

MINUTES OF THE GOVERNMENT RECORDS COUNCIL

January 8, 2004

The meeting was called to order at 9:40 a.m. at the Department of Community Affairs, Room 235A, Trenton, New Jersey. The Open Public Meetings Act statement was read.

Mr. Dice called the roll:

Present: Chairman Vincent Maltese, Virginia Hook, Bernard Spigner, and Diane Schonyers, (designee of Commissioner William Librera, Department of Education), Joe Monzo (designee of Commissioner Susan Bass Levin, Department of Community Affairs)

Mr. Maltese read a resolution to convene in closed session to receive legal advice concerning the complaints to be adjudicated that day. Ms. Hook moved to adopt the resolution that was seconded by Ms. Schonyers. All members present approved the motion. The Council met in closed session from 9:40 to 10:40 a.m.

The Council reconvened in open session at 10:40 a.m. in Room 129 of the Department of Community Affairs, Trenton, New Jersey. The Open Public Meeting Act statement was read and attendees recited the Pledge of Allegiance.

Mr. Dice called the roll:

Present: Chairman Vincent Maltese, Virginia Hook, Bernard Spigner, and Diane Schonyers, (designee of Commissioner William Librera, Department of Education), Joe Monzo (designee of Commissioner Susan Bass Levin, Department of Community Affairs)

Also Present: Deputies Attorney General Barbara Conklin, Juliet Wyne, Acting Executive Director Paul Dice and Staff Associates Chris Malloy, Donna Siminski, Anthony Carbabelli, and Gloria Luzzatto.

Mr. Maltese called for the election of Officers for 2004 and entertained nominations for Chairman, Vice Chairman and Secretary. A motion was made by Mr. Spigner and seconded by Ms. Hook to nominate Vincent Maltese as Chairman. The motion was adopted by roll call:

Ayes: Ms. Hook, Mr. Monzo, Ms. Schonyers, Mr. Spigner, Mr. Maltese,
Nyes: None

A motion was made by Ms. Hook and seconded by Mr. Monzo to nominate Bernard Spigner as Vice Chairman. The motion was adopted by roll call:

Ayes: Ms. Hook, Mr. Monzo, Ms. Schonyers, Mr. Spigner, Mr. Maltese,

Nyes: None

A motion was made by Mr. Spigner and seconded by Ms. Schonyers to nominate Virginia Hook as Secretary. The motion was adopted by roll call:

Ayes: Ms. Hook, Mr. Monzo, Ms. Schonyers, Mr. Spigner, Mr. Maltese,
Nays: None

Mr. Maltese asked Mr. Dice to review the meeting schedule for 2004. Mr. Dice advised that the 2004 Council meetings could be held on the second Thursday of the month and that conflicts with this schedule occurred in February and November due to State Holidays and scheduling conflicts for the meeting room. He recommended the alternate dates of February 10, 2004 and November 10, 2004 for the meetings held in February and November. A motion to accept the meeting dates as presented by Mr. Dice was made by Mr. Monzo and seconded by Ms. Schonyers. The motion was adopted by roll call:

Ayes: Ms. Hook, Mr. Monzo, Ms. Schonyers, Mr. Spigner and Mr. Maltese.

Nays: None

Mr. Maltese asked Mr. Dice to review comments received regarding the Custodian Consequence Procedure. He indicated that a number of comments were received and the comments period had been open for approximately 90 days. Mr. Maltese recommended that the comments period be closed as of January 15 and that once closed, the Council review and analyze all the responses. A motion to accept the Chairman's recommendation was made by Mr. Monzo and seconded by Mr. Spigner. The motion was adopted by roll call.

Ayes: Ms. Hook, Mr. Monzo, Ms. Schonyers, Mr. Spigner and Mr. Maltese

Nays: None

Mr. Maltese asked Mr. Dice to review personnel matters. Mr. Dice reviewed the staff changes indicating that Donna Siminski's was leaving the Government Records Council staff and that Erin Malone and Kimberly Gardner had been hired as Case Managers, bringing the total to five Case Managers to handle inquiries and complaints.

Mr. Maltese called for the adoption and release to the public of the closed session minutes from December 11, 2003. Mr. Dice noted that Mr. Monzo was absent and did not vote in the closed session meeting and this will be reflected in the minutes. Ms. Schonyers noted that her name needed to be added to the attendance roster for this meeting. A motion to accept the minutes as amended was made by Ms. Schonyers and seconded by Ms. Hook. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms Schonyers, Mr. Spigner and Mr. Maltese.

Nays: None

Abstain: Mr. Monzo

Mr. Maltese asked that the minutes from the public meeting of December 11, 2003 reflect that he recused and excused himself from the room in the Douglas Wicks v. Bernards Township Board of Education (2002-107) case. Mr. Maltese called for adoption of the minutes as amended. A motion to accept the minutes as amended was made by Ms. Hook and seconded by Ms. Schonyers. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms Schonyers, Mr. Spigner and Mr. Maltese.

Nays: None

Abstain: Mr. Monzo

Mr. Maltese asked for the Executive Director's Report. Mr. Dice distributed the complaint and inquiry report and indicated that it had 112 open and 153 closed complaints to date. He noted that in the month of December the GRC received 72 inquiries.

Mr. Maltese asked for a review of any communications. Mr. Dice overviewed communications received by the GRC.

Rose Rosenbaum v. Rutgers University (2002-91)

Mr. Dice reviewed the issues in the complaint indicating the complainant challenged the denial of an OPRA request for copies of written responses to an Opinion Survey Questionnaire conducted in 1998 by the Center of Wildlife Damage Control, a component of Rutgers University, concerning crop damage attributable to the white-tailed deer. The survey questionnaire was shared with members of the New Jersey Legislature during consideration of a bill. Mr. Dice recommended to the Council that:

1. The survey responses sought by the requestor are academic research records exempted from disclosure under N.J.S.A. 47:1A-1.1.
2. The privilege of confidentiality or non-disclosure was not waived because the New Jersey State Legislation considered the use of this survey for a bill. Unlike a common law or regulatory privilege, a statutory exemption cannot be waived.
3. The custodian responded to the open public records request 22 days after the initial written letter dated July 23, 2002 from the requestor. The University's response was not in a timely manner. The custodian submitted a certification regarding her actions.

In reviewing the certification from the custodian, Mr. Dice noted that the custodian received a copy of the request August 5, 2002, sent the OPRA form to the complainant on August 7 for completion and responded to the request on August 15. Mr. Dice recommended that the Council find that the custodian responded in a timely manner in 7 business days once she became aware of the request.

Mr. Maltese asked that the custodian be advised to communicate the process for completing a records request and directing record requests to the custodian in an expeditious manner.

A motion was made by Ms. Hook to adopt the Acting Executive Director's recommendation with the modification that the custodian acted in a timely manner in 7 business days once she became aware of the complainant's records request. Mr. Spigner seconded the motion. The motion was adopted by roll call.

Ayes: Ms. Hook, Mr. Monzo, Ms. Schonyers, Mr. Spigner and Mr. Maltese

Nays: None

Davis v. City of Hackensack (2003-2)

Mr. Dice provided the members of the Council with an overview of the complaint. The case involved a verbal request for records and challenged a special service charge that was included in copying records. Mr. Dice recommended to the Council that the complaint be dismissed for the following reasons:

1. Pursuant to N.J.S.A. 47:1A-5(g), "a request for access to a government shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian." Based on the facts in this case, namely the February 28, 2003 certification from Louis J. Garbaccio, the request in this case was oral.
2. The requestor has not provided any proof that a written request was made.
3. The Council has no jurisdiction over complaints concerning responses to oral requests for government records.

Ms. Schonyers asked who had the responsibility to tell the requestor they were required to submit a written request for records. Mr. Maltese explained that the custodian had the responsibility to inform the requestor of the proper procedures for submitting an OPRA request, and it was the Council's responsibility to interpret the law. He stated that a request must be in writing pursuant to N.J.S.A. 47:1A-5(g), which did not occur in this case. Mr. Maltese recommended that the Council adopt the Acting Executive Director's recommendations to dismiss the case. However, he added that the complainant has the right to submit the same request again in writing.

A motion to accept the Acting Executive Director's recommendation was made by Ms. Hook and seconded by Ms. Schonyers. The motion was adopted by roll call.

Ayes: Ms. Hook, Mr. Monzo, Ms. Schonyers, Mr. Spigner and Mr. Maltese

Nays: None

Perry v. New Jersey Department of Corrections (2003-32)

Mr. Dice provided the members of the Council with an overview of the complaint. The case involved a request of the Department of Correction for a copy of a written statewide policy prohibiting prison disciplinary hearing officers from providing in-person, physical confrontation to inmates of adverse witnesses.

Mr. Maltese indicated that to determine whether the requested document was attorney-client privilege required a detailed explanation by the custodian and would be required to make a determination in this case.

Ms. Schonyers, Mr. Monzo and Mr. Spigner agreed that clarification was needed regarding the outline of the training session.

Mr. Maltese asked Mr. Dice to coordinate the structure for an in-camera review of the document and schedule it for the February Agenda. Mr. Maltese also asked that the custodian address the timeliness and “knowing and willful” timeliness records response issue at the same time that the Council does its in-camera review of the document. A motion to accept the following recommendations was made by Mr. Monzo and seconded by Mr. Spigner.

1. Proceed with an in-camera review of the outline of the training session conducted by the department’s attorneys for disciplinary hearing officers and supervisory staff.
2. Order the custodian to testify at the February 10, 2004 Council meeting regarding why the Council should accept that the outline of the training session conducted by the department’s attorneys for disciplinary hearing officers and supervisory staff is attorney-client privileged and, therefore, non-disclosable.
3. Order the custodian to testify at the February 10, 2004 Council meeting regarding why the Council should not consider the custodian to have knowingly and willfully violated the Open Public Records Act by not responding to the request until 14 days after the request was made.

The motion was adopted by roll call.

Ayes: Ms. Hook, Mr. Monzo, Ms. Schonyers, Mr. Spigner and Mr. Maltese

Nays: None

The Times of Trenton Publishing Corporation, publisher of the Trenton Times v. Department of Law and Public Safety, Division of Criminal Justice (2003-78)

Mr. Dice provided the members of the Council with an overview of the complaint, stating that the case involved Trenton Times requesting the membership roster and applications of the Baron Athletic Association from the investigatory file of the New Jersey Division of Criminal Justice and its denial on the grounds that it was a criminal investigatory record exempt from disclosure under N.J.S.A. 47:1A-1.1. He stated further that the requestor's counsel also challenged the Division of Law providing legal advice to the Government Records Council in the case as representing a conflict of interest. The Acting Executive Director recommended that the Council find that:

1. The requested documents are "criminal investigatory records" and exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
2. Requestor counsel's position that the Rules of Professional Conduct prohibit the Division of Law from providing legal advice to the Government Records Council should be dismissed on the basis of Carol Johnston's, Senior Deputy Attorney General, November 20, 2003 letter to requestor's counsel.
3. The custodian responded to this request in a timely manner in 6 business days.
4. The complaint should be dismissed

Mr. Maltese discussed whether a document or documents that are considered criminal investigatory records are sealed from disclosure when OPRA permits the right to access certain information during an active criminal investigation pursuant to N.J.S.A. 47:1A-3(b). He recommended that the custodian review the requested documents, addressing whether the roster and application or parts thereof may be subject to disclosure under N.J.S.A. 47:1A-3(b) or exempt from disclosure under some other statute.

Mr. Maltese asked the Deputy Attorney General for their legal opinion regarding the irreconcilable conflict of interest issue asserted by the complainant's counsel.

Deputy Attorney General Barbara Conklin advised that Ms. Johnston's letter to the Government Records Council set forth the legal obligation of the attorney general's office to represent all state agencies and specifically responded to Mr. Robinson's concerns asking that the Council dismiss the State's Attorney General as their legal counsel in this case. Ms. Conklin recommended to the Council that based on Ms. Johnston's letter no further action was needed on this issue.

The motion was made by Mr. Maltese to request the custodian to submit certification addressing whether the roster and application or parts thereof may be subject to disclosure under N.J.S.A. 47:1A-3(b) or exempt from disclosure under some other statute. Ms. Hook seconded the motion. The motion was adopted by roll call.

Ayes: Ms. Hook, Mr. Monzo, Ms. Schonyers, Mr. Spigner and Mr. Maltese

Nays: None

Newark Morning Ledger Co., Publisher of Star-Ledger v. New Jersey Sports & Exposition Authority (NJSEA) (2003-43)

Mr. Dice provided the members of the Council with an overview of the complaint. The case involved a request for the turnstile numbers, which represented the physical number of people passing through the gate for games played by the New Jersey Devils and New Jersey Nets at the New Jersey Sports and Exposition Authority's Continental Arena from October 1, 2002 to the date of the request. The Acting Executive Director respectfully recommends the Council find that:

1. The requested information (the turnstile numbers) is a government record pursuant to N.J.S.A. 47:1A-1.1 as the turnstile numbers are made, maintained and kept by the New Jersey Sports and Exposition Authority.
2. The NJSEA has failed to meet its burden of proof that the turnstile numbers are a trade secret or proprietary commercial or financial information pursuant to N.J.S.A. 47:1A-1.1.
3. The NJSEA has failed to meet its burden of proof that disclosure of the turnstile numbers would give an advantage to competitors or bidders.
4. The requested information is subject to public access under the Open Public Records Act (OPRA). Therefore, the custodian will provide the requestor with the turnstile numbers for the Devils and Nets games from October 1, 2002 to the date of the request.
5. The response by the custodian to the requestor was made in a timely manner in 7-business days.
6. The requestor is a prevailing party and is to submit documentation regarding their reasonable attorney's fees for determination by the Government Records Council pursuant to N.J.S.A. 47:1A-6.

The Deputy Attorney General Juliet Wyne advised the Council that under OPRA, the custodian had the burden of proof to show that the turnstile numbers fit within the exemptions and the custodian had not met their burden of proof in this case. She explained that they claimed that the turnstile numbers were a trade secret or proprietary information and had not explained why the turnstile numbers fit within the exemption, making conclusory allegations. The custodian never proved that the turnstile numbers were the property of the teams and the custodian counsel admitted that the license agreements were silent on this. She advised further that the actual attendance figures are made public and to claim that the physical attendance numbers were confidential and a trade secret was an inconsistent position. They have not sufficiently met the burden of proof to claim that disclosure of the turnstile numbers would give an unfair advantage to bidders.

Mr. Maltese recommended that the order become effective 10 days from the date of the decision and the records reflect that the requested records encompass the period from October 1, 2002 to the date of the records request.

A motion to accept the Acting Executive Director's recommendations and include the modifications was made by Mr. Spigner and seconded by Ms. Hook. The motion was adopted by roll call without Mr. Monzo's participation as he had stepped out of the room.

Ayes: Ms. Hook, Ms. Schonyers, Mr. Spigner and Mr. Maltese

Nays: None

Linda a. Bava and Mark M. Bava v. Bergen County School District (2003-84)

Mr. Dice presented the facts of the complaint to the Council indicating that the complainants requested admissions files, test scores, teacher recommendations and comparison test scores for their child who had applied to one of the Bergen County Academies. He noted that the complainants were denied access to their child's teachers' recommendations and admissions test scores of other students citing a Department of Education regulation restricting access. The Acting Executive Director recommended that the Council find that:

1. In response to an oral request made between April 15, 2003 and early May 2003, the custodian provided access to Ashley Bava's completed application to Bergen County Academy (BCA), her Franklin Avenue Middle School (FAMS) grade transcripts and her BCA mathematics admission test results.
2. A student's teachers' recommendations are part of a student's "pupil record" pursuant to N.J.A.C. 6:3-6.1 and are not publicly accessible under Open Public Records Act (OPRA).
3. Based on the information presented to the custodian regarding "comparison test scores," the Custodian reasonably interpreted the term as a request for all BCA applicants test scores and names.
4. A student's score on an admissions test is part of their "pupil record" pursuant to N.J.A.C. 6:3-6.1 and is not publicly accessible under OPRA.
5. The requestor's letter of November 30, 2003 limiting the term "comparison test scores" only to successful BCA applicants, without names and ranked by district is materially different from the written OPRA request made to the custodian and should not be considered part of the Complaint. The requestor may submit a new OPRA request to the custodian for this data.
6. The custodian responded to the requestor in a timely manner.
7. The complaint is dismissed.

The Deputy Attorney General Barbara Conklin advised that parents have certain rights to access their own child's school records pursuant to N.J.A.C. 6:3, but when the complainant's made an OPRA request they are making a request as a citizen and not as a parent and are precluded from access pursuant to N.J.S.A. 47:1A-9. Ms. Schonyers added that under N.J.A.C. 6:3, the parent can only access their own child's information and not other pupils information.

A motion to accept the Acting Executive Director's recommendation was made by Mr. Spigner and seconded by Mr. Monzo. The motion was adopted by roll call.

Ayes: Ms. Hook, Mr. Monzo, Ms. Schonyers, Mr. Spigner and Mr. Maltese

Nays: None

Robert Cruz v. New Jersey Parole Board (2003-114)

Mr. Dice reviewed the issue in the complaint stating that a written OPRA request was not made in this case as required in N.J.S.A. 47:1A-5(g). He advised that the Council lacked jurisdiction in the case and recommended that the Council dismiss the complaint.

A motion to accept the Acting Executive Director's recommendation was made by Ms. Hook and seconded by Mr. Monzo. The motion was adopted by roll call:

Ayes: Ms. Hook, Mr. Monzo, Ms. Schonyers, Mr. Spigner and Mr. Maltese

Nays: None

Larry Loigman v. Monmouth County Prosecutor's Office (2002-44) – Continuation

Mr. Dice presented the following documents that were received in response to the Council's November 13, 2003 Final Decision for the Council's consideration:

1. December 15, 2003 certification from custodian outlining and explaining the events that gave rise to a delay in providing the requestor with the requested 2002 name and salary information.
2. December 15, 2003 certification from custodian explaining that she never received the Council's November 13, 2003 Final Decision on Access; Interim Decision on Custodian Penalty which had been sent to her by the Council's staff via e-mail.
3. December 18, 2003 letter from custodian to Gloria Luzzatto of the Council explaining that the charges for the requested information would be \$79.75 for copying and \$415.83 for labor.
4. December 22 2003 letter from Requestor objecting to the charges outlined in the custodian's December 18, 2003 letter and stating that he had not been offered the option of inspecting the records rather than receiving copies.

Mr. Maltese made the following motion which was seconded by Ms. Hook:

1. The requestor has the right to inspect the records and not receive copies if he so chooses.
2. Extraordinary labor charges for preparing the records for inspection will not be charged given that the custodian has not explained the rationale for applying such charges.

3. Should the requestor require copies of all or parts of the selected documentation, such charges, pursuant to N.J.S.A. 47:1A-5, shall not exceed \$79.75.

The motion was adopted by roll call:

Ayes: Ms. Hook, Mr. Monzo, Ms. Schonyers, Mr. Spigner and Mr. Maltese

Nays: None

Jackson v. Kean University (2002-98)

Mr. Dice reviewed the following information with the Council that was received in response to the Council's November 13, 2003 Final Decision:

1. December 10, 2003 letter from custodian enclosing the requested information pursuant to the Council's November 13, 2003 Final Decision.
2. Paul Dice's verbal recount at the open session of the January 8, 2004 meeting of a telephone conversation of the same date that Gloria Luzzatto of the GRC had with the requestor. The requestor informed Luzzatto that the information she received did not contain the leave of absence information she's seeking for a particular individual.

Referring to the information received, the Acting Executive Director recommended the Council find that the Acting Executive Director elicit a certification from the custodian to the effect that the information she provided to the requestor comprises the entirety of what Kean University has on record and which is responsive to the request, with the appropriate redactions, pursuant to the Open Public Records Act.

A motion to accept the Acting Executive Director's recommendation was made by Ms. Schonyers and seconded by Mr. Spigner. The motion was adopted by roll call:

Ayes: Ms. Hook, Mr. Monzo, Ms. Schonyers, Mr. Spigner and Mr. Maltese

Nays: None

Fred Burnett v. Somerset County Clerk (2003-129)

Mr. Dice reviewed a written response to the Council's December 11, 2003 Final Decision on Access; Interim Order on Cost Duplication that was received from the requestor's counsel stating that the parties reached an agreement in the case. Mr. Dice recommended that the Council close this case based on the response received from the requestor's counsel. A motion to accept the Acting Executive Director's recommendation was made by Ms. Hook and seconded by Mr. Spigner. The motion was adopted by roll call.

Ayes: Ms. Hook, Mr. Monzo, Ms. Schonyers, Mr. Spigner and Mr. Maltese

Nays: None

Mr. Maltese opened the meeting to the public. There were no public comments. Mr. Maltese called for a motion to close the public portion, and a motion to adjourn at 12:25 p.m. The motion was approved by consensus.

Respectfully submitted,

/s/ Virginia Hook, Secretary