

Minutes of the Government Records Council March 10, 2005 Public Meeting - Open Session

The meeting was called to order at 9:00 a.m. at the Department of Community Affairs, Room 235A, Trenton, New Jersey. The Open Public Meetings Act statement was read.

Ms. Luzzatto called the roll:

Present: Chairman Vincent Maltese, Diane Schonyers (designee of Commissioner William Librera, Department of Education), Ms. Minus-Vincent (DCA – Susan Bass)

Absent: Ms. Hook, Secretary

Also Present: Executive Director Paul Dice, Assistant Executive Director Gloria Luzzatto, Case Managers Chris Malloy, Kimberly Gardner, Erin Knoedler, and Colleen McGann, Deputy Attorney General Andrea Grundfest, Staff Advisor David Zipin

Mr. Maltese read the 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 9:07 a.m. to 10:40 a.m.

The Council reconvened in open session at 10:45 a.m. in Room 129 of the Department of Community Affairs, Trenton, New Jersey. The Open Public Meetings Act statement was read and attendees recited the Pledge of Allegiance.

Mr. Maltese asked Mr. Dice to review personnel matters.

Mr. Dice introduced Ms. Catherine Starghill the new In-House Counsel for the Government Records Council. He stated that Ms. Starghill serves as the primary legal counsel between the GRC and the Division of Law. Ms. Debra Allen represents the Division of Law; Mr. Elnardo Webster is the outside counsel for the GRC.

Mr. Maltese welcomed Ms. Starghill to the GRC and acknowledged her tenure with the Privacy Commission. Mr. Maltese also asked Ms. Starghill if she would like to make a statement.

Ms. Starghill stated she is looking forward to working with everyone.

Mr. Dice stated that Ms. Jennifer Arozamena will be joining the Government Records Council on March 21, 2005. Ms. Arozamena will serve as the GRC Resource Center Coordinator. GRC Resource Center will be an area that maintains *subject reference guides*. Mr. Dice stated that this position has been established for several reasons. One of which is quality control; so that the case managers have a systematic way of getting information to them and that they have a systematic way of retrieving that information.

Mr. Maltese: The approvals of minutes will be deferred to the next meeting.

Mr. Maltese requested to review Administrative Action.

Ms. Luzzatto stated there are twelve (12) case listed under administrative actions. These cases involve settlements, agreements for mediation or complaint withdrawals.

Mr. Dice noted that whenever an action is taken on a case to close it because it involves a settlement by the parties or withdrawal, it would always appear on the agenda as an administrative action no vote taken. The council in the last meeting gave me authority to dismiss certain cases. I will do that and I have invoked that on three (3) cases here. However, it will always be put on the agenda and read into the record at the meeting.

The three (3) cases in question are:

1. Barbara Schwarz v. NJ Senate Democratic Office (2004-184)
2. Barbara Schwarz v. NJ Office of Legislative Services (2004-185)
3. Barbara Schwarz v. NJ Assembly Republic in Office (2004-186)

Mr. Dice stated that there was a question as to whether or not these were public agencies as defined under the Open Public Record. Based on the research that I was directed to do by the Council, I completed that, I am satisfied that these agencies are part of the legislature and are not independent agencies. The Assembly Republic in Office and NJ Senate Democratic Office exist to serve elected officials. I respectfully request that the Council reconsider the decisions and now dismiss the cases on the basis the GRC lacks jurisdiction in this matter, which was the original recommendation.

Mr. Maltese called a motion to accept the findings and recommendations. The motion was made by Ms. Schonyers and second by Ms. Minus-Vincent. The Motion was passed on roll call:

Ayes: Ms. Schonyers, Ms. Minus-Vincent, and Mr. Maltese

Nays: None

Mr. Maltese stated that the following cases listed on the agenda would not be heard at this meeting:

1. Martin O'Shea v. Township of West Milford (2004-17)
2. Kenneth Serrano v. New Brunswick Police Dept. (2004-151)
3. Howard Avin v. Borough of Oakland (2004-180)
4. Tina Renna v. County of Union (2004-191)

Warren Cundiff v. Dept of Law & Public Safety (2003-34)

Mr. Dice: The Division of Law & Public Safety's defense is that everything falls under attorney work product. On page 7 you'll find the first of two (2) lists. In the first list, we find that the documents are attorney work product and should not be considered disclose able. In the second list of documents, we find the documents are not covered by attorney

work product privilege and should be disclosed. Mr. Dice read from his recommendations as follows:

1. The Department of Law & Public Safety has proven why it's lack of engagement in pre litigations discovery. They is a lawful reason for denying the subject OPRA request.
2. The plaintiff council's January 13th written request for records was a valid OPRA request and should have been accepted as such by the Division of Law & Public Safety.
3. The Division of Law & Public Safety has borne its burden of proving that documents 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 18, 20, 23 and 27 are privileged as attorney work product. Therefore, are not discloseable.
4. The Division of Law & Public Safety has not born its burden that documents 6, 13, 14, 15, 16, 17, 19, 21, 22, 24, 25, 26 and 28 are privileged as attorney work product and therefore, should be disclosed.

Council should order the Division of Law & Public Safety to disclose the documents listed in number 4 above within Five (5) business days from the receipt of Council's decision.

Mr. Maltese: The only thing I would add is to have Mr. Dice or staff take a look at the number of days that elapsed between the request and the response and if it exceeded the statutory time period the custodian should be placed on the matrix.

Mr. Maltese called a motion to accept the findings and recommendations. The motion was made by Ms. Schonyers and second by Ms. Minus-Vincent. The Motion was passed on roll call:

Ayes: Ms. Schonyers, Ms. Minus-Vincent, and Mr. Maltese

Nays: None

C.W. v. William Paterson University (2003-80)

Ms. Gardner: Mr. W. submitted a request for a tape recording of a May 8, 2003 residence disciplinary hearing. He made the request on May 8, 2003 and sent it through regular mail with a delivery conformation, which did not require a signature for conformation. The custodian maintains that they did not receive it until June 30, 2003 when they received the actual denial of access complaint from the GRC. This case was heard previously by the GRC when it was referred to mediation. It has since been returned to the GRC for adjudication because the parties could not reach an agreement in mediation.

The Complainant contends that the Custodian failed to provide access within the statutory time period under OPRA, that they failed to provide a complete government record. He also states that they had an unlawful refusal to provide a marker denoting:

1. That a redaction was made.
2. Where the redaction was made on the government record.
3. Unlawful denial of access to government records by demanding that requestor utilize

the custodian record request form.

In a February 20, 2005 letter to the GRC the complainant defended his position that he should obtain the requested record through OPRA and that the utilization of FERPA and the provisions of FERPA were misapplied to his case. Ms. Gardner reviewed the Custodian's response to the complaint set forth in the submissions to the GRC and reflected in the Findings and Recommendations of the Executive Director. She noted in the analysis of the case that the GRC came to the conclusion that the Custodian did violate the issue of timeliness; however, the actions did not rise to the level knowing and willful violation under the totality of the circumstances. She stated further that the Custodian did appropriately redact the statement pursuant to 1.1 of OPRA in that the redactions were identifying information of a specific students name. They identified the redactions on the tape and in writing. Mr. Dice: could you explain a marker? Ms. Gardner explained that when they submitted a marker at the redaction; instead of it going silent, they put in an indication of where that redaction took place.

She stated that the Executive Director respectfully recommends that the Council find that:

1. The record does not support university personnel signed for a receipt of the May 8, 2003 OPRA request.
2. The custodian did violate NJSA 47:1a-5i by not responding to the June 30, 2003 OPRA request until July 14, 2003. However the custodian delay in providing access does not rise to a level of knowing under the totality of the circumstances giving the issues surrounding the seat of OPRA request and the technical difficulties in making the necessary redactions of the tape.
3. The custodian acted properly and in accordance with NJSA 47:1a-1.1 in making and explain the redactions of the tape.
4. The custodian alleged imposition of the use of OPRA request forms did not hinder the complainant access to the requested documentation.
5. The custodian did provide the record under the OPRA request however FERPA is a valid preemption to the records request.

The Council is in discussion on lack of receipt. Ms. Schonyers: Just to be consistent because there was a delay in the response is it appropriate to add the custodian to the matrix because it may tighten up their internal procedures?

Mr. Maltese: to be consistent I think that this custodian names should go on the matrix and there could be a footnote to show that there may be mitigating circumstances that we would consider if in fact this custodian is brought before us again.

Mr. Maltese called a motion to accept the Executive Directors findings and recommendations. The motion was made by Ms. Schonyers and seconded by Ms. Minus-Vincent. The Motion was passed on roll call:

Ayes: Ms. Schonyers, Ms. Minus-Vincent, and Mr. Maltese

Nays: None

T.S. v. Division of Criminal Justice (2003-102)

Ms. Luzzatto: This case was originally decided in February 27, 2004. The Council dismissed the case finding that they had accepted the custodian's certification that there was no record information based on legal parameters under an expungement statute. The complainant appealed the Council's decision to the Appellate Division of Superior Court January 2005 and we just received a decision from the Appellate Division on March 2, 2005, which remanded the case to the GRC consistent with their findings. On that same day we received an e-mail from the complainant that he wished to withdraw on his OPRA request and that he was not waiving any rights under the expungement statute. There is no further action required by the Council and we respectfully request that the case be closed.

Mr. Maltese called a motion to accept the Executive Directors findings and recommendations as written. The motion was made by Ms. Schonyers and seconded by Ms. Minus-Vincent. The Motion was passed on roll call:

Ayes: Ms. Schonyers, Ms. Minus-Vincent, and Mr. Maltese

Nays: None

NJ Libertarian Party v. Division of Youth and Family Services (2004-114)

Chris Malloy: The Council heard this case at the January 13, 2005 public meeting. He stated that the Executive Director recommends that the council dismiss the case on the bases that the custodian has complied with the Council's January 13, 2005 decision.

Mr. Maltese called for a motion to accept the Executive Director's findings and recommendations as written. The motion was made by Ms. Minus-Vincent and seconded by Ms. Schonyers. The Motion was passed on roll call:

Ayes: Ms. Schonyers, Ms. Minus-Vincent, and Mr. Maltese

Nays: None

Barbara Schwarz v. NJ State Library (2004-123)

Chris Malloy reviewed the positions of the parties in this case and the GRC staff analysis set forth in the Findings and Recommendations of Executive Director. He stated that the Executive Director respectfully recommends that the Council find that the Library inventory should not be considered part of the body of administrative records and that there are no records found to be responsive to the request.

Mr. Dice: We are not saying that the administrative records of the library are not subject to OPRA; we are limiting this to the Library inventory.

Mr. Maltese: Are the books and what we find on the shelves government record? Your position is that they are not; however, such things as purchase orders or other records the library keeps for purposes of operating library would be government records.

Mr. Dice: Based on what we are able to find in Title 18, which is the statute that makes the differentiation of what is a library record, we do not find, for the purposes of OPRA, that the records in circulation in the library should be considered government record. We have come to conclusion that it is outside of the scope of OPRA.

Mr. Maltese: What weight did you put on the issue about duty to research in this case?

Mr. Dice: We would find that if there were a government record responsive, the individual would have to disclose them pursuant to OPRA. I believe the custodian has the duty to determine whether they have a government responsive to the document.

Mr. Maltese called for a motion to accept the Executive Director's findings and recommendations as written. The motion was made by Ms. Schonyers and seconded by Ms. Minus-Vincent. The Motion was passed on roll call:

Ayes: Ms. Schonyers, Ms. Minus-Vincent, and Mr. Maltese

Nays: None

Chanka Kawanzaa v. NJ Department of Corrections (204-167)

Ms. Gardner reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in Findings and Recommendations of the Executive Director. She presented the recommendations of the Executive Director to dismiss the case on the basis of:

1. The requested records have been disclosed and pursuant to N.J.S.A. 47:1A-7(b) the Council does not have jurisdiction over the accuracy of the documents content.
2. While the Custodian did violate N.J.S.A. 47:1A-5(g) by not promptly complying with the records request, the Custodian's actions does not rise to a level of a knowing and willful violation of OPRA under the totality of the circumstances.

Mr. Maltese called for a motion to accept the recommendations of the Executive Director as written. The motion was made by Ms. Minus-Vincent and seconded by Ms. Schonyers. The motion was passed on roll call:

Ayes: Ms. Schonyers, Ms. Minus-Vincent, and Mr. Maltese

Nays: None

Pablo Caban v. Department of Corrections (2004-174)

Ms. Gardner reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in Findings and Recommendations of the Executive Director. She presented the recommendations of the Executive Director to dismiss the case on the basis of:

1. The Custodian provided the Complainant with the information necessary to obtain the requested records.
2. The requested records are exempt from disclosure because N.J.S.A. 47:1A-9(a) states that an Executive Order preempts disclosure and Executive Order #26 sec. 4 (b) 1 states that medical records are exempt from disclosure.

Mr. Maltese called for a motion to accept the recommendations of the Executive Director as written. The motion was made by Ms. Minus-Vincent and seconded by Ms. Schonyers. The motion was passed on roll call:

Ayes: Ms. Schonyers, Ms. Minus-Vincent, and Mr. Maltese

Nays: None

Barbara Schwartz v. Rutgers University (2004-183)

Mr. Malloy reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in Findings and Recommendations of the Executive Director. She presented the recommendations of the Executive Director to dismiss the case on the basis of:

1. The library inventory is not considered part of the body of administrative records and therefore, is not within the scope of the Open Public Records Act.
2. The Custodian certified that no government records responsive to the request were found pursuant to the Open Public Records Act.

Mr. Maltese called for a motion to accept the recommendations of the Executive Director as written. The motion was made by Ms. Schonyers and seconded by Ms. Minus-Vincent. The motion was passed on roll call:

Ayes: Ms. Schonyers, Ms. Minus-Vincent, and Mr. Maltese

Nays: None

Robert Blau v. Somerset County (2003-86)

Ms. Gardner stated that on February 18, 2005 the case was returned to Government Records Council from the Office of Administrative Law because the complaint was withdrawn pursuant to a February 9, 2005 letter from the Complainant. She reviewed the Executive Director's recommendation to close this case based on the Complainant's withdrawal of his complaint.

Mr. Maltese called for a motion to accept the recommendations of the Executive Director as written. The motion was made by Ms. Schonyers and seconded by Ms. Minus-Vincent. The

motion was passed on roll call:

Ayes: Ms. Schonyers, Ms. Minus-Vincent, and Mr. Maltese

Nays: None

Mr. Dice: Ladies and Gentleman of the public if you are wondering why certain withdrawals are listed as administrative action and certain withdrawals are not. If we have a case that the council has already acted on, as is the Blau case where the council referred the case to the Office of Administrative Law, it is necessary for the Council to close the case.

Larry Loigman v. Township of Middletown (2004-138)

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

1. The Custodian did not violate N.J.S.A. 47:1A-5(i) in requesting an extension of time to produce the requested records.
2. The Complainant has not been denied access to government records since the records have been offered after receipt of payment of a special service charge.
3. The \$182.00 special service charge is lawful pursuant to N.J.S.A. 47:1A-1, et. seq. Records should be disclosed upon payment of the special service charge and statutory copying costs set forth in N.J.S.A. 47:1A-5(b).
4. The GRC does not have jurisdiction to regulate how a Custodian utilizes its counsel in its response to records requests.

The Council noted a correction to the findings and recommendations in the heading. The heading should be amended to read "Township of Middletown."

Mr. Maltese called for a motion to accept the recommendations of the Executive Director as written. The motion was made by Ms. Schonyers and seconded by Ms. Minus-Vincent. The motion was passed on roll call:

Ayes: Ms. Schonyers, Ms. Minus-Vincent, and Mr. Maltese

Nays: None

Frank Culmone v. Longport Police Department (2004-147)

William Hewitt v. Longport Police Department (2004-148)

Ms. Knoedler noted that these cases are combined. She reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in Findings and Recommendations of the Executive Director. She presented the recommendations of the Executive Director to dismiss the case on the basis of:

1. The records requested are not disclosable under N.J.S.A. 47:1A-10 as they are personnel and pension records and the Complainant is not an “individual in interest” of the records.
2. Although the Custodian was not aware of the requests, the Chief of Police, as an employee of the public agency, has a statutory obligation to forward the request to the Custodian so that she may fulfill the request within the statutory time frame established by OPRA.
3. The issue of a formal grievance being filed does not need to be addressed because the records are clearly not disclosable pursuant to N.J.S.A. 47:1A-10 as they are personnel and pension records.

Mr. Maltese called for a motion to accept the recommendations of the Executive Director as written in both cases. The motion was made by Ms. Minus-Vincent and seconded by Ms. Schonyers. The motion was passed on roll call:

Ayes: Ms. Schonyers, Ms. Minus-Vincent, and Mr. Maltese

Nays: None

Larry Loigman v. Township of Middletown (2004-165)

Ms. McGann reviewed the Executive Director’s Findings and Recommendations with the recommendation that the Council conduct a fact-finding hearing at the April 14, 2005 meeting as set forth in the February 10, 2005 interim decision of the GRC.

Mr. Maltese: You received no response from either party Mr. Dice?

Mr. Dice: No, we have not.

Mr. Maltese called for a motion to accept the recommendations of the Executive Director as written. The motion was made by Ms. Schonyers and seconded by Ms. Minus-Vincent. The motion was passed on roll call:

Ayes: Ms. Schonyers, Ms. Minus-Vincent, and Mr. Maltese

Nays: None

Howard Avin v. Borough Clerk of Oradell (2005-175)

Howard Avin v. Borough of Ridgewood (2004-178)

Howard Avin v. Borough of Waldwick (2004-179)

Howard Avin v. Borough of Ramsey (2004-181)

Howard Avin v. Borough of Franklin Lakes (2004-182)

Ms. McGann reviewed the background information of the cases set forth in the Executive Director’s Finding and Recommendations with the recommendation that the requested records not be disclosed.

Council's discussed the privacy issues presented in these cases and concurred with the Executive Director's decision.

Mr. Maltese commented that he wants to make it clear that in rendering our decision in these cases, assuming we decide that the information was properly withheld, we understand it is based on the specific facts that are set forth in these cases.

Mr. Maltese called for a motion to accept the recommendations of the Executive Director as written. The motion was made by Ms. Schonyers and seconded by Ms. Minus-Vincent. The motion was passed on roll call:

Ayes: Ms. Schonyers, Ms. Minus-Vincent, and Mr. Maltese

Nays: None

Tina Renna v. County of Union (2004-191)

Ms. McGann reviewed the background information of the cases set forth in the Executive Director's Finding and Recommendations with the recommendation that the Council find that:

1. The Complainant received the requested records and the Complainant's confirmation of same.
2. The Custodian responded to the request in writing but did not explain that more time was needed to provide the requested documents.
3. The actions of the Custodian do not rise to a level of knowing and willful pursuant to N.J.S.A. 47:1A-1 et. seq. under the totality of the circumstances.

Mr. Maltese noted that on page one (1) of the findings and recommendations it reflects that the request was made on October 27, 2004 and the response made on October 28, 2004. He suggested that this should be amended to indicate the October 28, 2005 date was an acknowledgment of receipt of OPRA request only and add November 17, 2004 and December 1, 2004 as the dates when meaningful responses were submitted. So, accordingly this would again place the Custodian on the matrix.

Mr. Maltese suggested that the Council adopt 1 & 2 of the Executive Director's recommendations and hold a decision on 3 pending a review the factual information of the case by the Executive Director.

Mr. Maltese called for a motion to accept the recommendations of the Executive Director as amended. The motion was made by Ms. Schonyers and seconded by Ms. Minus-Vincent. The motion was passed on roll call:

Ayes: Ms. Schonyers, Ms. Minus-Vincent, and Mr. Maltese

Nays: None

Rory Moore v. Old Bridge Township (2004-209)BIU

Ms. McGann reviewed the background information of the cases set forth in the Executive Director's Finding and Recommendations with the recommendation that the Council find the:

1. The Custodian shall release a copy of the Township's Ethics Code in its current form pursuant to N.J.S.A. 47:1A-1 et seq.
2. The Custodian shall release records, if in existence, regarding the response Ms. Ward made on establishing a quorum pursuant to N.J.S.A. 47:1A-1 et seq.
3. Notification of the completion of items #1 and #2 shall be sent to the Executive Director within five (5) business days.
4. Upon completion of items #1- #3 to the satisfaction of the Executive Director, the case will be summarily dismissed.

Mr. Maltese called for a motion to accept the recommendations of the Executive Director as written. The motion was made by Ms. Schonyers and seconded by Ms. Minus-Vincent. The motion was passed on roll call:

Ayes: Ms. Schonyers, Ms. Minus-Vincent, and Mr. Maltese

Nays: None

Mr. Maltese asked the Executive Director if he had any personnel matters to report at this time? Mr. Dice stated that he nothing to report.

Having discussed all cases listed on the agenda with the exception of the cases that will be rescheduled for the next meeting, Mr. Maltese opened the meeting to public comment.

Public comment by: Joe Renna

His comments were:

1. Union County denies or delays access to requested records waiting until the 7th day to respond; they are not using OPRA right under the law.
2. The request goes to a part time employee and is then sent to a County counsel person who does not work on Fridays.
3. The delays or being misinformed causes the need for the document to pass.
4. Requests that the GRC define the Matrix
5. If information is wrong or suspect, "what recourse does the public have?"

Mr. Maltese called for a motion to adjourn the meeting. Ms. Minus-Vincent made the motion to adjourn the meeting and Ms. Schonyers seconded the motion. By a consensus of the members the meeting was adjourned at 1:00 p.m.

Respectfully submitted,



DeAnna Minus-Vincent

Secretary

Dated: August 11, 2005