

GOVERNMENT RECORDS COUNCIL
September 11, 2003 Public Meeting – Open Session

The meeting was called to order at 9:35 a.m. at the Department of Community Affairs, Room 235A, Trenton, New Jersey. Chairman Vincent Maltese read the Open Public Meetings Act statement.

Mr. Pfeiffer called the roll:

Present: Vincent Maltese, Chairperson; Bernard Spigner, Vice Chairperson; Virginia Hook, Secretary; Matthew U. Watkins (designee of Commissioner Susan Bass Levin, Department of Community Affairs) and Diane Schonyers (designee of Commissioner William Librera, Department of Education).

Also Present: Barbara Conklin and Juliet Wyne, Deputy Attorneys General; Marc Pfeiffer, Acting Executive Director; Paul Dice, Assistant Executive Director and Marc Leavitt, Staff Associate.

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 with a second by Bernard Spigner. All members approved the resolution. The Council met in closed session from 9:35 to 10:30 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 attendees recited the Pledge of Allegiance, after which Mr. Pfeiffer called the roll:

Present: Vincent Maltese, Chairperson; Bernard Spigner, Vice Chairperson; Virginia Hook, Secretary; Matthew U. Watkins and Diane Schonyers.

Also Present: Barbara Conklin and Juliet Wyne, Deputy Attorneys General; Marc Pfeiffer, Acting Executive Director; Paul Dice, Assistant Executive Director and Marc Leavitt, Staff Associate

Mr. Spigner asked for a moment of silence in remembrance for those lost two years ago at the World Trade Center and other sites.

Mr. Maltese asked for a motion to accept the closed and open minutes of the August 14, 2003 meetings that the Executive Director distributed prior to this meeting. Mr. Watkins moved to accept the motion as stated with a second by Mrs. Hook. The motion was adopted by roll call:

Ayes: Ms. Hook, Mr. Spigner, Mr. Watkins, Mr. Maltese

Abstentions: Ms. Schonyers

Nays: None

Mr. Pfeiffer presented the Executive Director's monthly report. He said that Attorney General advice regarding "knowing and willful" conduct under OPRA and whether school board attorneys could be considered "public officials" subject to OPRA penalties were not ready for this meeting. Copies of the Executive Director's report were made available to the public.

Shain vs. the Township of Lakewood (2002-110)

Mr. Pfeiffer explained that this complaint concerns a November 2002 request for copies of all "initial statements and questionnaires" of tax-exempt property in the Township. There are over 500 such documents. Given a combination of workload, statutory deadlines in the office, and staff leave schedules, the custodian advised that the request would not be fulfilled until the end of January. The requestor did receive copies as they were made. 150 copies were provided within the first seven days. The requester filed a complaint at the end of December.

Because the requestor has received all of the requested records, the only remaining issue for Council adjudication is whether there has been a violation of OPRA under N.J.S.A. 47:1A-11. In this regard, the Executive Director recommends that because the request for access substantially disrupted agency operations and the Township attempted to reach a reasonable solution with the requestor for providing the documents, the Township was justified in denying access by not providing the documents within seven business days. Therefore, there was no violation of OPRA under N.J.S.A. 47:1A-11. Mr. Pfeiffer recommended that the case be dismissed.

Mr. Maltese asked for a motion to approve the Findings and Recommendation of Executive Director dated September 4, 2003. Mr. Spigner offered the motion as stated. Ms. Schonyers offered a second. The motion was adopted by roll call:

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

Nays: None

Shain vs. the Township of Lakewood (2003-111)

Mr. Pfeiffer stated that the complaint concerns a request for copies of contracts of a certain attorney hired by the Township and copies of itemized statements of work performed by said attorney over a period of time. The Township failed to provide immediate access to the request for contracts and provided the itemized statements five months later. No explanations for the delay have been provided. The requestor has received all requested documents.

There are contradicting claims concerning when documents were made available to the requestor (December or April). These claims become irrelevant in the context of the initial failure to disclose on a timely basis.

Mr. Pfeiffer stated his finding that the custodian violated the requirements of OPRA to provide access to copies of contracts immediately upon request, and waiting five months to provide copies of the itemized statements of attorney invoices. However, there was also no factual basis to conclude that the custodian knowingly and willfully violated OPRA. He recommended that the case be dismissed. Further, he recommended that the custodian and governing body be warned that future violations of this nature could result in a finding that the custodian “knowingly and willfully” violated OPRA.

The Council members discussed the education of custodians and the concept of “knowing and willful” violations of OPRA.

Mr. Maltese suggested that the Council accept the Findings and Recommendation of Executive Director dated September 5, 2003 with the following modifications:

- Dismiss the portion of the complaint seeing access to the records;
- Carry the “knowing and willful” penalty issue to the October meeting given the Council’s need for advice from the Office of the Attorney General; and
- Advise the Executive Director to seek an explanation from the custodian why the custodian’s actions do not rise to the level of a knowing and willful violation.

Mr. Watkins offered the motion as stated. Ms. Schonyers offered a second. The motion was adopted by roll call:

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

Nays: None

Brower vs. Chatham Township (2003-30)

Mr. Pfeiffer explained that this complaint concerns a request for the "name of the person who called the custodian to complain" that a candidate's wife was working at a polling place. The custodian certified that a written record of the name of the person does not exist. The requestor claims that the custodian admitted to him that the name of the complainant was in a file, but upon going to obtain it, decided not to disclose it. The custodian denies that such an admission was made, and asserts that she walked to her file cabinet because the "intimidating attitude" of the requestor, a newly elected Council member, made her extremely nervous. The Township Administrator confirms that no record exists, as does the Manager of the County Board of Elections.

Mr. Pfeiffer explained that the credible evidence supports the conclusion that a government record identifying the name of the individual who questioned the custodian does not exist and recommends that the Council dismiss the Complaint. Mr. Pfeiffer observed that even if the custodian knows who the individual is, OPRA does not require a custodian to create a government record if none exists.

Mr. Maltese asked for a motion to accept the Findings and Recommendation of Executive Director dated September 5, 2003. Mr. Spigner offered the motion as stated. Ms. Hook offered a second. The motion was adopted by roll call:

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

Nays: None

Seery v Upper Pittsfield (Complaint 2003-38)

Mr. Pfeiffer explained that this complaint concerns a request for copies of GIS "maps" the requestor claims he observed being presented by the Township mayor at various municipal meetings and which were stored in the municipal building. The custodian denied access claiming that the maps were "not the property" of the municipality because they were loaned to the mayor by vendor developing of the mapping program on a personal basis and were not final products. The map vendor stated the maps were not yet "available for public use" because the mapping is still being tested for accuracy but admitted they had been made available to several municipalities to support "time sensitive internal projects."

Mr. Pfeiffer stated his finding that the maps are government records and that any notations or markings on the maps may be redacted if they qualify as confidential material under OPRA. He concluded that the custodian did not knowingly and willfully violate OPRA by denying access in this case and recommended that the Council order the custodian to provide the requestor access to the maps.

A discussion then ensued.

Mr. Maltese called for a motion accept the Findings and Recommendation of Executive Director dated September 5, 2003 with an added provision that the order of access will be effective 10 days from the meeting date to provide the custodian an opportunity to appeal the decision, if so desired. Ms. Hook offered the motion as stated. Mr. Spigner offered a second. The motion was adopted by roll call.

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

Nays: None

Reda vs. Township of West Milford (Complaints 2002-58 and 2003-49)

Mr. Pfeiffer suggested the Council combine these cases as they involve substantially the same type of documentation. He stated that the complaints involve claims of advisory, consultative, or deliberative (ACD) privilege for a large and undetermined number of e-mails between the Township manager or clerk and two named council members. This is the Council's first case concerning e-mail claimed to be ACD and the first in which an index of records is necessary.

One complaint concerns e-mails sent or received between January 1, 2002 and September 19, 2002, and the other, September 20, 2002 through January 17, 2003. The custodian provided an index of 130 e-mails in Complaint 2002-58 that was of limited use and recently advised that a professional search of its computer system revealed additional e-mails requiring indexing. The custodian has offered to provide an index for e-mails covered by Complaint 2003-49.

Mr. Pfeiffer explained that the description of the e-mails in the custodian's index do not provide sufficient information to allow the Council to assess the custodian's claim of confidentiality. Given the time-consuming process of in camera inspection and the likelihood many more e-mails will be added to the complaints, Mr. Pfeiffer recommended that the matters be referred to the Office of Administrative Law for hearing, assembly of a record, and an Initial Decision of findings of fact and conclusions of law pursuant to the Administrative Procedures Act that the Council may accept, reject or modify.

Ms. Hook offered a motion to accept the Interim Findings and Recommendations of Executive Director dated September 5, 2003 and transmit the matters to OAL. Mr. Watkins offered a second. The motion was adopted by roll call:

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

Nays: None

Blanchard v. Rahway Board of Education (2003-57)

Mr. Maltese noted that Blanchard v. Rahway Board of Education would be carried over until the Council's October meeting. In response to communications from the requestor, Mr. Maltese instructed Mr. Pfeiffer to advise the requestor that if the Council imposed a fine, the money would not go to the requestor.

L.E. Fisher v. the Township of Fairfield (Essex) [2002-38]

Mr. Pfeiffer stated that this complaint involved a request for an attorney voucher that the custodian initially disclosed with redactions to protect alleged attorney-client privileged material. Over the course of the investigation, and through correspondence between the parties and the Council, the custodian revealed additional material while maintaining the privileged nature of remaining redactions. At issue were the justifications for the privileges and the challenge to the privilege presented by the disclosure of information to a legal adversary.

The custodian recently produced the full, unredacted invoice. Because the custodian has voluntarily disclosed the requested record, the requestor is not a prevailing party for the purposes of awarding attorney fees under OPRA. Although the custodian and custodian counsel was less than thorough in complying with the OPRA requirements for providing an explanation for the redactions, there is no evidence to support a finding that the custodian knowingly and willfully violated OPRA. Under these circumstances, Mr. Pfeiffer recommended that this complaint be dismissed.

A discussion among the Council members then ensued regarding prevailing party.

Mr. Maltese asked for a motion to accept the Findings and Recommendations of Executive Director dated September 5, 2003. Mr. Watkins offered the motion as stated. Ms. Schonyers seconded the motion.

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

Nays: None

Mr. Maltese turned to new business.

Mr. Pfeiffer reported on the proposed Custodian Consequence Policy in cases where custodian conduct fell short of a knowing and willful violation of OPRA. The proposed policy would allow the Council to issue custodians reminders, admonitions or reprimands and, finally, censure.

Mr. Maltese stated it was the consensus of the Council to solicit public comment on the proposal and post it on the GRC web site. He asked for a motion. Mr. Watkins offered the motion as stated. Mr. Spigner seconded the motion. The motion was adopted by roll call:

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

Nays: None

Mr. Maltese opened the meeting to the public.

Cynthia Jablonski, Department of Treasury, asked about the Seery case. Since the municipality did not own the map, who would be liable if its release resulted in damages to the owner. Mr. Maltese said it was produced by an outside company for use by the governing body, and became a public record when it was taken to the municipal building to be used. Deputy Attorney General Barbara Conklin said that the Council could not generalize about such a broad question, since the facts in each case would be different.

Donna Snyder, clerk and business administrator for Mansfield Township, and representing the state Municipal Clerks Association, asked Mr. Pfeiffer about site plans and architectural plans. She said that in the former case, it was necessary to prevent removal of site plans from government offices for copying in order to preserve the integrity of the files and that her practice is to call the architect before her staff made copies of copyrighted plans.

Leslie Fehrenbach of Rutgers University reminded the Council that not all custodians are municipal clerks and urged the Council to make information available to state universities and colleges in a timely fashion.

Mr. Maltese asked for a motion to adjourn. Ms. Schonyers offered the motion as stated. Mr. Watkins seconded the motion.

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

Nays: None

The meeting was adjourned at 11:40 a.m.

Respectfully submitted,

A handwritten signature in black ink that reads "Virginia Hook". The signature is written in a cursive style with a horizontal line extending from the end of the name.

Virginia Hook, Secretary