a unanimous vote.

5. **Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2014-137)**
6. **Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2014-138) Consolidated**

- The Complainant failed in part to establish valid grounds for reconsideration.
- The Complainant established in part that the Council should reconsider its Interim Order that disallowed charges related to the fee application.
- The Council should amend Conclusion No. 2 to restore one (1) hour at a rate of \$300, thereby increasing the total award to \$5,640, an increase of \$300.
- The Complainant or Complainant's Counsel shall submit an updated fee application, based on the limited scope of fees awarded.
- 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. Martucci made a motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

7. **Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2014-266)**

8. **Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2014-267) Consolidated**

- The Complainant failed in part to establish valid grounds for reconsideration.
- The Complainant established in part that the Council should reconsider its Interim Order that disallowed charges related to the fee application.
- The Council should amend Conclusion No. 2 to restore one (1) hour at a rate of \$300, thereby increasing the total award to \$6,390, an increase of \$300.
- The Complainant or Complainant's Counsel shall submit an updated fee application, based on the limited scope of fees awarded.
- 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. Martucci 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)**

- The GRC must conduct an *in camera* review to determine whether the withheld records fall under the criminal investigatory exemption.
- The knowing and willful analysis is 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. Martucci seconded the motion. The motion passed by a unanimous vote.

10. **Susan Barker v. Borough of Lakehurst (Ocean) (2015-26)**

- The Custodian provided records responsive to Item No. 1 in the first OPRA request and did not unlawfully deny access.
- The GRC must conduct an *in camera* review of both the timesheets requested in Item No. 2 of the first OPRA request and the work schedule requested in Item No. 1 of the second OPRA request.
- The Custodian might have unlawfully denied access to Item Nos. 2, 3, and 4 of the second OPRA request. The Custodian must therefore provide responsive records. Alternatively, the Custodian must either certify that Sgts. Heinzman and Kline held the stated duties throughout the applicable timeframe and/or that no additional responsive records exist.
- The knowing and willful analysis is deferred, pending the Custodian's compliance.
- Mr. Ritardi called for any discussion on the Executive Director's findings and recommendations as written. Mr. Caruso noted that he added a paragraph to pages 7 and 8 to clarify that certain request items may have appeared invalid. Mr.

Caruso noted that the paragraph did not change the proposed 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. Martucci seconded the motion. The motion passed by a unanimous vote.

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

- The Custodian did not timely respond, based on unwarranted and unsubstantiated extensions, thus resulting in a "deemed" denial.
- The Council need not order disclosure because the Custodian released responsive records.
- The Council should refer the matter to the Office of Administrative Law for a determination of whether the Custodian or any other Kean official knowingly and willfully violated OPRA.
- 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. Martucci made a motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

12. **Regina Discenza v. Lacey Township Board of Education (Ocean) (2015-233)**

- The Custodian did not timely respond, thus resulting in a "deemed" denial.
- Requested item No. 2 is invalid because it failed to provide ample identifiers to allow the Custodian to locate responsive records.
- The GRC must conduct an *in camera* review of the 37 records responsive to requested items No. 1 and 3 to validate the Custodian's assertion that the records are exempt from disclosure.
- The knowing and willful analysis is 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. Martucci seconded the motion. The motion passed by a unanimous vote.

13. **Jason Marshall Litowitz v. NJ Department of Transportation (2015-332)**

- The Custodian properly requested an extension of time to respond.
- The Custodian failed to respond within the extended time frame, thus resulting in a "deemed" denial.
- The Custodian did not unlawfully deny access to requested item No. 1 because the records were already provided.
- The Custodian did not unlawfully deny access to requested item No. 2 because the Custodian certified that no responsive records exist, and the Complainant did not provide any competent, credible evidence to refute the certification.
- The Custodian failed to cite a valid legal basis for denying access to the portion of requested item No. 3, which seeks e-mails, letters, and memoranda. The Custodian shall therefore disclose said records to the Complainant.

- The portion of requested item No. 3 that seeks notes and other documents is an invalid request for a class of various documents instead of a request for specifically named or identifiable government records.
- The knowing and willful analysis is deferred, pending the Custodian's compliance.
- Mr. Ritardi called for any discussion on the Executive Director's findings and recommendations as written. Mr. Stewart noted that he changed the proposed recommendations to address a request item that was partially invalid and partially valid. Mr. Ritardi called for a motion to accept the Executive Director's findings and recommendations as amended. Mr. Huber made a motion, and Mr. Martucci seconded the motion. The motion passed by a unanimous vote.

14. Paula Brown v. Township of Cedar Grove (Essex) (2016-177)

- The Custodian lawfully denied access to draft documents.
- 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. Martucci made a motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

VI. Action: Petition on Rulemaking for N.J.A.C. 5:105-2:10(b)

- Mr. Ritardi called for a motion to deny the Petition for Rulemaking. Mr. Martucci made a motion to deny the petition, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

VII. Court Decisions of GRC Complaints on Appeal:

- Killion v. Hammonton Police Dep't (Atlantic), 2016 N.J. LEXIS 1193 (2016): As briefly noted at the Council's November 15, 2016 meeting, the Supreme Court denied Complainant's petition for certification. The Appellate Division previously affirmed the Council's decision in GRC Complaint No. 2013-228. Killion v. Hammonton Police Dep't, 2016 N.J. Super. Unpub. LEXIS 1510 (App. Div. 2016).

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

- D.F. v. Collingswood Bd. of Educ., 2016 N.J. Super. Unpub. LEXIS 2449 (App. Div. 2016): Here, the Appellate Division reversed and remanded two (2) Law Division decisions without retaining jurisdiction.

Plaintiffs challenged the first Law Division decision holding that, after conducting an *in camera* review, defendants properly redacted 162 names from attorney billing records. Plaintiffs argued that the court failed to obtain a Vaughn Index, the attorney-client privilege did not apply to the redactions, the court erred in relying on attorney work product as a valid exemption, and the court's holding was inconsistent. Plaintiff also argued that defendants should not be allowed to supplement the record.

The Appellate Division rejected Plaintiff's argument about the Vaughn Index, stating that prior decisions gave the court the ability to perform *in camera* reviews. The Court also noted that OPRA "does not mandate a privilege log" when an agency asserts the attorney-client privilege exemption. *Id.* at 6. However, the Appellate Division agreed with Plaintiffs that the first court left many unanswered questions regarding the application of the attorney-client privilege, as well as the effects of the possible completion of underlying litigation. Further, the Court held that the first court erred in dismissing the case on the basis that the redacted information would provide insight into trial strategy. The Court reasoned that ongoing litigation is not a valid exemption, and thus the first court failed to determine the applicability of the attorney-client privilege exemption on all 162 names in the absence of detailed descriptions of those individuals.

Plaintiff also challenged the second Law Division decision (from a different judge) denying their motion for summary judgement because the "law of the case doctrine" precluded the second court from revisiting the first court's decision. The Court, "armed with the foregoing," determined that the second court was not precluded from reviewing the first decision because it failed to address the attorney-client privilege. The Court thus remanded back to the trial court for additional inquiries, including allowing defendants to supplement the record.

- Paff v. Cape May Cnty. Prosecutor's Office, 2016 N.J. Super. Unpub. LEXIS 2485 (App. Div. 2016): Here, the Appellate Division only addressed Defendant's assertion that the trial court erred by requiring disclosure of four (4) letters under the common law right of access. Of interest, the trial court upheld defendants OPRA denial, holding that the letters were exempt as "inter-agency or intra-agency advisory, consultative, or deliberative" material. N.J.S.A. 47:1A-1.1. The record also includes no indication of whether Plaintiff planned on appealing the trial court's OPRA denial.
- Gilleran v. Township of Bloomfield and Palagano, 2016 N.J. LEXIS 1274 (2016): Here, the Supreme Court, by majority opinion, held that:

[C]ompelling release on demand of security surveillance video would be contrary to the legislative intent motivating OPRA's exemptions based on security concerns. The Township's explanation for denying the request for the footage was adequate. Requests for video from surveillance cameras protecting public facilities are better analyzed under the common law right of access. The Court therefore reverses the judgment of the Appellate Division and remands the matter for further proceedings based on the unresolved common law claim.

Id. at 3-4.

Justice Rabner, joined by Justice Timpone, offered a dissenting opinion, wherein he argued that Defendants failed to prove that disclosure "'would jeopardize security' or 'would create a risk to' safety . . ." *Id.* at 36. This decision will likely have some significant impact for the Council going forward.

The meeting adjourned at 2.50 p.m.

Respectfully submitted,

Steven Ritardi, Esq., Acting Chair

Date Approved: January 31, 2017