

[N.J.A.C. 5:105](#)

This file includes all Regulations adopted and published through the New Jersey Register, Vol. 54 No. 21,
November 7, 2022

*NJ - New Jersey Administrative Code > TITLE 5. COMMUNITY AFFAIRS > CHAPTER 105. COMPLAINT
ADJUDICATION AND OPEN PUBLIC RECORDS ACT (OPRA) INFORMATION INQUIRY PROCEDURES*

Title 5, Chapter 105 -- Chapter Notes

Statutory Authority

CHAPTER AUTHORITY:

[N.J.S.A. 47:1A-7](#) and [52:14B-3](#).

History

CHAPTER SOURCE AND EFFECTIVE DATE:

R.2022 d.138, effective October 3, 2022.

See: [54 N.J.R. 809\(a\)](#), [54 N.J.R. 2081\(a\)](#).

CHAPTER HISTORICAL NOTE:

Chapter 105, Complaint Adjudication and Open Public Records Act (OPRA) Information Inquiry Procedures, was adopted as new rules by R.2008 d.115, effective May 5, 2008. See: [39 N.J.R. 1557\(a\)](#), [40 N.J.R. 2237\(a\)](#).

In accordance with N.J.S.A. 52:14B-5.1b, Chapter 105, Complaint Adjudication and Open Public Records Act (OPRA) Information Inquiry Procedures, was scheduled to expire on May 5, 2015. See: [43 N.J.R. 1203\(a\)](#).

Chapter 105, Complaint Adjudication and Open Public Records Act (OPRA) Information Inquiry Procedures, was readopted, effective April 5, 2015. See: [47 N.J.R. 891\(a\)](#).

Chapter 105, Complaint Adjudication and Open Public Records Act (OPRA) Information Inquiry Procedures, was readopted as R.2022 d.138, effective October 3, 2022. See: Source and Effective Date. See, also, section annotations.

Annotations

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Research References & Practice Aids

CHAPTER EXPIRATION DATE:

Chapter 105, Complaint Adjudication and Open Public Records Act (OPRA) Information Inquiry Procedures, expires on October 3, 2029.

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[N.J.A.C. 5:105-1.1](#)

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§ 5:105-1.1 Purpose, scope, conformance, and construction of rules

- (a) The rules in this chapter are for the purpose of establishing procedures for the consideration of complaints filed pursuant to the Act, and for the benefit of any person seeking to utilize the Council as an information resource for understanding the Act and/or the functions of the Council.
- (b) Any aspect of the adjudicatory process for denial of access complaints not covered by this chapter shall be governed by the Administrative Procedures Act, [N.J.S.A. 52:14B-1](#) et seq., and the Uniform Administrative Procedure Rules, *N.J.A.C. 1:1*. To the extent that these rules are inconsistent with the Administrative Procedures Act and Uniform Administrative Procedure Rules, the rules in this chapter shall apply.
- (c) The rules in this chapter shall be liberally construed to permit the Council to discharge its statutory function.
- (d) The rules in this chapter shall conform to the requirements of the Administrative Procedures Act, [N.J.S.A. 52:14B-1](#) et seq., and the Uniform Administrative Procedure Rules, *N.J.A.C. 1:1*, except as otherwise provided in this chapter.

History

HISTORY:

Amended by R.2022 d.138, effective November 7, 2022.

See: [54 N.J.R. 809\(a\)](#), [54 N.J.R. 2081\(a\)](#).

Section was "Purpose and scope". Added (c) and (d).

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[N.J.A.C. 5:105-1.2](#)

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§ 5:105-1.2 (Reserved)

History

HISTORY:

Repealed by R.2022 d.138, effective November 7, 2022.

See: [54 N.J.R. 809\(a\)](#), [54 N.J.R. 2081\(a\)](#).

Section was "Construction of the rules".

Annotations

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[N.J.A.C. 5:105-1.3](#)

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§ 5:105-1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

"Act" or "OPRA" means the New Jersey Open Public Records Act, [N.J.S.A. 47:1A-1](#) et seq.

"Administrative Complaint Disposition" means a decision of the Council as to whether to accept or reject the Executive Director's recommendation of dismissal based on jurisdictional, procedural or other defects of the complaint.

"Administrative order" means an order issued by the Council requiring the records custodian or the complainant to perform a specific action in furtherance of the adjudication of a pending denial of access complaint or taking other actions deemed appropriate to adjudicate a complaint in an expedited manner.

"Advisory opinion" means an opinion issued by the Council regarding the accessibility of a particular record as a government record pursuant to [N.J.S.A. 47:1A-7.b](#).

"Chairperson" means the presiding officer of the Government Records Council.

"Complaint" or "denial of access complaint" means a denial of access complaint submitted to the Council on a form authorized by the Council in which a requestor claims that a custodian has unlawfully denied the requestor access to a government record.

"Complainant" means a person who made an OPRA request of a public agency and filed a denial of access complaint with the Council.

"Custodian of a Government Record" or "Custodian" means in the case of a municipality, the municipal clerk and in the case of any other public agency, the officer officially designated by formal action of that agency's director or governing body, as the case may be.

"Effective date" means the date upon which the Council renders a decision related to a matter awaiting adjudication, or such other date upon which the Council desires to make a decision effective.

" *Ex parte* communication" means a communication, either oral or written, from one party to the Government Records Council regarding the merits of a pending complaint without the knowledge of other participating parties. This definition shall not include general inquiries as to the status of a complaint or other general inquiries about OPRA.

"Fair preponderance of the credible evidence" means superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

"Government record" or "record" means any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of official business by any officer, commission,

agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof pursuant to [N.J.S.A. 47:1A-1.1](#).

"Government Records Council" or "Council" means the public agency established by the Act to adjudicate denial of access complaints and provide information regarding the Act and the Council to requestors of government records, custodians and the general public pursuant to [N.J.S.A. 47:1A-7.a](#).

"Hearing Officer" means a Council member, or the Executive Director, who receives testimony and documentary evidence regarding a denial of access complaint, inspects records or receives testimony *in camera*, and assembles a record of those proceedings for later review and adjudication by the Council.

"*In camera*" or "*in camera* inspection" means a proceeding in which the Council or hearing officer inspects a government record and receives testimony, if any is necessary for the Council to determine whether the record requested by the complainant should be publicly accessible under the Act over the custodian's objection or claim that the record is exempt from disclosure by virtue of a provision in the Act, or other applicable law.

"Inquiry" means a request from the public, including custodians, submitted to the Council, in writing, or from the toll-free helpline, for information regarding or assistance with the Act, the Council, and issues and matters regarding access to government records.

"Interim order" means an order issued by the Council during the pendency of an adjudication including, but not limited to, an order that requires the custodian or the complainant to perform some act in accordance with OPRA, the compliance of which must be reported back to the Council, or an order that refers a matter to the Office of Administrative Law.

"Intervenor" means a person or party who moves to intervene in an existing denial of access complaint.

"Letter of Representation" means a letter submitted to the Council by a person representing a party in a proceeding before the Council.

"Mediation" means an informal, non-adversarial process led by a mediator and having the objective of helping the parties to a denial of access complaint reach a mutually acceptable, voluntary agreement pursuant to [N.J.S.A. 47:1A-7.b.](#), [47:1A-7.d.](#) and [47:1A-7.e.](#)

"Mediation Settlement Agreement" means a written agreement between the complainant and the custodian reached during the mediation process memorializing a resolution of some or all of the issues presented during the mediation process.

"Mediator" means a neutral person who is trained in dispute resolution techniques and who was selected by the Council to intervene between parties to a denial of access complaint in an effort to help them resolve their differences pursuant to [N.J.S.A. 47:1A-7.b.](#)

"New evidence" means evidence that could not have been provided prior to the Council's decision because the evidence did not exist or was unknown to the party at that time.

"Party" means a complainant, custodian, intervenor, and their representatives.

"Penalty" means the civil penalty which may be imposed upon an official, officer, employee, or custodian who knowingly and willfully violates the Act and is found to have unreasonably denied access to the requested government record under the totality of the circumstances pursuant to [N.J.S.A. 47:1A-11](#).

"Person" means natural person, partnership, corporation, limited liability company, association, or society.

" *Prima facie* evidence" means evidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.

"Public agency" or "agency" means any of the principal departments in the executive branch of State government, and any division, board, bureau, office, commission, or other instrumentality within or created by such department; the legislature of the State and any office, board, bureau, or commission within or created by the legislative branch; and any independent State authority, commission, instrumentality, or agency pursuant to [N.J.S.A. 47:1A-1.1](#). The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission, or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality, or agency created by a political subdivision or combination of political subdivisions.

"Representative" means a person who has the authority from the Council or the State of New Jersey to represent a party in a proceeding before the Council.

"Requestor" means a person who delivers to a public agency an OPRA request to copy, examine, or inspect a government record pursuant to the Act.

"Revised interim order" or "revised final decision" means a decision issued by the Council that follows an interim order or final decision correcting a non-substantive or factual error.

"Secretary" means Secretary of the Council.

"Staff" or "Council staff" means the professional and clerical staff that the Council may employ as it deems necessary pursuant to [N.J.S.A. 47:1A-7.a](#).

"Statement of Information" means a written response to a complaint, and all attachments thereto, submitted to the Council by a custodian or his or her representative.

" *Sua sponte*" means the Council's ability to raise issues, legal defenses, or other matters not raised by the parties to a denial of access complaint.

"Vice Chairperson" means the presiding officer of the Council in the absence of the Chairperson.

History

HISTORY:

Amended by R.2022 d.138, effective November 7, 2022.

See: [54 N.J.R. 809\(a\)](#), [54 N.J.R. 2081\(a\)](#).

Added definitions "Administrative order", " *Ex parte* communication", "Intervenor", "New evidence", " 'Revised interim order' or 'revised final decision' "; rewrote "Complaint", "Inquiry", "Interim order", "Party", "Penalty", "Person", " 'Public Agency' or 'agency' ", "Requestor", " *Sua Sponte*"; and deleted definition " 'Supplemental decision' or 'revised final decision' ".

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[N.J.A.C. 5:105-1.4](#)

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§ 5:105-1.4 Description of the Council

(a) The Council shall consist of the Commissioners of the Department of Community Affairs and the Department of Education, or their designees, and three members of the public (not more than two of which can be of the same political party) appointed by the Governor with the advice and consent of the Senate pursuant to [N.J.S.A. 47:1A-7.a](#). The Council is supported by an Executive Director, and professional and clerical staff.

(b) Contact information for the Council:

State of New Jersey

Government Records Council

101 South Broad Street

PO Box 819

Trenton, New Jersey 08625-0819

Toll Free: (866) 850-0511

Direct Phone: (609) 292-6830

Fax: (609) 633-6337

Email:

Government.Records@dca.nj.gov

Website: www.nj.gov/grc

(c) All communications to Council members, Executive Director or staff shall be delivered to the contact information listed above, or to any such other address that the Council may direct from time to time.

(d) The Council's website, www.nj.gov/grc, shall contain the Act, the Council's public meeting schedule, denial of access complaint forms, Council and legal decisions, frequently asked questions and other reference materials that the Council deems appropriate.

History

HISTORY:

Amended by R.2022 d.138, effective November 7, 2022.

See: [54 N.J.R. 809\(a\)](#), [54 N.J.R. 2081\(a\)](#).

In (b), substituted "PO" for "P.O." and "

Government.Records@dca.nj.gov

" for "

grc@dca.state.nj.us

".

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[N.J.A.C. 5:105-1.5](#)

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§ 5:105-1.5 Powers and duties of the Council

- (a) The Council shall have the following powers and duties pursuant to [N.J.S.A. 47:1A-7.b](#):
1. Adjudicate complaints filed with the Council regarding access to government records;
 2. Make mediation services available free of charge to complainants and custodians;
 3. Respond to inquiries about the Act or the Council from the public and public agencies; however, neither the Council nor staff shall provide legal advice to any member of the public, public agency, party, or person;
 4. Provide information about the Act and services available from the Council;
 5. Maintain a toll-free help-line and website to assist the public and custodians in obtaining information about the Act, the Council and issues and matters regarding access to government records;
 6. At the Council's discretion, issue advisory opinions on the accessibility of government records;
 7. Make training opportunities available to custodians, public officers, public employees and officials concerning the provisions of the Act; and
 8. Prepare for custodians lists of the types of records in possession of public agencies, which are government records accessible under the Act.

History

HISTORY:

Amended by R.2022 d.138, effective November 7, 2022.

See: [54 N.J.R. 809\(a\)](#), [54 N.J.R. 2081\(a\)](#).

Rewrote the section.

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[N.J.A.C. 5:105-1.6](#)

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§ 5:105-1.6 Records designated confidential

(a) In addition to records designated as confidential pursuant to the provisions at [N.J.S.A. 47:1A-1](#) et seq., any other law, rule promulgated under the authority of any statute or Executive Order of the Governor, resolution of both houses of the Legislature, Executive Order of the Governor, Rules of Court, or any Federal law, Federal rule, or Federal order, the following records shall not be considered government records subject to public access pursuant to [N.J.S.A. 47:1A-1](#) et seq.:

1. Denial of access complaint submissions, including, but not limited to, statements of information and sur-replies during the pendency of an adjudication by the Council;
2. Mediation communications as defined at P.L. 2004, c. 157 ([N.J.S.A. 2A:23C-4](#)) pertaining to the confidential mediation process of any individual denial of access complaint, except for the "Mediation Disposition Report"; and
3. Unredacted documents provided to the Council for an *in camera* review.

History

HISTORY:

Repeal and New Rule, R.2022 d.138, effective November 7, 2022.

See: [54 N.J.R. 809\(a\)](#), [54 N.J.R. 2081\(a\)](#).

Section was "Conformance".

Annotations

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[N.J.A.C. 5:105-2.1](#)

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§ 5:105-2.1 General provisions

- (a) Any requestor who is denied access, in whole or in part, to a government record by a custodian, at the option of the requestor, may file a complaint with the Council pursuant to [N.J.S.A. 47:1A-6](#). Such filing shall be made within 60-calendar days or, if the last day of the period is a Saturday, Sunday, or legal holiday, within the next business day, pursuant to [N.J.A.C. 1:1-1.4](#), after the requestor receives a response from the custodian that grants or denies access or, if the custodian does not respond within seven business days of the request, within 60-calendar days following the expiration of such seven-business-day period, whichever is later, unless accompanied by a motion to file within time, showing good cause.
- (b) The right to institute a proceeding before the Council shall solely be the right of the requestor pursuant to [N.J.S.A. 47:1A-6](#) of the Act.
- (c) The Council will handle complaints in a summary or expedited manner pursuant to [N.J.S.A. 47:1A-6](#) of the Act.
- (d) Upon receipt of a complaint, the Council will first determine whether any portion of the complaint is outside its jurisdiction, frivolous, or without factual basis. If the complaint falls within any of said categories, the Council shall reduce its determinations to writing and transmit a copy thereof to the complainant and to the custodian against whom the complaint was filed pursuant to [N.J.S.A. 47:1A-7.e](#).
- (e) If the Council concludes that the complaint is within its jurisdiction and is neither frivolous nor without factual basis, the Council shall proceed with the adjudication process.
- (f) At the request of the Council, any party shall produce documents and legal certifications to the facts and/or arguments presented with respect to matters before the Council pursuant to [N.J.S.A. 47:1A-7.c](#).
- (g) Discovery shall be limited to the submissions of the parties submitted to the Council.
- (h) In response to the complaint before it, the Council may raise issues and defenses pertaining to that complaint on a *sua sponte* basis if it deems such action appropriate or necessary and if said action on behalf of the Council would be in the interest of furthering the provisions and intent of the Act.
- (i) The Council shall not charge any party a fee in regard to actions filed with or proceedings before the Council pursuant to [N.J.S.A. 47:1A-7.f](#).
- (j) Council votes adjudicating a complaint shall be rendered at open public meetings of the Council. Parties, their representatives, or other persons are not permitted to make oral or written presentations to the Council regarding the complaint at the meetings unless requested by the Council to do so.

History

HISTORY:

Amended by R.2022 d.138, effective November 7, 2022.

See: [54 N.J.R. 809\(a\)](#), [54 N.J.R. 2081\(a\)](#).

Rewrote (a); in (d), updated the N.J.S.A. reference; and in (j), inserted "their representatives, or other persons".

Annotations

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[N.J.A.C. 5:105-2.2](#)

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§ 5:105-2.2 Parties to a complaint

- (a) The complainant and custodian shall always be parties to a complaint and, along with their legal representatives, shall be notified of all decisions or orders issued by the Council concerning a complaint. If a party secures representation following submission of a denial of access complaint, the party must notify the Council and all other parties immediately. The representatives of any party named in a complaint shall file with the Council a letter of representation and a copy of same shall be served upon all parties at the same time the Council receives the notification.
- (b) At the Executive Director's discretion, the Government Records Council may entertain an application for a party to intervene in a pending complaint consistent with the following:
1. Upon timely application, any person not initially a party who has a statutory right to intervene or who will be substantially, specifically, and directly affected by the outcome of a contested case may, on motion, seek leave to intervene;
 2. Parties must file any objections to the movant's application within 10 business days following receipt of the application;
 3. In ruling upon a motion to intervene, the Council shall take into consideration the nature and extent of the movant's interest in the outcome of the case, whether the movant's interest is sufficiently different from that of any party, so as to add measurably and constructively to the scope of the case, the prospect of confusion or undue delay arising from the movant's inclusion, and other appropriate matters;
 4. The Council will notify the parties of the acceptance or rejection of movant's application through an administrative order or interim order; and
 5. Persons permitted to intervene shall have all the rights and obligations of a party to the proceeding.
- (c) Notwithstanding (b)3 above, persons statutorily permitted to intervene shall be granted intervention.

History

HISTORY:

Amended by R.2022 d.138, effective November 7, 2022.

See: [54 N.J.R. 809\(a\)](#), [54 N.J.R. 2081\(a\)](#).

Rewrote the section.

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§ 5:105-2.3 Complainant document submissions to the Council

- (a) The complainant submitting a completed denial of access complaint on the form required pursuant to (c) below to the Council and custodian initiates the complaint process.
- (b) All submissions must be in writing. The Council shall not consider *ex parte* communications from any party.
- (c) Complaints shall be submitted on the Council's denial of access complaint form either through U.S. mail, facsimile, email, or through the Council's online interface. However, a courtesy copy of complaints exceeding 50 pages shall be submitted to the GRC at 101 South Broad Street, PO Box 819, Trenton, NJ 08625.
- (d) Complaint forms may be obtained from the Council's staff or downloaded from the Council's website (www.nj.gov/grc).
- (e) The complainant shall include in the complaint or the attachments thereto any information, issues, and arguments that the complainant wishes to bring to the Council's attention for consideration in the adjudication of the complaint. The complaint may also include any attachments, affidavits, certifications, or other documentation deemed relevant or supportive of the allegations set forth in the complaint.
- (f) Upon retention, an attorney representing a complainant in a matter before the Council shall submit to the Council a letter of representation. Failure to submit this letter will result in the Council considering the complainant to be *pro se*. The Government Records Council will only communicate with the complainant until receipt of the letter of representation.
- (g) A complainant may amend their complaint as a matter of right within 30 business days after the filing of the initial complaint. Such amendments must be submitted, in writing, to the Council with copies served simultaneously on all parties.
 - 1. Additional amendments or supplements to a complaint submitted beyond the 30-business-day amendment period shall only be accepted for consideration in the adjudication of a complaint when such acceptance is authorized by the Executive Director.
- (h) Objections to a party's representative by another party, and a party's response thereto, to the complaint must be in writing, presented to the Council, served on all parties, and include:
 - 1. The Council's case reference name and number;
 - 2. Clear identification of the representative in question; and
 - 3. A detailed explanation of the reasons for the objections, or conversely the response to such objections.

- (i) The Council, acting through its Executive Director, may require complainants to submit, within stipulated time limits, additional information deemed necessary for the Council to adjudicate the complaint.
- (j) The Council shall determine whether a complaint may proceed with the complainant remaining anonymous. To remain anonymous, the complainant must first make a clear and convincing showing that compelling circumstances exist such that:
1. There is a genuine risk of physical harm;
 2. The complaint will entail revelation of highly personal and private information;
 3. The very relief sought would be defeated by revealing the complainant's identity; or
 4. Other substantial reasons why identification of the party would be improper.
- (k) If the Council determines that the complainant has demonstrated compelling circumstances pursuant to (j) above, the Council shall then weigh the complainant's privacy interests against the public interest. If the complainant does not meet the burden of showing why they should proceed anonymously, the Council shall notify the complainant of the decision by administrative order. The Council shall dismiss the complaint unless the complainant submits a written statement expressing his or her willingness to proceed on a non-anonymous basis to the Executive Director within 30 days of receiving the Council's decision.
- (l) All complaints, including authorized anonymous complaints, shall include the complainant's name, address, telephone number or fax number, and email address, if available.

History

HISTORY:

Amended by R.2022 d.138, effective November 7, 2022.

See: [54 N.J.R. 809\(a\)](#), [54 N.J.R. 2081\(a\)](#).

Rewrote the section.

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§ 5:105-2.4 Custodian document submissions to the Council

- (a) Custodians shall submit a completed and signed statement of information (SOI) on the form required at (c) below to the Council and the complainant simultaneously that details the custodians' position for each complaint filed with the Council in all instances for which mediation is declined, mediation is not accepted by either party, or in which mediation is accepted but through which the parties do not fully resolve the issues presented. The custodian shall sign the completed SOI even if it is completed by their legal representative.
- (b) All submissions shall be in writing. The Council will not consider *ex parte* communications from any party.
- (c) SOIs shall be submitted on the Council's SOI form through either U.S. mail, facsimile, or email. A courtesy copy of SOIs exceeding 50 pages shall be submitted to the GRC at 101 South Broad Street, PO Box 819, Trenton, NJ 08625.
- (d) SOI forms shall be provided by Council's staff and may be downloaded from the GRC website (www.nj.gov/grc).
- (e) The custodian shall include in the SOI, or the attachments thereto, any information, defenses, and arguments that they wish to bring to the Council's attention for consideration in the adjudication of the complaint. The custodian may also include with the SOI any affidavits, certifications, or documentation deemed appropriate or supportive of the defenses set forth in the SOI.
- (f) Upon retention, an attorney representing a custodian in a matter before the Council shall submit to the Council a letter of representation. Failure to submit this letter will result in the Council considering the custodian to be *pro se*. The Government Records Council will only communicate with the custodian until receipt of the letter of representation.
- (g) Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than 10 business days from the date of receipt of the SOI form from the Council's staff. Custodians must sign the SOI. The Council will not accept additional submissions from the custodian, beyond what is permitted pursuant to this chapter, unless the Executive Director orders the same or offers express approval for the same. Failure to comply with this time period may result in the complaint being adjudicated based solely on the submissions of the complainant.
- (h) A custodian's failure to submit a completed and signed SOI, and to serve the complainant with the SOI, may result in the Council's issuing a decision in favor of the complainant.
- (i) The Council shall provide the complainant with copies of the completed and signed SOI if the custodian fails to do so.

(j) If a complainant amends their complaint, the custodian shall have five business days from the date of receipt of the same to submit their position regarding the complaint amendment with the Council. The Council will not accept additional submissions beyond said time period, unless the Executive Director orders the same or offers their express approval for the same. Failure to comply with this time period may result in the case being adjudicated based solely on the submissions of the complainant.

(k) Parties submitting objections to another party's representative shall adhere to the process set forth at [N.J.A.C. 5:105-2.3\(h\)](#).

(l) A party may respond to any challenge to its representative within five business days of receipt of the challenge.

(m) The Council, acting through its Executive Director, may require custodians to submit, within prescribed time limits, additional information deemed necessary for the Council to adjudicate the complaint.

(n) Upon receipt of the custodian's SOI, the complainant shall have five business days to file a reply. Upon receipt of the same, the custodian shall have three business days to file a sur-reply. Except as provided at (j), (k), (l), or (m) above, no further submissions shall be filed or accepted.

History

HISTORY:

Amended by R.2022 d.138, effective November 7, 2022.

See: [54 N.J.R. 809\(a\)](#), [54 N.J.R. 2081\(a\)](#).

Rewrote the section.

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[N.J.A.C. 5:105-2.5](#)

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§ 5:105-2.5 Mediation

- (a) Upon receipt of a complaint, the Council shall offer the services of a mediator without charge to the parties.
- (b) A complaint will be referred to a mediator only if the complainant and custodian agree to enter into mediation by executing the most recent version of the Council's authorized agreement to mediate.
- (c) A party who fails to respond to an offer of mediation within five business days from the date of its receipt shall be deemed to have rejected the offer to mediate the complaint.
- (d) A mediator selected by the Council will conduct all mediation proceedings.
- (e) Mediation practices shall be governed by the Uniform Mediation Act, [N.J.S.A. 2A:23C-1](#) et seq.
- (f) Neither the mediator nor any party to mediation shall divulge to anyone a mediation communication, as defined in the Uniform Mediation Act, without the written consent of all participants. No party may use the statements made or documents produced during mediation proceedings against another party in any proceeding before the Council if mediation fails to resolve all issues presented in the complaint and the complaint is referred to the Council for adjudication.
- (g) Representatives of the parties may participate in mediation proceedings and shall be bound by the rules with respect to mediation as set forth in this section. Such representative(s) must submit a letter of representation to the Council and must sign the agreement to mediate as provided at (b) above.
- (h) A "nonparty participant," as defined at [N.J.S.A. 2A:23C-2](#), may participate in mediation proceedings and shall be bound by the rules with respect to mediation as set forth in this section. Such nonparty participant shall execute the most recent version of the Council's agreement to mediate.
- (i) Parties may cease participation in the mediation process at any time and elect to have their complaint referred back to the Council for adjudication.
- (j) The mediator may cease proceedings and refer the complaint back to the Council if the mediator has reason to believe a party has breached the provisions at (f) above, breached any provision of the agreement to mediate, or determines that the process is less than productive.
- (k) A complaint shall remain in mediation until referred back to the Council for adjudication by the mediator's notification of such to the parties and Council staff.
- (l) The Council shall not consider any mediation communications if the complaint is referred back to the Council for adjudication.
- (m) The Council shall administratively dismiss any complaint upon the mediator's receipt of a written mediation agreement fully executed by the parties that stipulates that the matters presented in the complaint

have been resolved and notification from the mediator that the complaint has been settled. The Council shall provide the parties notice of any dismissal by issuing an administrative complaint disposition on the complaint.

History

HISTORY:

Amended by R.2022 d.138, effective November 7, 2022.

See: [54 N.J.R. 809\(a\)](#), [54 N.J.R. 2081\(a\)](#).

Rewrote the section.

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[N.J.A.C. 5:105-2.6](#)

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§ 5:105-2.6 Council complaint deliberations - no hearing

- (a) The Council members shall review the findings and recommendations of the Executive Director, as well as all party submissions, and vote to modify, reject or accept such findings and recommendations during open public meetings.
- (b) The Council shall convene in closed session as necessary in accordance with the Open Public Meetings Act, [N.J.S.A. 10:4-6](#) to [10:4-21](#).
- (c) Parties are not permitted to make oral or written presentations to the Council regarding complaints at Council meetings unless expressly requested to do so by the Council.
- (d) The Council will issue its decision to all parties, as soon as practicable, following the adjudicatory proceedings. All decisions of the Council shall be posted online, as soon as practicable, following the adjudicatory proceedings.

History

HISTORY:

Amended by R.2022 d.138, effective November 7, 2022.

See: [54 N.J.R. 809\(a\)](#), [54 N.J.R. 2081\(a\)](#).

Rewrote (d).

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[N.J.A.C. 5:105-2.7](#)

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§ 5:105-2.7 Council complaint deliberations - hearing

- (a) If the Council is unable to make a determination as to the accessibility of a record based upon the complaint and the custodian's response thereto, the Council may conduct a hearing, pursuant to [N.J.S.A. 47:1A-7](#).e, and in conformity with the rules provided for administrative hearings by a public agency in contested cases pursuant to the Administrative Procedures Act, [N.J.S.A. 52:14B-1](#) et seq., and the Uniform Administrative Procedures Rules, *N.J.A.C. 1:1*, insofar as they may be applicable and practicable.
- (b) The following concern the filing of additional documentation or arguments:
1. The Council reserves the right not to consider documentation submitted by a complainant or custodian unless it has been submitted to the Council and the other parties named in the complaint not later than 10 business days in advance of the scheduled hearing.
 2. A written statement by the party shall accompany each such submission explaining the relevance of such submission.
 3. Parties filing submissions must provide copies to all parties to the complaint and provide proof of service to the Council simultaneously therewith.
 4. The Council will not accept any submissions at the hearing that have not been provided to all parties pursuant to these rules, unless the Chairperson authorizes said submissions.

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[N.J.A.C. 5:105-2.8](#)

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> SUBCHAPTER 2. COMPLAINT PROCESS**

§ 5:105-2.8 In camera inspections

- (a) The Council may, at its discretion, issue an administrative order or interim order for *in camera* inspection of the documents that are the subject of a denial of access complaint. Both parties will be notified that an *in camera* inspection has been ordered through an administrative order or interim order.
- (b) Notice of inspection: The Council shall provide the custodian with advance written notice of the *in camera* inspection. The notice shall include, in addition to such other information as may be deemed relevant:
1. The documents requested to be inspected; and
 2. The manner in which the documents are to be presented to the Council for inspection.
- (c) Presentation of documents to the Council: The custodian, or their representative, shall:
1. Deliver the documents for inspection, in a sealed envelope, to the Executive Director of the Council, or such other person as the Council may designate; and
 2. Deliver to the Executive Director of the Council, or such other person as the Council may designate, and to the complainant, a certification signed by the custodian stipulating that the copies of the documents delivered to the Council are true and complete copies of the documents in question with no alterations or redactions, and an *in camera* inspection index that:
 - i. Gives the title or name of each document, or any parts thereof, claimed to be exempt from disclosure;
 - ii. Provides a general description of each document. The descriptions should be general enough to explain the exemptions without compromising the alleged reason for their exemption from disclosure;
 - iii. Lists the reasons that each document, or any parts thereof, are alleged to be exempt from disclosure; and
 - iv. Lists a full explanation why the alleged reason for exemption from disclosure applies to each document.
 3. The requirements in (c)2 above shall be presented in the format of a document index consistent with the document index required on the Statement of Information form that may be obtained from Council's staff or downloaded from the GRC website (www.nj.gov/grc).
- (d) Upon receipt of the certification and document index at (c)2 above, complainants will be permitted to respond within five business days of receipt of said certification and index.
- (e) Neither the Council, nor anyone else authorized to inspect the documents, shall make copies of same.

- (f) Anyone authorized to access the documents shall not take any notes making reference to specific information contained in the documents.
- (g) The Council shall review the documents in closed session at any of its regular monthly meetings or at a special meeting conducted pursuant to the Open Public Meetings Act, [N.J.S.A. 10:4-6](#) to [10:4-21](#).
- (h) The Council shall have the option, at its discretion and while in the public session of any its regular monthly meetings conducted pursuant to the Open Public Meetings Act, [N.J.S.A. 10:4-6](#) to [10:4-21](#), of asking the custodian questions regarding the document(s) in question.
- (i) Neither the complainant nor the custodian, nor any of their representatives, shall be present during the *in camera* inspection.
- (j) After inspecting the documents, the Council shall announce its decision at an open public meeting and provide written notice of its decision to all parties to the complaint, in accordance with [N.J.A.C. 5:105-2.6\(d\)](#).
- (k) During public session, anyone involved in the *in camera* inspection shall forego all mention of the specific contents of the documents. Reference shall only be made to the assigned reference number or to the general descriptions of the documents listed in the *in camera* inspection index.
- (l) Upon completion of the *in camera* inspection, the Council will seal a copy of the documents and destroy all duplicate copies. The sealed documents shall be exempt from disclosure under OPRA, in accordance with [N.J.A.C. 5:105-1.6](#) and the common law.

History

HISTORY:

Amended by R.2022 d.138, effective November 7, 2022.

See: [54 N.J.R. 809\(a\)](#), [54 N.J.R. 2081\(a\)](#).

Rewrote the section.

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[N.J.A.C. 5:105-2.9](#)

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§ 5:105-2.9 Decisions of the Council

(a) The Council shall issue the following types of decisions:

1. Administrative orders;
2. Interim orders;
3. Final decisions;
4. Revised interim or final decisions; and
5. Administrative complaint dispositions.

(b) Unless the Council directs otherwise, the Executive Director shall stipulate the effective date of the Council's decisions for purposes of calculating all deadlines set forth in a decision and calculating when motions for reconsideration and appeals must be filed.

(c) Enforcement. The complainant shall, pursuant to New Jersey Rules Governing the Courts, [R. 4:67-6](#), have the authority to enforce compliance with the orders and decisions issued by the Council.

History

HISTORY:

Amended by R.2022 d.138, effective November 7, 2022.

See: [54 N.J.R. 809\(a\)](#), [54 N.J.R. 2081\(a\)](#).

Rewrote (a); and in (c), substituted "complainant" for "Council".

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[N.J.A.C. 5:105-2.10](#)

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§ 5:105-2.10 Relief from Council decisions - reconsideration

- (a) The Council, at its own discretion, may reconsider any decision it renders.
- (b) Requests for reconsideration shall be filed within 10 business days following receipt of a Council decision, except that requests for reconsideration that are based on the discovery of new evidence must be submitted no later than 30 business days following receipt of a Council decision and within 10 business days of when the requestor discovered the new evidence. A request for reconsideration based on the discovery of new evidence shall be supported by an affidavit showing with particularity the materiality and necessity of the additional evidence and the reason why such evidence was not presented previously. For purposes of this subsection, "new evidence" is defined as evidence that could not have been provided prior to the Council's decision because the evidence did not exist or was unknown to the party at that time.
- (c) Parties may request reconsideration based on the following reasons: change in circumstances, extraordinary circumstances, fraud, illegality, mistake, and new evidence. Mistake in this instance means a mistake by the Government Records Council.
- (d) Requests shall be submitted, in writing, on the most recent version of Council's designated form, delivered to the Council, and served on all parties. Request for reconsideration forms will be provided by Council's staff or may be downloaded from the GRC website (www.nj.gov/grc). A courtesy copy of a request for reconsideration exceeding 50 pages shall be submitted to the GRC at 101 South Broad Street, PO Box 819, Trenton, NJ 08625.
- (e) Parties must file any objection to the request for reconsideration within 10 business days following receipt of the request submitted, in accordance with [N.J.A.C. 5:105-2.6\(d\)](#).
- (f) Sur-replies beyond a party's objections to a request for reconsideration are not permitted.
- (g) The Council will provide all parties with written notification of its determination regarding the request for reconsideration.

History

HISTORY:

Petition for Rulemaking.

See: [48 N.J.R. 599\(a\)](#), [1319\(c\)](#).

Amended by R.2022 d.138, effective November 7, 2022.

See: [54 N.J.R. 809\(a\)](#), [54 N.J.R. 2081\(a\)](#).

Rewrote the section.

Annotations

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Case Notes

In a requestor's appeal from a final decision of State of New Jersey Government Records Council (GRC) under Open Public Records Act (OPRA), [N.J.S.A. 47:1A-1](#) to [47:1A-13](#), denying her request for access to 12 e-mails circulated among township officials regarding work-related complaints the requestor had made, the GRC properly concluded that the records created by a former public official are subject to the deliberative process privilege under OPRA, thus, the e-mails were properly determined to be protected by the privilege and not subject to disclosure. In addition, since the requestor claimed on appeal that she had waived her privilege as to her personnel records but did not raise the issue before the GRC, the case required remand for the GRC to determine whether she waived the confidentiality under the personnel records exception or whether there were countervailing concerns or policies that would preclude release of such records. [McGee v. Township of E. Amwell, 416 N.J. Super. 602, 7 A.3d 785, 2010 N.J. Super. LEXIS 216 \(2010\)](#).

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[N.J.A.C. 5:105-2.11](#)

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§ 5:105-2.11 Relief from Council decisions - appeals

- (a) An administrative order or final decision of the Council may be appealed to the Appellate Division of the Superior Court within 45 calendar days from the date the decision is issued to the parties in accordance with New Jersey Rules Governing the Courts.
- (b) The Council's administrative order, interim order, or final decision shall remain in full force and effect, unless, and until, a party files a request for a stay pending an appeal. Such request shall be filed with the Council prior to filing an appeal.
- (c) A request for a stay is not required when a prevailing party complainant appeals a final decision only with regard to the amount of attorney's fees awarded.

History

HISTORY:

Amended by R.2022 d.138, effective November 7, 2022.

See: [54 N.J.R. 809\(a\)](#), [54 N.J.R. 2081\(a\)](#).

Rewrote the section.

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[N.J.A.C. 5:105-2.12](#)

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§ 5:105-2.12 Stays of Council's administrative orders, interim orders, and final decisions

- (a) Requests for a stay of a final decision must be in writing, delivered to the Council and simultaneously served upon all parties.
- (b) Parties must file any objection to the request for a stay from a final decision within 10 business days following receipt of the request.
- (c) The Executive Director may grant a stay from a final decision based on consideration of the request and any objection to the request submitted to the Council.
- (d) Requests for a stay of the effective date of a Council administrative order or interim order must be made prior to the last day by which action was to have been taken in accordance with the Council's decision. Appeals of administrative orders and interim orders may be made to the Appellate Division of New Jersey Superior Court, in accordance with [N.J. Court Rule 2:5-6](#).
 - 1. Requests must be in writing, delivered to the Council and simultaneously served upon all parties.
 - 2. Parties must file any objection to the request for a stay from an administrative order or interim order within 10 business days following receipt of the request.
- (e) The Executive Director may grant a stay of an administrative order or interim order for the period of time requested.
- (f) A request for a stay of administrative orders, interim orders, or final decisions must be in writing and include a detailed analysis of the issue(s), which includes an analysis of the following factors that the Council will include in its decision-making process:
 - 1. The clear likelihood of success on the merits of the claim;
 - 2. The danger of irreparable harm in the absence of a stay;
 - 3. The harm to others if a stay is not granted; and
 - 4. The public interest.

History

HISTORY:

Amended by R.2022 d.138, effective November 7, 2022.

See: [54 N.J.R. 809\(a\)](#), [54 N.J.R. 2081\(a\)](#).

Section was "Stays of Council's interim orders and final decisions". Rewrote the section.

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[N.J.A.C. 5:105-2.13](#)

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§ 5:105-2.13 Prevailing party attorney's fees

(a) Reasonable attorney's fees shall be awarded when the complainant has achieved the desired result because the complaint brought about a change, voluntary or otherwise, in the custodian's conduct and a factual causal nexus exists between the complainant's filing of a Denial of Access Complaint and the relief ultimately achieved.

(b) If the Council decides that a complainant is a prevailing party entitled to an award of reasonable attorney's fees, the parties shall be given 20 business days to confer on the award amount. The parties shall promptly notify the Council, in writing, if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, the complainant, or their attorney, shall submit a fee application to the Council, in accordance with (c) below.

(c) The complainant, or their attorney, shall submit an application to the Council for an award of attorney's fees within 20 business days following the expiration of the conference period at (b) above, or a voluntary settlement agreement. The application must include a certification from the attorney(s) representing the complainant that includes:

1. The Council's complaint reference name and number;
2. Law firm affiliation;
3. A statement of client representation;
4. The hourly rates of all attorneys and support staff involved in the complaint;
5. Copies of weekly time sheets for each professional involved in the complaint, which includes detailed descriptions of all activities attributable to the project in 0.1 hour (six-minute) increments;
6. Evidence that the rates charged are in accordance with prevailing market rates in the relevant community. Such evidence shall include:
 - i. Years of related or similar experience;
 - ii. Skill level; and
 - iii. Reputation; and
7. A detailed listing of any expense reimbursements with supporting documentation for such costs.

(d) The complainant, or their attorney, must serve all parties with the application for attorney's fees and all attachments thereto. Failure to comply with (c) above shall result in dismissal of the complaint without a fee award.

(e) The custodian shall have 10 business days from the date of service to object to the attorney's fees requested.

(f) All objections to applications for attorney's fees must be in writing to the Council and served upon all the parties.

(g) The Council shall:

1. Consider all submissions of the parties concerning the attorney's fees application;
2. Determine the amount of reasonable attorney's fees to be awarded to complainant's attorney; and
3. Predicate the attorney's fees award upon the number of hours and rate based on:
 - i. Applicable law;
 - ii. Submissions of the parties; and
 - iii. The Council's own discretion.

History

HISTORY:

Amended by R.2022 d.138, effective November 7, 2022.

See: [54 N.J.R. 809\(a\)](#), [54 N.J.R. 2081\(a\)](#).

Rewrote the section.

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Citizen who filed complaints alleging that three counties were in violation of the Open Public Record Act (OPRA) was entitled to a ruling that the requested record were government records that were used in the ordinary course of business and were not subject to being withheld on the basis of any exception in the OPRA. Even though no employee of any of the counties knowingly or willfully violated OPRA, the citizen was a "prevailing party" for the purposes of the OPRA attorney's fee provision and the citizen was entitled to an award thereof. [Hopkins v. Monmouth Cnty. Bd. of Taxation et al, OAL DKT. NO. GRC 03129-15, 2015 N.J. AGEN LEXIS 451](#), Initial Decision (November 16, 2015).

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[N.J.A.C. 5:105-2.14](#)

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§ 5:105-2.14 Knowing and willful violations of the Act; penalties

(a) Public officials, officers, employees or custodians who knowingly and willfully violate the Act and are found to have unreasonably denied access under the totality of the circumstances shall be subject to a civil penalty pursuant to [N.J.S.A. 47:1A-11](#).

(b) Penalty amounts are as follows:

1. \$ 1,000 for initial violation;
2. \$ 2,500 for a second violation that occurs within ten (10) years of an initial violation; and
3. \$ 5,000 for a third violation that occurs within ten (10) years of an initial violation.

(c) The Council shall not impose a penalty unless it has undertaken, or caused the Office of Administrative Law to have undertaken, an expedited or summary hearing to determine whether a public official, officer, employee or custodian knowingly and willfully violated the Act and unreasonably denied access under the totality of the circumstances.

(d) Penalties shall be collected and enforced in proceedings in accordance with the Penalty Enforcement Law of 1999, [N.J.S.A. 2A:58-10](#) et seq., and the rules of court governing actions for the collection of civil penalties.

(e) The New Jersey Superior Court shall have jurisdiction of proceedings for the collection and enforcement of the penalty imposed by the Council.

(f) Appropriate disciplinary proceedings may be initiated by the employing public agency against a public official, officer, employee, or custodian against whom a penalty has been imposed.

History

HISTORY:

Amended by R.2022 d.138, effective November 7, 2022.

See: [54 N.J.R. 809\(a\)](#), [54 N.J.R. 2081\(a\)](#).

In (f), substituted "the employing" for "a", and inserted a comma following "employee".

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[N.J.A.C. 5:105-3.1](#)

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> SUBCHAPTER 3. INQUIRIES*

§ 5:105-3.1 Inquiries

- (a) Any person may telephone or write the Council with a request for information regarding the Act and Council procedures. All written communications to the Council shall be dated, state the name of the sender, the street and/or P.O. Box address of the sender, and the facsimile number or e-mail address to which replies shall be sent.
- (b) The Council, where possible, will direct inquirers to available resources such as Council decisions, court decisions, Act citations, publications available through the Council, etc., that might assist inquirers.
- (c) Guidance offered during the inquiry process is based solely on the facts provided and shall not constitute final decisions of the Council, is not legal advice and shall not alter any legal right or liability already existing in New Jersey or under Federal law.

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[N.J.A.C. 5:105-4.1](#)

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> SUBCHAPTER 4. ADVISORY OPINIONS*

§ 5:105-4.1 Advisory opinions

- (a) The Council shall, in its discretion, issue advisory opinions as to whether a particular type of record is a government record which is accessible to the public pursuant to [N.J.S.A. 47:1A-7](#).b.
- (b) Advisory opinions address whether general categories of records are disclosable and do not serve as complaint-specific decisions of the Council.
- (c) Advisory opinions do not constitute final decisions of the Council, are not legal advice and shall not alter any legal right or liability already existing in New Jersey or under Federal law.
- (d) The issuance of advisory opinions shall not prejudice any party's rights to file a complaint with the Council.

Annotations

Notes

[Chapter Notes](#)

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