

Minutes of the Government Records Council
March 9, 2006 Public Meeting – Open Session

The meeting was called to order at 9:40 a.m. at the Department of Community Affairs, Room 129, Trenton, New Jersey. The Open Public Meetings Act statement was read.

Ms. Davies called the roll:

Present: Mr. Maltese, Ms. Michelle Richardson (designee of Commissioner Susan Bass Levin, Department of Community of Affairs), Ms. Kathryn Forsyth (Designee of Commissioner Lucille Davy, Department of Education) Ms. Robin Berg-Tabakin, GRC Staff: Executive Director Catherine Starghill, Operations Manager, Gloria Luzzatto, Deputy Attorney General Debra Allen, Chris Malloy, Kimberly Gardner, Dara Lownie, Jennifer Arozamena, Colleen McGann and Marion Davies.

Mr. Maltese called for a motion to go into closed session for legal advice to discuss the following cases:

1. Paff v. Township of Plainsboro 2005-29
2. Meyers v. Borough of Fairlawn 2005-127
3. Paff v. Bergen County 2005-115
4. Allen v. NJ Department of Corrections (2005-126)
5. Buttimore v. NJ Department of Law & Public Safety, Division of Criminal Justice 2005-90 and 2005-92
6. Sauter v. Township of Colts Neck (2005-7)
7. McCormack v. NJ Department of Treasury (2005-103)

A motion was made by Ms. Tabakin and seconded by Ms. Forsyth. The motion was adopted by a unanimous vote.

The Council met in closed session from 9:45 a.m. to 11:10 a.m.

Mr. Maltese called for a motion to go into open session. A motion was made by Ms. Tabakin and seconded by Ms. Forsyth. The motion was adopted by a unanimous vote.

Open Session reconvened at 11:20 a.m. Ms. Davies called the roll:

In attendance:

Mr. Maltese, Ms. Tabakin, Ms. Richardson, Ms. Forsyth.

The pledge of allegiance was recited.

Mr. Maltese introduced the two new members on the Council: Ms. Michelle Richardson, (Designee of Commissioner Susan Bass Levin, Department of Community Affairs and Ms. Kathryn Forsyth (Designee of Commissioner Lucille Davy, Department of Education).

Mr. Maltese and Ms. Richardson recused themselves from the following case:

Cathy C. Cardillo v. City of Hoboken Zoning Office, 2005-158. Mr. Richman, also a designee of Commissioner Levin, sat in for the discussion and vote in this matter. The Vice Chair, Ms. Tabakin, conducted the meeting in this case.

Cathy C. Cardillo v. City of Hoboken Zoning Office 2005-158

Ms. Gardner reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Gardner presented the following recommendation to the Council:

The Executive Director respectfully recommended that the Council find that an *in camera* inspection of the requested records should be conducted to determine if the records are exempt from disclosure because they contain "security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein" pursuant to N.J.S.A. 47:1A-1.1.

Ms. Tabakin, called for a motion to accept the Executive Director's recommendation as written. A motion was made by Mr. Richman and seconded by Ms. Forsyth. The motion passed unanimously.

Mr. Maltese recused himself from the following three (3) cases:

Sauter v. Township of Colts Neck, 2005-07

Paff v. Bergen County, 2005-115

Dittrich v. City of Hoboken, 2006-10 and 11

The Vice Chair, Ms. Tabakin, conducted the meeting in these three cases.

Jeffrey Sauter v. Township of Colts Neck 2005-7

Ms. McGann reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. McGann presented the following recommendations to the Council:

The Executive Director respectfully recommended the Council find that:

1. Based on the Fire Company's funding and organizational structure, and the judicial precedent of Lafayette Yard defining public agency under OPRA, the Colts Neck Fire Department is a "Public Agency" as defined in N.J.S.A. 47:1A-1.1 and is, therefore, subject to OPRA.
2. It is the responsibility of the municipal clerk, pursuant to N.J.S.A. 47:1A-1.1 to respond to the request and obtain any records responsive held by the Fire Department necessary to fulfill the records request.
3. The Custodian's response to the request for vouchers was inadequate and as such, it is found that the Custodian has not provided a written reason explaining why the documents were not immediately available, in violation of N.J.S.A. 47:1A-5.g. That being said, the Custodian has violated N.J.S.A. 47:1A-5.e in not granting immediate access to the requested vouchers.
4. The Custodian violated N.J.S.A. 47:1A-5.i and N.J.S.A. 47:1A-5.g in failing to provide access to the requested record or a specific reason for a denial or delay in access within the statutorily mandated seven-business days.
5. Based on the fact that the Custodian believed that the response was timely and was acting under the notion that he was not responsible for the records of the Fire Department the Custodian's actions do not meet the legal standard for a knowing and willful violation pursuant to N.J.S.A. 47:1A-11.a or unreasonable denial of access under the totality of the circumstances in this case. However,

the Custodian's actions do appear to be at least negligent regarding his knowledge of OPRA.

Ms. Tabakin called for a motion to accept the Executive Director's recommendation as written. A motion was made by Ms. Forsyth and seconded by Ms. Richardson. The motion passed unanimously.

John Paff v. Bergen County 2005-115

Ms. Lownie reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendations to the Council:

The Executive Director respectfully recommended the Council find that:

1. Because government records responsive to the request, pursuant to N.J.S.A. 47:1A-1.1 did not exist the Custodian would not have unlawfully denied access to the requested records as he certifies that the records do not exist. However, the Custodian violated N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. by failing to provide the Complainant with a written response within the statutorily mandated seven (7) business days therefore creating a "deemed" denial.
2. While seeking legal advice on how to appropriately respond to a records request is reasonable, it is not a lawful reason for delaying a response to an OPRA records request because the Custodian should have obtained a written agreement from the Complainant extending the time period to respond. Therefore, the Custodian violated N.J.S.A. 47:1A-6 by not providing a lawful basis for the denial of access to the request. However, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
3. The Custodian should not be placed on the matrix based on the Council's decision in Renna v. County of Union, GRC Case No. 2005-89 (October, 2005), as well as the fact that the time matrix is now obsolete.

Ms. Tabakin called for a motion to accept the Executive Director's as written. A motion was made by Ms. Richardson and seconded by Ms. Forsyth. The motion passed unanimously.

Vesselin Dittrich v. City of Hoboken 2006-10 and 11

Ms. Lownie reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendation to the Council:

The Executive Director respectfully recommended the Council find that based on the fact that the Complainant affirmatively asserted on the Denial of Access Complaint form that he instituted a Superior Court case regarding access to the records that are the subject of this denial of access complaint and the Council's decision in Mosee v. Atlantic City Police Department, GRC Case No. 2005-33 (September, 2005), the Council is statutorily precluded from adjudicating this complaint pursuant to N.J.S.A. 47:1A-6.

Ms. Tabakin called for a motion to accept the Executive Director's as written. A motion was made by Ms. Forsyth and seconded by Ms. Richardson. The motion passed unanimously.

Ms. Forsyth recused herself from the following case:
Johnson v. Department of Education Essex County 2006-17

Mildred Johnson v. Department of Education 2006-17

Ms. Lownie reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendation to the Council:

The Executive Director respectfully recommended that the Council find that based on the fact that the Complainant affirmatively asserted on the Denial of Access Complaint form that she instituted a Superior Court case regarding access to the records that are the subject of this denial of access complaint and the Council's decision in Mosee v. Atlantic City Police Department, GRC Case No. 2005-33 (September, 2005), the Council is statutorily precluded from adjudicating this complaint pursuant to N.J.S.A. 47:1A-6.

Mr. Maltese called for a motion to accept the Executive Director's recommendation as written. A motion was made by Ms. Tabakin and seconded by Ms. Richardson.

New Administrative Category:

Ms. Starghill presented the following recommendation to the Council:

The Council would give the Executive Director the power of authority to administratively handle cases in two additional categories:

1. Jurisdiction: When it is clear on its face that complainant affirmatively asserted on the Denial of Access Complaint form that action was instituted in Superior Court case regarding access to the records that are the subject of the denial of access complaint and there are no other issues.
2. Valid OPRA records request – use of form: When it is clear that the only issue is the failure to use the OPRA records request form and the custodian has not attempted to fulfill the request.

Mr. Maltese called for a motion to accept the Executive Directors recommendations on the new administrative categories. A motion was made by Ms. Richardson and seconded by Ms. Tabakin. The motion passed unanimously.

John Paff v. Township of Plainsboro 2005-29

Ms. McGann reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. McGann presented the following recommendation to the Council:

The Executive Director respectfully recommended that the Council agree with the Complainant's Motion to Settle the Record.

Mr. Maltese called for a motion to accept the Executive Directors recommendation as written. A motion was made by Ms. Richardson and seconded by Ms. Forsyth. The motion passed unanimously.

Frances O'Loughlin v. Ocean Gate Board of Education 2005-43

Ms. Lownie reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in the Supplemental Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendations to the Council:

The Executive Director respectfully recommended the Council find that:

1. The Custodian has complied with the Council's January 27, 2006 Interim Order by releasing the Board of Education's October 20, 2004 meeting minutes to the Complainant within ten (10) business days of receiving said Order and has included a Certified Mail receipt indicating same.
2. Pursuant to N.J.S.A. 47:1A-7.b., the Council does not have authority over the content of records.

Mr. Maltese called for a motion to accept the Executive Directors recommendation as written. A motion was made by Ms. Richardson and seconded by Ms. Tabakin. The motion passed unanimously.

Edward Buttimore v. Department of Law & Public Safety 2005-90

Ms. Gardner reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Gardner presented the following recommendation to the Council:

The Executive Director respectfully recommended the Council find that pursuant to N.J.S.A. 47:1A-9.a, N.J.A.C. 13:1E-3.2(a)1 and the unpublished decision in Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Superior Court of New Jersey, Law Division - Mercer County, Docket No.: MER-L-1090-05 (Decided July 5, 2005) the proposed rule exempting the EEO records from being disclosed pursuant to OPRA does apply and the requested EEO records are exempt from disclosure and the Custodian did not unlawfully deny access to the requested records.

Mr. Maltese called for a motion to accept the Executive Directors recommendation as written. A motion was made by Ms. Forsyth and seconded by Ms. Richardson. The motion passed unanimously.

Edward Buttimore v. Department of Law & Public Safety 2005-92

Ms. Gardner reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Gardner presented the following recommendation to the Council:

The Executive Director respectfully recommended the Council find that pursuant to N.J.S.A. 47:1A-9.a, N.J.A.C. 13:1E-3.2(a)5 and the unpublished decision in Newark Morning Ledger Co., Publisher of the Star-Ledger v. Division of the State Police of the New Jersey Department of Law and Public Safety, Superior Court of New Jersey, Law Division - Mercer County, Docket No.: MER-L-1090-05 (Decided July 5, 2005), the proposed rule exempting the interview recommendation reports from being disclosed pursuant to OPRA does apply. Therefore, the requested interview recommendation reports are confidential and exempt from disclosure and the Custodian did not unlawfully deny access to the requested records.

Mr. Maltese called for a motion to accept the Executive Directors recommendation as written. A motion was made by Ms. Richardson and seconded by Ms. Forsyth. The motion passed unanimously.

John Mc Cormack v. NJ Department of Treasury 2005-103

Ms. McGann reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in the *in camera* Findings and Recommendations of the Executive Director. Ms. McGann presented the following recommendations to the Council:

The Executive Director respectfully recommended that the Council find that:

1. Document 1: February 25 Memo is exempt from disclosure as "advisory, consultative and deliberative material" pursuant to N.J.S.A. 47:1A-1.1.
2. Document 2: New Unit Scope for Taxation Taxpayer Services is exempt from disclosure as "advisory, consultative and deliberative material" pursuant to N.J.S.A. 47:1A-1.1.
3. Document 3: February 24, 2005 Department of Treasury Pending Promotional Announcements is disclosable.
4. Document 4: Active Promotional Lists is exempt from disclosure as "advisory, consultative and deliberative material" pursuant to N.J.S.A. 47:1A-1.1 and "personnel information" pursuant to N.J.S.A. 47:1A-10.
5. Document 5: NJ Division of Taxation Organizational Charts, Page 1: "NJ Division of Taxation Organizational Chart Before New Unit Scope" is disclosable.
6. Document 5: NJ Division of Taxation Organizational Charts, Page 2 is exempt from disclosure as "advisory, consultative and deliberative material" pursuant to N.J.S.A. 47:1A-1.1.
7. Document 5: NJ Division of Taxation Organizational Charts, Page 3 "TPS Field Operations Current" is disclosable.

8. Document 5: NJ Division of Taxation Organizational Charts, Page 4 is exempt from disclosure as “advisory, consultative and deliberative material” pursuant to N.J.S.A. 47:1A-1.1.
9. Document 6: Employee Status Listing is exempt from disclosure as “advisory, consultative and deliberative material” pursuant to N.J.S.A. 47:1A-1.1.
10. The Custodian shall comply with these Conclusions and Recommendations and provide confirmation to the Executive Director that the Custodian has so complied with the Council’s decision within ten (10) business days from receipt of this decision.

Mr. Maltese called for a motion to accept the Executive Directors recommendations as written. A motion was made by Ms. Tabakin and seconded by Ms. Forsyth. The motion passed unanimously.

John McCormack v. NJ Department of Treasury 2005-104

Ms. McGann reviewed the parties’ respective positions and the GRC’s analysis and issues in the case as set forth in the Second Supplemental Findings and Recommendations of the Executive Director. Ms. McGann presented the following recommendation to the Council:

The Executive Director respectfully recommended the Council find that based on the February 7, 2006 response to the Council’s Interim Order, the Custodian has complied with the Council’s January 27, 2006 decision in disclosing the requested “handwritten notes taken of meeting between Edward Scheingold, John McCormack and Linda B. Hickey; notes taken by Linda Hickey,” except Section 2, Portion "D" and "E" as indicated in the January 19, 2006 *In Camera* Findings and Recommendations and has done so within (10) business days from receipt of the Council’s decision.

Mr. Maltese called for a motion to accept the Executive Directors recommendations as written. A motion was made by Ms. Richardson and seconded by Ms. Forsyth. The motion passed unanimously.

Donal Meyers v. Borough of Fairlawn 2005-127

Ms. Gardner reviewed the parties’ respective positions and the GRC’s analysis and issues in the case as set forth in the Supplemental Findings and Recommendations of the Executive Director. Ms. Gardner presented the following recommendation to the Council:

The Executive Director respectfully recommended that the Council vote to approve the Borough of Fair Lawn’s request for a stay.

Ms. Tabakin made a motion to go into closed session for legal advice regarding the request for a stay in this case. The motion was seconded by Ms. Richardson. The motion passed unanimously.

The Council met in closed session from 12:15 p.m. to 12:45 p.m.

The Council reconvened in open session at 12:50 p.m. Mr. Maltese called for a motion. Ms. Richardson made a motion to table the Council's decision in this case for further discussion and the Council would reconsider the request for a stay at the next meeting. The motion was seconded by Ms. Forsyth. The motion passed unanimously.

Isaac Fajerman v. Monmouth County Clerk's Office 2005-167

Ms. Lownie reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendation to the Council:

The Executive Director respectfully recommended that the Council find that based on the fact that the Complainant affirmatively asserted on the Denial of Access Complaint form that he instituted a Superior Court case regarding access to the records that are the subject of this denial of access complaint and the Council's decision in Mosee v. Atlantic City Police Department, GRC Case No. 2005-33 (September, 2005), the Council is statutorily precluded from adjudicating this complaint pursuant to N.J.S.A. 47:1A-6.

Mr. Maltese called for a motion to accept the Executive Directors recommendations as written. A motion was made by Ms. Richardson and seconded by Ms. Tabakin. The motion passed unanimously.

Matthias L. DiMattia v. NJ Dept. of Environmental Protection (DEP) 2005-200

Mr. Malloy reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in the Supplemental Findings and Recommendations of the Executive Director. Mr. Malloy presented the following recommendation to the Council:

The Executive Director respectfully recommended that the Council find that the Complainant's records request was not a valid OPRA request and as such the Custodian's refusal to fulfill the records request does not amount to an unlawful denial of access pursuant to the provisions of OPRA.

Mr. Maltese called for a motion to accept the Executive Directors recommendations as written. A motion was made by Ms. Richardson and seconded by Ms. Forsyth. The motion passed unanimously.

John Paff v. Borough of Audubon 2006-1

Ms. Lownie reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendations to the Council:

The Executive Director respectfully recommended that the Council find:

1. The Complainant's records request was not a valid OPRA request and as such the Custodian's refusal to fulfill the records request does not amount to an unlawful denial of access pursuant to the provisions of OPRA.

2. The Custodian was not obligated to fulfill the Complainant's request, however she chose to do so and certifies that she notified the Complainant of such on January 9, 2006 and is awaiting payment of \$2.25.
3. The Council does not have authority over a municipality's ordinances or regulations pursuant to N.J.S.A. 47:1A-7.b.
4. The Custodian's actions do not rise to the level of a knowing a willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Mr. Maltese called for a motion to accept the Executive Directors recommendations as written. A motion was made by Ms. Richardson and seconded by Ms. Tabakin. The motion passed unanimously.

Mildred Johnson v. NJ Dept. of Human Services – Division of Youth and Family Services 2006-18

Ms. Lownie reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendation to the Council:

The Executive Director respectfully recommended that the Council find that based on the fact that the Complainant affirmatively asserted on the Denial of Access Complaint form that she instituted a Superior Court case regarding access to the records that are the subject of this denial of access complaint and the Council's decision in Mosee v. Atlantic City Police Department, GRC Case No. 2005-33 (September, 2005), the Council is statutorily precluded from adjudicating this complaint pursuant to N.J.S.A. 47:1A-6.

Mr. Maltese called for a motion to accept the Executive Directors recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Richardson. The motion passed unanimously.

Mildred Johnson v. Office of the Child Advocate 2006-20

Ms. Lownie reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendation to the Council:

The Executive Director respectfully recommended that the Council find that based on the fact that the Complainant affirmatively asserted on the Denial of Access Complaint form that she instituted a Superior Court case regarding access to the records that are the subject of this denial of access complaint and the Council's decision in Mosee v. Atlantic City Police Department, GRC Case No. 2005-33 (September, 2005), the Council is statutorily precluded from adjudicating this complaint pursuant to N.J.S.A. 47:1A-6.

Mr. Maltese called for a motion to accept the Executive Directors recommendations as written. A motion was made by Ms. Tabakin and seconded by Ms. Richardson. The motion passed unanimously.

Joseph A. Elcavage v. West Milford Township 2006-46

Ms. Lownie reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendation to the Council:

The Executive Director respectfully recommended that the Council find that based on the fact that the Complainant affirmatively asserted on the Denial of Access Complaint form that he instituted a Superior Court case regarding access to the records that are the subject of this denial of access complaint and the Council's decision in Mosee v. Atlantic City Police Department, GRC Case No. 2005-33 (September, 2005), the Council is statutorily precluded from adjudicating this complaint pursuant to N.J.S.A. 47:1A-6.

Mr. Maltese called for a motion to accept the Executive Directors recommendations as written. A motion was made by Ms. Tabakin and seconded by Ms. Richardson. The motion passed unanimously.

Administrative – Adjudication:

Shinn v. NJ Department of Environmental Protection (2005-183)

Graupe v. City of Clifton (2005-189)

Sunday v. City of Paterson Free Public Library (2005-206)

Caggiano v. Sussex County SCD (2005-215)

Caggiano v. Sussex County SCD (2005-225)

Solarski v. North Hanover Township (2005-238)

Caggiano v. Sussex County SCD (2005-241)

Fronczkiewicz v. Township of Washington (2006-7)

Johnson v. Superior Court of NJ – Essex Vicinage (2006-19)

Johnson v. Bergen County Surrogate's Court (2006-21)

Otto v. Office of Legislative Services Ethical Standards (2006-26)

Mr. Maltese called for a motion to accept the Executive Directors recommendations as written. A motion was made by Ms. Tabakin and seconded by Ms. Richardson. The motion passed unanimously.

David Allen v. Department of Corrections 2005-126

At its March 9, 2006 public meeting during closed session, the Council conducted the *in camera* inspection of the unredacted December 17, 2004 Special Investigations Division ("SID") investigation and the November 8, 2004 letter and envelope relevant to the complaint.

After completing the *in camera* inspection of the unredacted documents in closed session, Mr. Maltese called for a motion which concluded that the requested records relevant to the complaint were exempt from disclosure in their entirety pursuant to N.J.S.A. 47:1A-1.1 and also N.J.S.A. 47:1A-3.a. A motion was made by Ms. Richardson and seconded by Ms. Tabakin. The motion passed unanimously.

Advisory Opinion 2006-01

Ms. Starghill presented the Council with the following amendment to the Advisory Opinion 2006-01, which was approved by the Council at the February 9, 2006 meeting:

When an agency has not adopted its own official OPRA records request form, requestors may submit their records request on the Model Request Form located on the Government Records Council website (www.nj.gov/grc/).

Executive Directors Report:

Ms. Starghill informed the Council that the Government Records Council Proposed Regulations have been published in the March 6, 2006 edition of the New Jersey Register.

Ms. Starghill also discussed the open and closed session minutes from previous meetings with the Council and the approval of same by the new Council members. Ms. Allen stated that she would review the requirements of the Open Public Meetings Act and provide advice to the Council at the next meeting.

Public Comment:

Matthias L. DiMattia – Bordentown, NJ

Elizabeth Mason – President Foundation for Open Government

Bruce Solomon – Custodian for the Department of Law and Public Safety

Mr. Maltese called for a motion to adjourn. A motion was made by Ms. Tabakin and seconded by Ms. Richardson. The motion passed unanimously.

Meeting adjourned at 1:55 p.m.

Respectfully submitted,



Robin Berg Tabakin, Secretary

Dated Approved: April 11, 2006

