



Minutes of the Government Records Council January 26, 2010 Public Meeting – Open Session

The meeting was called to order at 10:04 a.m. at the Department of Community Affairs, Conference Room 126, Trenton, New Jersey. The Open Public Meetings Act statement was read.

The pledge of allegiance was recited while standing by all.

The meeting notice and fire emergency procedure was read by Ms. Tabakin.

Ms. Hairston called the roll:

Present: Robin Berg Tabakin, Chairwoman, Harlynn Lack (designee of Department of Community Affairs Acting Commissioner Charles Richman), and Kathryn Forsyth (designee of Department of Education Commissioner Bret Schundler).

GRC Staff In Attendance: Executive Director Catherine Starghill, In-House Counsel Karyn Gordon, GRC Secretary Brigitte Hairston, Case Managers: Dara Lownie, Frank Caruso, John Stewart, Sherin Keys, and Deputy Attorney General Debra Allen.

Ms. Tabakin read the Resolution for Closed Session (Resolution Number A 2010-01-26) to go into closed session pursuant to N.J.S.A. 10:4-12.b(7) to receive legal advice and discuss anticipated litigation in which the public body may become a party in the following matters:

1. Frank Amoresano v. Rowan University (2008-186) *In-Camera*
2. John Paff v. County of Camden (2009-25)

A motion was made to go into closed session by Ms. Forsyth and seconded by Ms. Lack to go into closed session. The motion was adopted by a unanimous vote. A motion was made by Ms. Forsyth and seconded by Ms. Lack to end the closed session. The motion was adopted by a unanimous vote. The Council met in closed session from 10:07 a.m. until 10:25 a.m.

Open Session reconvened at 10:30 a.m. and Ms. Hairston called roll.

Present: Ms. Tabakin, Ms. Lack, and Ms. Forsyth.

Ms. Tabakin read the Resolution for Closed Session (Resolution Number B 2010-01-26) to go into closed session pursuant to N.J.S.A. 10:4-12.b(7) to receive legal advice and

discuss anticipated litigation in which the public body may become a party in the following matters:

1. Joseph Elcavage v. West Milford Township (Passaic) (2009-07)
2. Joseph Elcavage v. West Milford Township (Passaic) (2009-08)

A motion was made to go into closed session by Ms. Forsyth and seconded by Ms. Lack to go into closed session. The motion was adopted by a unanimous vote. A motion was made by Ms. Forsyth and seconded by Ms. Lack to end the closed session. The motion was adopted by a unanimous vote. The Council met in closed session from 10:30 a.m. until 10:55 a.m.

Open Session reconvened at 11:00 a.m. and Ms. Hairston called roll.

Present: Ms. Tabakin, Ms. Lack, and Ms. Forsyth.

A motion was made by Ms. Lack and seconded by Ms. Forsyth to approve the closed session minutes of the December 22, 2009 meeting. The motion passes by an unanimous vote.

A motion was made by Ms. Forsyth and seconded by Ms. Lack to approve the open session minutes of the December 22, 2009 meeting. The motion passes by an unanimous vote.

Council Adjudication:

The following complaints were presented to the Council for summary administrative adjudication:

1. George Cotz v. Rutgers University of NJ (2009-214)
2. Gregory Byrnes v. Borough of Rockaway (Morris) (2009-234)
3. Frank D'Amore v. Borough of North Plainfield (Somerset) (2009-248)
4. Brian Alpert v. NJ Department of Community Affairs, Office of Smart Growth (2009-263)
5. Patrick Heller v. NJ Department of Transportation (2009-264)
6. David Weiner v. County of Essex (2009-300)
7. Steven J Kossup v. Paterson Municipal Court (Passaic) (2009-310)
8. Suzanne Venezia v. Monmouth County Correctional Facility (Monmouth) (2009-315)
9. Jay Thomas v. Ramapo College of New Jersey (2009-322)
10. Emily Previti v. City of Atlantic City (Atlantic) (2010-07)

Ms. Tabakin called for a motion to accept the Executive Director's recommendations as written in all of the above Administrative Complaint Dispositions. A motion was made by Ms. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

The following complaints requiring individual adjudication were not put to a vote due to the lack of quorum:

1. James D'Andrea v. NJ Department of Community Affairs, Division of Local Government Services (2007-64)

2. William Gettler v. Wantage Regional Schools, Board of Education (Sussex) (2007-105)
3. Joyce Blay v. Jackson Board of Education (Ocean) (2007-177)
4. John Paff v. Borough of Lavallette (Ocean) (2007-209)
5. David Hinchcliffe v. NJ Department of Community Affairs, Division of Local Government Services (2007-306)
6. John Bentz v. Borough of Paramus (Bergen) (2008-89)
7. J.C. v. NJ Department of Education, Deputy Commissioner's Office (2008-91)
8. Robert Verry v. Borough of South Bound Brook (Somerset) (2008-161)
9. Gertrude Casselle v. NJ Department of Community Affairs, Division of Community Resources (2008-248)
10. Ursula Cargill v. NJ Department of Education (2009-9)
11. Ursula Cargill v. State Ethics Commission (2009-10)
12. James Sage v. County of Monmouth Board of Chosen Freeholders (2009-43)

The following complaints were presented to the Council for individual adjudication:

Cristina Kumka (Northern Valley Suburbanite) v. City of Englewood (Bergen) (2007-07)

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

The Executive Director respectfully recommends the Council find that because the parties have agreed to a Stipulation of Settlement and Dismissal, signed on July 24, 2009, and because Administrative Law Judge Leslie Celentano approved the Stipulation of Settlement and Dismissal on July 31, 2009, no further adjudication is required.

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

Tucker Kelley v. Rockaway Township (Morris) (2007-11)

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

The Executive Director respectfully recommends the Council find that because the Complainant's argument set forth in his Exceptions is outweighed by the credible evidence adduced during the hearing at the Office of Administrative Law, and because the Complainant has failed to otherwise provide any legal basis for the GRC to reject the Administrative Law Judge's findings, the Council accepts the Administrative Law Judge's Initial Decision dated January 5, 2010, which concludes:

“[the Construction Official] and [the Custodian] did not unreasonably deny [the Complainant] access to the permits he requested under OPRA. Since [the Construction

Official] and [the Custodian] did not unreasonably deny [the Complainant] access to the permits he requested under OPRA, I also **CONCLUDE** that [the Construction Official] and [the Custodian] did not knowingly and willfully violate OPRA and that this case should be dismissed.

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

Larry Kohn v. Township of Livingston (Essex) (2007-323)

Mr. Caruso reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Caruso presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian forwarded the records No. 1, No. 2, No. 3, No. 5 and No. 6 to the Complainant pursuant to the Council's Interim Order, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council's Interim Order, the Custodian has complied with the Council's December 22, 2009 Interim Order.
2. The Custodian's response to the Complainant's November 21, 2007 and November 22, 2007 OPRA requests was in violation of N.J.S.A. 47:1A-5.g. because the Custodian failed to respond to each request item individually. Moreover, the Custodian failed to bear his burden of proving a lawful denial of access to records No. 1, No. 2, No. 3, No. 5 and No. 6 pursuant N.J.S.A. 47:1A-6. However, because the Custodian did not unlawfully deny access to the Complainant's November 21, 2007 OPRA request Item No. 2 and November 22, 2007 request pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005) and complied with the Council's Interim Orders dated September 30, 2009 and December 22, 2009, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

John Paff v. Township of Springfield (Union) (2008-77)

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

The Executive Director respectfully recommends the Council find that this complaint should be dismissed because the Complainant voluntarily withdrew his complaint from

the Office of Administrative Law via letter to the GRC, submitted by the Complainant's Counsel, dated December 9, 2009. Therefore, no further adjudication is required.

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

Thomas Healy v. NJ Department of Labor & Workforce Development (2008-108)

Mr. Caruso reviewed the GRC's analysis and issues in the case as set forth in the Supplemental Findings and Recommendations of the Executive Director. Mr. Caruso presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find because there are disputed issues of material fact, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts, as well as for a determination of whether the Custodian unlawfully denied access and, if so, whether such denial was a knowing and willful violation of OPRA and an unreasonable denial of access under the totality of the circumstances.

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

Frank Amoresano v. Rowan University (2008-186)

Ms. Gordon reviewed the GRC's analysis and issues in the case as set forth in the *In Camera* Findings and Recommendations of the Executive Director. Ms. Gordon presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. The Custodian timely complied with the Council's November 4, 2009 Interim Order.
2. The *In Camera* Examination set forth in the table below reveals the Custodian has lawfully denied access to the record listed in the document index pursuant to N.J.S.A. 47:1A-6 because the record was used in the deliberative or decision-making process regarding the scope of the Fiscal 2007 internal audits.
3. There is no need to determine whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances because the Custodian lawfully denied access to the requested records.

| Record or Redaction Number | Record Name/Date | Description of Record or Redaction | Custodian's Explanation/ Citation for Non-disclosure or Redactions | Findings of the <i>In Camera</i> Examination ¹ |
|--|--|--|--|--|
| Audit Risk Assessment & Recommended Audit Plan | Audit Risk Assessment & Recommended Audit Plan dated June 2006 | Record withheld from disclosure in its entirety. | Internal Audit Report is ACD material not considered a government record under <u>N.J.S.A. 47:1A-1.1</u> . OPRA is a records law not an "information" law. State entities are obligated to provide identifiable government records not otherwise exempt. | The record contains recommendations for the Audit Committee and management to consider in determining the scope of the Fiscal 2007 internal audits (and thus cost) based on the risk assessment estimates of Rowan University made by Accume Partners. Report is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> . |

¹ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

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| Human Resources/ Payroll Internal Audit | Human Resources/ Payroll Internal Audit Audit #2007-1 dated October 2006 | Record withheld from disclosure in its entirety. | Internal Audit Report is ACD material not considered a government record under <u>N.J.S.A. 47:1A-1.1</u> . OPRA is a records law not an “information” law. State entities are obligated to provide identifiable government records not otherwise exempt. | The record contains recommendations for the Audit Committee and management to consider in determining the scope of the Fiscal 2007 internal audits (and thus cost) based on the risk assessment estimates of Rowan University made by Accume Partners. Report is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> . |
| Gift Receipts Internal Audit | Gift Receipts Internal Audit dated October 2007 | Record withheld from disclosure in its entirety. | Internal Audit Reports is ACD material not considered a government record under <u>N.J.S.A. 47:1A-1.1</u> . OPRA is a records law not an “information” law. State entities are obligated to provide identifiable government records not otherwise exempt. | The record contains recommendations for the Audit Committee and management to consider in determining the scope of the Fiscal 2007 internal audits (and thus cost) based on the risk assessment estimates of Rowan University made by Accume Partners. Report is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> . |

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| Self Funded Programs Internal Audit | Self Funded Programs Internal Audit dated February 2007 | Record withheld from disclosure in its entirety. | Internal Audit Reports is ACD material not considered a government record under <u>N.J.S.A. 47:1A-1.1</u> . OPRA is a records law not an “information” law. State entities are obligated to provide identifiable government records not otherwise exempt. | The record contains recommendations for the Audit Committee and management to consider in determining the scope of the Fiscal 2007 internal audits (and thus cost) based on the risk assessment estimates of Rowan University made by Accume Partners. Report is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> . |
| Purchasing, Accounts Payable, Travel & University Credit Cards Internal Audit | Purchasing, Accounts Payable, Travel & University Credit Cards Internal Audit dated April 2007 | Record withheld from disclosure in its entirety. | Internal Audit Reports is ACD material not considered a government record under <u>N.J.S.A. 47:1A-1.1</u> . OPRA is a records law not an “information” law. State entities are obligated to provide identifiable government records not otherwise exempt. | The record contains recommendations for the Audit Committee and management to consider in determining the scope of the Fiscal 2007 internal audits (and thus cost) based on the risk assessment estimates of Rowan University made by Accume Partners. Report is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> . |

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| Construction Internal Audit | Construction Internal Audit dated March 2007 | Record withheld from disclosure in its entirety. | Internal Audit Report is ACD material not considered a government record under <u>N.J.S.A. 47:1A-1.1</u> . OPRA is a records law not an “information” law. State entities are obligated to provide identifiable government records not otherwise exempt. | The record contains recommendations for the Audit Committee and management to consider in determining the scope of the Fiscal 2007 internal audits (and thus cost) based on the risk assessment estimates of Rowan University made by Accume Partners. Report is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> . |
| LAN/WAN Internal IT Audit | LAN/WAN Internal IT Audit dated November 2006 | Record withheld from disclosure in its entirety. | Internal Audit Reports is ACD material not considered a government record under <u>N.J.S.A. 47:1A-1.1</u> . OPRA is a records law not an “information” law. State entities are obligated to provide identifiable government records not otherwise exempt. | The record contains recommendations for the Audit Committee and management to consider in determining the scope of the Fiscal 2007 internal audits (and thus cost) based on the risk assessment estimates of Rowan University made by Accume Partners. Report is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> . |

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|--|--|--|---|--|
| Contract/Grant Administration Internal Audit | Contract/Grant Administration Internal Audit dated November 2007 | Record withheld from disclosure in its entirety. | Internal Audit Reports is ACD material not considered a government record under <u>N.J.S.A. 47:1A-1.1</u> . OPRA is a records law not an “information” law. State entities are obligated to provide identifiable government records not otherwise exempt. | The record contains recommendations for the Audit Committee and management to consider in determining the scope of the Fiscal 2007 internal audits (and thus cost) based on the risk assessment estimates of Rowan University made by Accume Partners. Report is ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u> . |
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Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. A motion was made by Ms. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Pat Walsh v. Township of Middletown (Monmouth) (2008-266)

Mr. Caruso reviewed the GRC’s analysis and issues in the case as amended in the Supplemental Findings and Recommendations of the Executive Director. Mr. Caruso presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian provided the Complainant with the unredacted financial disclosure forms requested, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council’s Interim Order, the Custodian has complied with the Council’s November 18, 2009 Interim Order.

2. Although the Custodian unlawfully redacted addresses of real property owned pursuant to N.J.S.A. 40A:9-22.6(b), N.J.S.A. 40A:9-22.6(c) and the court’s note in Kenny v. Byrne, 144 N.J. Super. 243, 252 (App. Div. 1976) and failed to bear her burden of proving that said redactions were lawful pursuant to N.J.S.A. 47:1A-6, because the Custodian complied with the Council’s Interim Orders dated November 18, 2009, it is concluded that the Custodian’s actions do not rise to the level of a

knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees.

Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as amended. A motion was made by Ms. Forsyth and seconded by Mr. Lack. The motion passed unanimously.

Jesse Wolosky v. Borough of Branchville (Sussex) (2009-23)

Ms. Keys reviewed the GRC’s analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Keys presented the following recommendations to the Council with amendments:

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian certified that no records responsive to Request Item No. 1 exist and there is no credible evidence in the record to refute the Custodian’s certification, the Custodian has not unlawfully denied access to the records requested in Request Item No. 1 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
2. Because the Custodian provided access to the records requested within the seven (7) business days mandated by OPRA, the Custodian has not unlawfully denied the Complainant access to the records requested pursuant to N.J.S.A. 47:1A-5.i., N.J.S.A. 47:1A-5.g., and N.J.S.A. 47:1A-6.
3. Because there were no records responsive to Request Item No. 1 and the Custodian disclosed the record responsive to Request Item No. 2 seventeen (17) business days prior to the filing of this Denial of Access Complaint at no charge, the filing of this complaint did not bring about a change (voluntary or otherwise) in the Custodian’s conduct. Therefore, pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the Complainant is not a “prevailing party” entitled to an award of reasonable attorney’s fees.

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

John Paff v. County of Camden (2009-25)

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

The Executive Director respectfully recommends the Council find that:

1. The Custodian's refusal to fulfill the Complainant's OPRA request until the Complainant submitted each request on a separate OPRA request form is an unreasonable limitation on access pursuant to N.J.S.A. 47:1A-1, Kushner v. Township of West Milford, GRC Complaint No. 2004-111 (October 2004), Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (May 2007), and Anonymous v. Long Hill Township Board of Education (Morris), GRC Complaint No. 2008-192 (November 2009).
2. Because the Custodian certified that there are no records responsive to the Complainant's request for a settlement agreement, the Custodian would have carried her burden of proving a lawful denial of access, had she provided such response to the Complainant within the statutorily mandated seven (7) business days pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). However, because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days that no specific settlement agreement exists, the Custodian's response to the Complainant's OPRA request is insufficient pursuant to N.J.S.A. 47:1-A-5.g.
3. Because the Custodian failed to provide the Complainant with the requested Code of Ethics in the medium requested, the Custodian violated N.J.S.A. 47:1A-5.d. As such, the Custodian must disclose to the Complainant the requested Code of Ethics in the medium requested pursuant to N.J.S.A. 47:1A-5.d.
4. **The Custodian shall calculate the appropriate fee in accordance with item # 3 above and shall make the exact amount of the fee available to the Complainant within three (3) business days from receipt of the Council's Interim Order. The Complainant shall comply with item # 3 above within five (5) business days from receipt of the Council's Interim Order by delivering to the Custodian (a) payment of the appropriate fee, or (b) a statement declining to purchase the record. The Complainant's failure to take any action within the five (5) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the record pursuant to N.J.S.A. 47:1A-5.b. Within seven (7) business days from receipt of the Council's Interim Order, the Custodian shall provide the Executive Director a statement with regards to the Complainant's willingness or refusal to purchase the requested record, the amount of the copy fee and confirmation that the record was so provided to the Complainant, if applicable. The Custodian's statement shall be in the form of a certification in accordance with N.J. Court Rule 1:4-4.**

5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied of access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pursuant to N.J.S.A. 47:1A-6 and entitled to an award of reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

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

Tina Renna v. Union County Improvement Authority (2009-28)

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

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian certified that he has no record of receiving the Complainant's OPRA request dated November 3, 2008 until the Complainant re-submitted said request on December 1, 2008 and the Complainant has not provided any evidence to contradict the Custodian's certification, the Custodian has not unlawfully denied access to the Complainant's OPRA request dated November 3, 2008.
2. The Custodian's failure to respond in writing to the Complainant's re-submitted OPRA request dated December 1, 2008 either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
3. The Custodian's written response dated January 26, 2009 is insufficient pursuant to N.J.S.A. 47:1A-5.g. because the Custodian failed to specifically deny access to the requested records that do not exist. Additionally, because the Custodian certified that there are no records responsive to the Complainant's request for the October 1, 2008 meeting minutes and corresponding paid bill list, as well as the paid bill list for the year 2003, the Custodian would have carried his burden of proving a lawful denial of access, had he provided such response to the Complainant within the statutorily mandated seven (7) business days pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian's failure to provide a written response to the Complainant's December 1, 2008 OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, and the Custodian's response to said request was insufficient because he failed to notify the Complainant that there are no records responsive to the Complainant's request for the October 1, 2008 meeting minutes and

corresponding paid bill list, as well as the paid bill list for the year 2003, the Custodian did not unlawfully deny access to the Complainant's OPRA request dated November 3, 2008 because the Custodian certified that he has no record of receiving said request and the Complainant has not provided any evidence to contradict the Custodian's certification. Additionally, there is no evidence in the record that suggests the Custodian's actions were intentional and deliberate, with knowledge of their wrongfulness. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

5. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Custodian provided a response to the Complainant's OPRA request. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved because the Custodian failed to provide any response to the Complainant's OPRA request until six (6) business days after the Complainant filed this Denial of Access Complaint. Further, the relief ultimately achieved had a basis in law because the Custodian should have provided the Complainant with a written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

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

Jesse Wolosky v. Stillwater Township (Sussex) (2009-30)

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

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5, N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. The unapproved, draft executive session meeting minutes dated November 18, 2008 constitute inter-agency or intra-agency advisory, consultative, or deliberative material and thus are not government records pursuant the definition of a government record

and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). Accordingly, the Custodian has borne her burden of proving a lawful denial of access to the November 18, 2008 draft minutes pursuant to N.J.S.A. 47:1A-6 because the requested draft executive minutes had not been approved by the governing body at the time of the Complainant's request.

3. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian provided the Complainant with all the records that she was legally obligated to disclose approximately nine (9) business days following the receipt of the Complainant's request, and because the November 18, 2008 draft minutes were exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1., it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. Based upon the contested facts of the case, the Council is unable to determine whether the filing of the Denial of Access Complaint in this matter brought about a change, voluntary or otherwise, in the Custodian's conduct. Therefore, this complaint should be referred to the Office of Administrative Law for a determination of whether the Complainant is a prevailing party and the amount of any award of reasonable attorney's fees.

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

Cindy Merckx v. Township of Franklin Board of Education (Sussex) (2009-47)

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

The Executive Director respectfully recommends the Council find:

1. The Custodian's failure to provide the Complainant with a written response to her OPRA request that specifically granted access, denied access, sought clarification or requested an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because all of the requested closed session minutes, with the exception of the minutes dated January 21, 2009, were approved by the Board of Education at the time of the Complainant's OPRA request and no longer constituted advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1., the Custodian failed to bear her burden of proving a lawful denial of access to the requested closed session meeting minutes pursuant to N.J.S.A. 47:1A-6. A second approval by the governing body for public release of the requested minutes is not required because N.J.S.A. 47:1A-5.g.

allows for the redaction of information that is exempt from disclosure under OPRA. In fact, OPRA requires the disclosure of a record with redactions of only the information which is asserted to be exempt from disclosure. A denial of access to the entire record is therefore unlawful under OPRA.

3. The Custodian must disclose to the Complainant the remainder of the requested closed session minutes that were approved by the governing body at the time of the Complainant's OPRA request, with appropriate redactions, if any. Specifically, the Custodian must disclose the closed session minutes dated January 16, 2008; March 26, 2008 and November 19, 2008.
4. **The Custodian shall comply with item # 3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4², to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

Carnell Gibbs v. NJ Department of Corrections (2009-52)

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

The Executive Director respectfully recommends the Council find because the Complainant's OPRA request fails to identify with reasonable clarity the specific government records sought and seeks information rather than identifiable records, the Complainant's OPRA request is invalid under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007); and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). As such, the Custodian has not unlawfully denied access to the Complainant's OPRA request.³

² "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

³ The Custodian would have also carried her burden of proving a lawful denial of access because she certified that there are no records responsive to the Complainant's OPRA request; however, this issue is moot because the Complainant's OPRA request is invalid. See Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

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

Jeffrey Patti v. Sussex County Prosecutor's Office (2009-76)

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

The Executive Director respectfully recommends the Council find:

1. The Complainant's request is invalid under OPRA because it fails to specify an identifiable government record, but rather seeks access to all of the records in the agency's files. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2008), Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (March 2008). Accordingly, the Custodian has not unlawfully denied the Complainant access to the records requested.
2. Pursuant to N.J.S.A. 47:1A-1.1., Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint No. 2002-79 and 2002-80 (June 2004), and Feggans v. City of Newark, GRC Complaint No. 2007-238 (October 2008), the requested video tapes are criminal investigatory records exempt from disclosure. As such, the Custodian has carried his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.
3. The 45-day filing limit set forth in Mason v. City of Hoboken, 196 N.J. 51 (2008) only applies to complaints filed in Superior Court and does not apply to the GRC; there is no provision in OPRA that limits the time in which a Denial of Access Complaint may be filed before the GRC.

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

Robert Verry v. Borough of South Bound Brook (Somerset) (2009-93)

Mr. Caruso reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Caruso presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that because the Complainant's OPRA request seeks information rather than a specifically identifiable government record, the request is invalid pursuant to New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007); MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005). Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div.

2005) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

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

Ricardo Gonzales v. Washington Township (Burlington) (2009-121)

Ricardo Gonzales v. Washington Township (Burlington) (2009-122)

Ricardo Gonzales v. Washington Township (Burlington) (2009-123)

Mr. Caruso reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Caruso presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. The original Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5, e.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Pursuant to N.J.S.A. 47:1A-6, the original Custodian has failed to bear his burden of proving a lawful denial of access to the requested records. **The Custodian shall disclose the records requested in the Complainant's two (2) February 24, 2009 OPRA requests and the Complainant's March 10, 2009 OPRA request Item No. 2. If no records responsive to the requests exist, the Custodian must inform the Complainant and the Executive Director that no records responsive exist.**
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁴, to the Executive Director.**
4. Because the Complainant's request for the original Custodian's contact information seeks information rather than an identifiable government record, the Complainant's March 10, 2009 OPRA request Item No. 1 is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005) and the original Custodian has not unlawfully denied access to requested information.
5. The Council defers analysis of whether the original Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

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

Steven Kossup v. City of Newark (Essex) (2009-133)

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

The Executive Director respectfully recommends the Council find:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Pursuant to Mid-Atlantic Recycling Technologies v. City of Vineland, 222 F.R.D. 81 (D.N.J. 2004), the Custodian's refusal to respond to the Complainant's OPRA request on the grounds that the Complainant was barred from submitting OPRA requests to the City of Newark by court order also results in a "deemed" denial of the Complainant's OPRA request and violates N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
3. Because the Complainant's request fails to seek specific identifiable government records, the Complainant's request is overly broad and is therefore invalid under OPRA pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Sallie, v. New Jersey Department of Banking and Insurance, Consumer Protection Service, GRC Complaint No. 2008-163 (October 2009), and Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009). Accordingly, the Custodian has not unlawfully denied the Complainant access to the records requested.
4. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances because the Complainant's request is invalid under OPRA.

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

Steven Kossup v. City of Newark (Essex) (2009-134)

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

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian failed to address each item of the Complainant's request, the Custodian has violated N.J.S.A. 47:1A-5.g. Paff v. Willingboro Board of Education (Burlington), GRC Complaint. No. 2007-272 (June 2008).
3. Because the second portion of the Complainant's request does not identify the specific government record sought, the request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). As such, the Custodian has not unlawfully denied access to the records requested.
4. Although the Custodian's unlawful deemed denial of access violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., and although the Custodian provided an insufficient response to the Complainant's request pursuant to N.J.S.A. 47:1A-5.g., because the Custodian provided the Complainant with the certified true copy of the requested minutes on the first (1st) business day following receipt of the certified true copy of the minutes, approximately twenty-five (25) business days following the date of receipt of the Complainant's request, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations with amendments. A motion was made by Ms. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Ruth Hardrick v. Hamilton Township Public Schools (Atlantic) (2009-172)

Mr. Stewart reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Stewart presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find because the Custodian certified that no record responsive to the Complainant's request exists, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian

did not unlawfully deny access to the requested record pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

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

Kimberly Smela v. City of Newark (Essex) (2009-254)

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

The Executive Director respectfully recommends the Council find:

1. Because the Custodian failed to meet his burden of proving that the denial of access to the requested records was authorized by law pursuant to N.J.S.A. 47:1A-6., the Custodian shall disclose the records relevant to this complaint.
2. **The Custodian shall comply with item #1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for any redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4⁵, to the Executive Director.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

Complaints on Appeal: None.

Complaints Adjudicated on NJ Superior Court & NJ Supreme Court: None.

Special Comment from the Council Chairwoman:

Executive Director's Report and New Business: None.

Public Comment: None.

A motion to end the Council's meeting was made by Ms. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Meeting adjourned at 11:45 a.m.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Respectfully submitted,

Harlynn Lack, Secretary

Date Approved: