



**Minutes of the Government Records Council  
August 27, 2019 Public Meeting – Open Session**

**I. Public Session:**

- **Call to Order**

The meeting was called to order at 1:35 p.m. by Ms. Robin Berg 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. Jennifer Simons 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, Trenton Times, Courier-Post (Cherry Hill), and the Secretary of State on August 22, 2019.”

Ms. Simons read the fire emergency procedure.

- **Roll Call**

Ms. Bordzoe called the roll:

Present: Robin Berg Tabakin, Esq. (Chairwoman), Jennifer Simons, Esq. (designee of Department of Education Commissioner Dr. Richard Lamont Repollet), Thurman Barnes (designee of Department of Community Affairs Commissioner, Lt. Governor Sheila Y. Oliver), and Steven Ritardi, Esq., Public Member

**\*\*Ms. Berg Tabakin and Mr. Ritardi participated telephonically. Mr. Ritardi joined the meeting at 1:54p.m.\*\***

GRC Staff in Attendance: Frank F. Caruso (Executive Director), Rosemond Bordzoe (Secretary), John Stewart (Mediator), Samuel Rosado (Staff Attorney), Brandon Garcia (Case Manager), and Deputy Attorney General Debra Allen.

Ms. Berg Tabakin advised that copies of the agenda are available by the conference room door.

## **II. Executive Director's Report:**

### **GRC Staffing**

Brandon Garcia, the GRC's newest case manager, began employment on August 5, 2019. The GRC commenced training immediately and Brandon was able to produce an agenda item for his first meeting.

Additionally, Frank Caruso was appointed to the position of "Executive Director" effective August 3, 2019.

### **OPRA Trainings**

The GRC conducted its 13<sup>th</sup> Annual OPRA Seminar on August 8, 2019. The GRC had approximately 190 attendees. Comments regarding the change of venue and day were largely positive. The GRC has met to discuss the event in hopes of further fine-tuning it for next year.

The GRC's next scheduled training is October 10, 2019 for the Essex Cnty. Muni. Clerk's Assoc. Mini-Conference in Nutley, NJ.

### **Current Statistics**

- Since OPRA's inception in July 2002, the GRC has received 5,268 Denial of Access Complaints. That averages about 310 annual complaints per 17 program years. So far in the current program year (FY2020), the GRC has received 63 Denial of Access Complaints.
  - The GRC has adjudicated 281 agenda items in the first 7 months of 2019. This represents an increase of 58 agenda items for the same time period last year.
  - The GRC's week-over-week open case trend hit a three (3) year low in June 2019 (438 open cases for the first time since May 31, 2016). The GRC has managed to regain that number twice since then.
- 465 of the 5,268 complaints remain open and active (8.8%). Of those open cases:
  - 5 complaints are on appeal with the Appellate Division (1.1%);
  - 25 complaints are currently in mediation (5.4%);
  - 6 complaints are proposed for the Office of Administrative Law (1.3%);
  - 27 complaints await adjudication by the Office of Administrative Law (5.8%);
  - 72 complaints are tentatively scheduled for adjudication at an upcoming GRC meeting, which includes the current meeting (15.5%);
  - 330 complaints are work in progress (71.0%); and
  - 0 complaints are being held in abeyance (0%).

- Since Program Year 2004, the GRC has received and responded to 31,016 total inquiries, averaging about 1,938 annual inquiries per 16 tracked program years (the GRC did not track inquiries in the agency’s first year). So far in the current program year (FY2020), the GRC has received 242 inquiries (6.0 inquiries per workday).

### **III. Approval of Minutes of Previous Meetings:**

#### **July 30, 2019 Open Session Meeting Minutes**

Ms. Berg Tabakin called for a motion to approve the draft open session minutes of the July 30, 2019 meeting. Ms. Simons confirmed the accuracy of the draft minutes with Mr. Christopher Huber, Esq. Ms. Simons made a motion, which was seconded by Mr. Barnes. The motion passed by a majority vote.

#### **July 30, 2019 Closed Session Meeting Minutes**

Ms. Berg Tabakin called for a motion to approve the draft closed session minutes of the July 30, 2019 meeting. Ms. Simons confirmed the accuracy of the draft minutes with Mr. Christopher Huber, Esq. Ms. Simons made a motion, which was seconded by Mr. Barnes. The motion passed by a majority vote.

### **IV. New Business – Cases Scheduled for Adjudication**

Ms. Berg 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): None**

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

1. **Rahgeam Jenkins v. Borough of Point Pleasant Police Department (Ocean) (2018-15)**
  - No Correspondence Received by the Custodian.
2. **Anonymous v. Borough of Haledon (Passaic) (2019-129)**
  - Unripe Cause of Action.
3. **Anonymous v. Borough of Haledon (Passaic) (2019-130)**
  - Unripe Cause of Action.
4. **Anonymous v. Borough of Haledon (Passaic) (2019-131)**
  - Unripe Cause of Action.
5. **Anonymous v. Borough of Haledon (Passaic) (2019-132)**
  - Unripe Cause of Action.

Ms. Berg Tabakin called for a motion to accept the recommendations as written in all the above Administrative Complaint Disposition. Ms. Simons made a motion, which was seconded by Mr. Barnes. The motion passed by a unanimous vote.

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

1. **Luis F. Rodriguez v. Kean University (2018-10)**
  - Complaint Voluntarily Withdrawn.
2. **Ed Beddow v. NJ Transit (2019-87)**
  - Complaint Settled in Mediation.
3. **D.Z. v. Audubon Board of Education (Camden) (2019-93)**
  - Complaint Settled in Mediation.
4. **Michael I. Inzelbuch, Esq. (o/b/o Lakewood Board of Education) v. NJ Department of Education (2019-119)**
  - Complaint Voluntarily Withdrawn.
5. **Timothy Bornemann v. County College of Morris (2019-142)**
  - Complaint Voluntarily Withdrawn.
6. **Jesse Humphries (o/b/o Plainfield Board of Education Association President Charisse Parker) v. Plainfield Board of Education (Union) (2019-150)**
  - Complaint Voluntarily Withdrawn.
7. **David Weiner v. Township of Ocean (Monmouth) (2019-157)**
  - Complaint Voluntarily Withdrawn.

**VI. New Business – Cases Scheduled for Individual Complaint Adjudication**

**A. Individual Complaint Adjudications with Recusals:**

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

1. **Stephen Schnitzer, Esq. (o/b/o Vito’s Trattoria, Inc.) v. NJ Transit (2016-140) (SR and RBT Recusal)**
  - This case cannot be adjudicated due to lack of quorum.

**B. Individual Complaint Adjudications with no Recusals:**

1. **Jeffrey W. Sauter v. Township of Colts Neck (Monmouth) (2013-239)**
  - This complaint should be dismissed because the ALJ determined that the Complainant abandoned his prosecution.
  - Ms. Berg Tabakin called for any discussion on the Council Staff’s findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. Ms. Simons made a motion and Mr. Barnes seconded the motion. The motion passed by a unanimous vote.

2. **Shawn G. Hopkins v. Borough of Monmouth Beach (Monmouth) (2014-37)**

- The Complainant's request for reconsideration based on fraud and "new evidence" should be denied.
- The Council should reconsider this complaint on its own volition. N.J.A.C. 5:105-2.10(a).
- The Council should amend Conclusion No. 2 of the January 31, 2019 Final Decision to reflect that the Custodian unlawfully denied access to the responsive photographs. However, no further action is necessary because the Complainant possessed same as part of a separate complaint.
- Ms. Berg Tabakin called for any discussion on the Council Staff's findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Ms. Simons made a motion and Mr. Barnes seconded the motion. The motion passed by a unanimous vote.

3. **Shawn G. Hopkins v. Borough of Spring Lake (Monmouth) (2014-50)**

- The Council should dismiss the complaint because the parties have agreed to a prevailing party fee amount, thereby negating the need for any further adjudication.
- Ms. Berg Tabakin called for any discussion on the Council Staff's findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Ms. Simons made a motion and Mr. Barnes seconded the motion. The motion passed by a unanimous vote.

4. **Michael Ehrenreich v. NJ Department of Transportation (2016-192)**

- The current Custodian complied with the Council's July 30, 2019 Interim Order.
- There is no knowing and willful violation.
- Ms. Berg Tabakin called for any discussion on the Council Staff's findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Ms. Simons made a motion and Mr. Barnes seconded the motion. The motion passed by a unanimous vote.

5. **Scott M. Halliwell and Anthony G. Pennant v. Borough of Brooklawn (Camden) (2016-201)**

- The Complainants' request for reconsideration based on extraordinary circumstances, fraud and illegality should be denied.
- The Council should defer a determination of whether the Custodian complied with the Council's April 30, 2019 Interim Order pending additional certifications.
- The knowing and willful analysis is deferred.
- Ms. Berg Tabakin called for any discussion on the Council Staff's findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Ms. Simons made a motion and Mr. Barnes seconded the motion. The motion passed by a unanimous vote.

6. **David Weiner v. NJ Department of Human Services, Division of Medical Assistance and Health Benefits (2017-170)**
  - The Council must conduct an *in camera* review to determine the validity of the Custodian's assertions that said reports were exempt from disclosure under the trade secret and proprietary information exemption. Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005).
  - The knowing and willful analysis is deferred.
  - Ms. Berg Tabakin called for any discussion on the Council Staff's findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Ms. Simons made a motion and Mr. Barnes seconded the motion. The motion passed by a unanimous vote.
  
7. **Peter J. Cresci v. City of Bayonne (Hudson) (2017-173)**
  - The Custodian's failure to timely respond resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).
  - The Custodian's failure to provide a Statement of Information resulted in a violation of GRC regulations. N.J.A.C. 5:105-2.4(a).
  - The Custodian may have unlawfully denied access to records responsive to the subject OPRA request. The Custodian shall either disclose responsive records or provide a certification if none exist.
  - The knowing and willful analysis is deferred.
  - Ms. Berg Tabakin called for any discussion on the Council Staff's findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Ms. Simons made a motion and Mr. Barnes seconded the motion. The motion passed by a unanimous vote.
  
8. **Patrick Desmond v. Borough of Oceanport (Monmouth) (2017-188)**
  - The Custodian's response was sufficient. N.J.S.A. 47:1A-5(g); Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
  - Ms. Berg Tabakin called for any discussion on the Council Staff's findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Ms. Simons made a motion and Mr. Barnes seconded the motion. The motion passed by a unanimous vote.
  
9. **Nicholas Patrick DiFelice v. Monroe Township Public Schools (Gloucester) (2017-232)**
  - The Custodian's failure to timely respond resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).
  - The Custodian unlawfully denied access to the responsive "Sullivan" e-mails and must disclose them with redactions where applicable.
  - The knowing and willful analysis is deferred.

- Ms. Berg Tabakin called for any discussion on the Council Staff’s findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. Ms. Simons made a motion and Mr. Barnes seconded the motion. The motion passed by a unanimous vote.

10. **Nicholas Patrick DiFelice v. Monroe Township Public Schools (Gloucester) (2017-233)**

- The Custodian’s failure to timely respond resulted in a “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).
- The Custodian failed to conduct a reasonable search. Schneble v. N.J. Dep’t of Env’tl. Protection, GRC Complaint No. 2007-22 (April 2008); Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2013-43, *et seq.* (Interim Order dated September 24, 2013). The Custodian shall perform a search using all criteria supplied by the Complainant. If a special service charge is still warranted thereafter, the Custodian shall recalculate same.
- The knowing and willful analysis is deferred.
- Ms. Berg Tabakin called for any discussion on the Council Staff’s findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. Ms. Simons made a motion and Mr. Barnes seconded the motion. The motion passed by a unanimous vote.

11. **Libertarians for Transparent Government v. Point Pleasant Borough Board of Education (Ocean) (2017-236)**

- The Custodian did not unlawfully deny access to the requested Order. N.J.S.A. 47:1A-6.
- The Complainant is not a prevailing party entitled to an award of attorney’s fees.
- Ms. Berg Tabakin called for any discussion on the Council Staff’s findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. Ms. Simons made a motion and Mr. Barnes seconded the motion. The motion passed by a unanimous vote.

12. **Steven Mozer v. NJ Department of Corrections (2018-5)**

13. **Steven Mozer v. NJ Department of Corrections (2018-6) Consolidated**

- The Complainant’s request No. 1 was invalid. Bragg v. N.J. Dep’t of Corr., GRC Complaint No. 2010-145 (March 2011).
- The Custodian lawfully denied access to the Complainant’s OPRA request No. 2, item No. 1 seeking presentence reports. N.J.S.A. 47:1A-1.1; Pitts v. N.J. Dep’t of Corr., GRC Complaint No. 2013-299 (September 2014).
- The Custodian lawfully denied access to the Complainant’s OPRA request No. 2, item No. 2 seeking a psychological evaluation. Spillane v. N.J. State Parole Bd., 2017 N.J. Super. Unpub. LEXIS 2392 (App. Div. 2017).
- Ms. Berg Tabakin called for any discussion on the Council Staff’s findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion

to accept the Executive Director's findings and recommendations as written. Ms. Simons made a motion and Mr. Barnes seconded the motion. The motion passed by a unanimous vote.

14. **Elinor Comlay v. Stockton Affiliated Services, Inc. (2018-167)**

- The Custodian lawfully denied access to the requested draft meeting minutes. N.J.S.A. 47:1A-6; Libertarians for Transparent Gov't v. Gov't Records Council, 453 N.J. Super. 83 (App. Div. 2018) (certif. denied, 233 N.J. 484 (2018)).
- Ms. Berg Tabakin called for any discussion on the Council Staff's findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Ms. Simons made a motion and Mr. Barnes seconded the motion. The motion passed by a unanimous vote.

15. **New Jersey Foundation for Open Government, Inc. v. Borough of Woodbine (Cape May) (2018-240)**

- The Custodian's response was insufficient. Paff v. Willingboro Bd. of Educ. (Burlington), GRC Complaint No. 2007-272 (May 2008).
- The Custodian's failure to timely respond resulted in a "deemed" denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i).
- The Custodian also performed an insufficient search for records responsive to the Complainant's OPRA request item No. 1. Schneble v. N.J. Dep't of Env'tl. Protection, GRC Complaint No. 2007-22 (April 2008).
- The Custodian unlawfully denied access to the records responsive to the Complainant's OPRA request. However, the GRC declines to order any further disclosures because the Custodian did so during the pendency of the complaint.
- There is no knowing and willful violation.
- The Complainant is a prevailing party. The parties shall confer on fees and advise the GRC within twenty (20) business days if an agreement is reached. If not, Complainant's Counsel shall submit a fee application in accordance with N.J.A.C. 5:105-2.13.
- Ms. Berg Tabakin called for any discussion on the Council Staff's findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Ms. Simons made a motion and Mr. Barnes seconded the motion. The motion passed by a unanimous vote.

**V. Complaints Adjudicated in U.S. Court of Appeals, Third Circuit:**

- Golden v. N.J. Inst. of Tech., 2019 U.S. App. LEXIS 24181 (3d Cir. Aug. 14, 2019): The U.S. 3<sup>rd</sup> Circuit reverses the District Court and grants the Plaintiff request for an award of attorney's fees under OPRA. The Court held that throughout the litigation, the Defendant reviewed, redacted, and produced several thousand pages of records originally deemed exempt from disclosure based upon directives from the FBI. The Court held that in analyzing the catalyst theory for awarding attorney's fees, OPRA holds that it is the responsibility of the records custodian, and not a third-party, to



decide whether to allow or deny access to records. Thus, the Court found that the Defendant's reliance on the FBI's directives to not disclose records was inapposite in determining that a causal nexus exists between the litigation and the relief achieved. The Court held that the Defendant could have exercised its own independent judgment regarding disclosure, but because they chose not to, they must bear the consequences. The Court reversed and remanded for the District Court to calculate an appropriate fee award.

**VI. Court Decisions of GRC Complaints on Appeal: None**

**VII. Complaints Adjudicated in NJ Superior Court & NJ Supreme Court: None**

**VIII. Public Comment: None**

**IX. Adjournment:**

Ms. Berg Tabakin called for a motion to end the Council meeting. Ms. Simons made a motion, which was seconded by Mr. Barnes. The motion passed by a unanimous vote.

The meeting adjourned at 1:56 p.m.

Respectfully submitted,

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Robin Berg Tabakin, Esq., Chair

Date Approved: September 24, 2019