



**Minutes of the Government Records Council
June 27, 2017 Public Meeting – Open Session**

I. Public Session:

- **Call to Order**

The meeting was called to order at 1:40 p.m. by Ms. Robin Tabakin at the Department of Community Affairs, Conference Room 129, Trenton, New Jersey.

- **Pledge of Allegiance**

All stood and recited the pledge of allegiance in salute to the American flag.

- **Meeting Notice**

Ms. Tabakin read the following Open Public Meetings Act statement:

“This meeting was called pursuant to the provisions of the Open Public Meeting Act. Notices of this meeting were faxed to the Newark Star Ledger, Trenton Times, Courier-Post (Cherry Hill), and the Secretary of State on June 22, 2017.”

Ms. Tabakin read the fire emergency procedure.

- **Roll Call**

Ms. Bordzoe called the roll:

Present: Robin Tabakin, Esq. (Chairwoman), Christopher Huber, Esq. (designee of Department of Education Acting Commissioner Kimberley Harrington), Jason Martucci, Esq. (designee of Department of Community Affairs Commissioner Charles A. Richman), and Steven Ritardi, Esq. (Public Member).

*****Steven Ritardi, Esq. (Public Member) participated telephonically from 1:40 p.m. until 2:34 p.m. for the purposes of voting on GRC Complaint Nos. 2014-218 and 2014-219 (consolidated), and GRC Complaint No. 2015-333*****

GRC Staff in Attendance: Joseph Glover (Executive Director), Rosemond Bordzoe (Secretary), Frank F. Caruso (Communications Specialist/Resource Manager), John Stewart (Mediator), Samuel Rosado (Staff Attorney), and Deputy Attorney General Cameryn Hinton.

Ms. Tabakin advised that copies of the agenda are available by the conference room door.

II. Executive Director's Report:

Current Statistics

- Since OPRA's inception in calendar year 2002, the GRC has received 4,658 Denial of Access Complaints. That averages about 311 annual complaints per approximately 15 program years.
- In the current program year, the GRC has so far received 288 Denial of Access Complaints.
- 489 of the 4,658 complaints remain open and active. Of those open cases,
 - 18 complaints are on appeal with the Appellate Division (3.7%);
 - 26 complaints are currently in mediation (5.3%);
 - 38 complaints await adjudication by the Office of Administrative Law (7.8%);
 - 65 complaints are tentatively scheduled for adjudication at an upcoming GRC meeting, which includes the June 2017 meeting (13%); and,
 - 338 complaints are work in progress (69%).
- Since 2004, the GRC has received 27,053 total inquiries. That is an average of about 1,932 annual inquiries per approximately 14 tracked program years. So far in the current program year, the GRC has received 1,907 inquiries.

III. Closed Session:

Ms. Tabakin read the Closed Session Resolution to go into closed session pursuant to N.J.S.A. 10:4-12(b)(7) to receive legal advice in the following matters:

- Michael Doss v. Borough of Bogota (Bergen) (2013-315) (**SR Recusal**)
- Michael Doss v. Borough of Bogota (Bergen) (2014-152) (**SR Recusal**)
Consolidated
- Jeffrey S. Feld v. NJ Division of Local Government Services (2015-333) (**JM Recusal**)

Ms. Tabakin called for a motion to go into closed session. Mr. Huber made a motion, and Mr. Ritardi seconded the motion. The Council adopted the motion by a unanimous vote.

The Council met in closed session from 1:45 p.m. until 2:31 p.m.

Ms. Tabakin called for a motion to end the closed session. Mr. Huber made a motion, which was seconded by Mr. Martucci. The Council adopted the motion by a unanimous vote. Open Session reconvened at 2:33 p.m., and Ms. Bordzoe called roll.

- Present: Ms. Tabakin, Mr. Huber, Mr. Martucci

*****Steven Ritardi, Esq. (Public Member) exited the meeting after voting on GRC Complaint No. 2015-333.*****

IV. Approval of Minutes of Previous Meetings:

- **May 23, 2017 Open Session Meeting Minutes**

Ms. Tabakin called for a motion to approve the open session minutes of the May 23, 2017 meeting. Mr. Huber made a motion, which was seconded by Mr. Martucci. The motion passed by a majority vote; Mr. Ritardi abstained.

V. New Business – Cases Scheduled for Adjudication

Ms. Tabakin stated that an “Administrative Complaint Disposition” means a decision by 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. The reason for the Administrative Disposition is under each complaint below:

A. Administrative Disposition Adjudications with Recusals (Consent Agenda): None.

B. Administrative Disposition Adjudications with no Recusals (Consent Agenda):

1. **Mack Edwards v. Mercer County Correctional Center (2017-79)**
 - The OPRA request was invalid.
2. **Jonathan Donnell Williams v. Mercer County Correctional Center (2017-83)**
 - The OPRA request was invalid.
3. **Brian Keith Bragg v. Turning Point, Inc. (2017-120)**
 - The OPRA request was invalid.

Ms. Tabakin called for a motion to accept the recommendations as written in all of the above Administrative Complaint Dispositions. Mr. Huber made a motion, which was seconded by Mr. Martucci. The motion passed by a unanimous vote.

C. Administrative Disposition of Uncontested, Voluntary Withdrawals by Complainant (No Adjudication of the Council is Required):

1. **William L. Brogan v. NJ Department of Transportation, Division of Highway Traffic Safety (2017-14)**
 - The parties settled the matter through mediation.
2. **William L. Brogan v. NJ Department of Transportation, Division of Highway Traffic Safety (2017-26)**
 - The parties settled the matter through mediation.
3. **Marko Bey v. NJ Department of Education (2017-71)**

- The parties settled the matter through mediation.
- 4. **Libertarians for Transparent Government v. NJ Office of the Public Defender (2017-85)**
 - The Complainant voluntarily withdrew the complaint.
- 5. **Kevin Moriarty v. Evesham Township Police Department (Burlington) (2017-100)**
 - The parties settled the matter through mediation.
- 6. **Luis F. Rodriguez v. Kean University (2017-105)**
 - The Complainant voluntarily withdrew the complaint.
- 7. **Luis F. Rodriguez v. Kean University (2017-127)**
 - The Complainant voluntarily withdrew the complaint.
- 8. **Luis F. Rodriguez v. Kean University (2017-130)**
 - The Complainant voluntarily withdrew the complaint.

VI. New Business – Cases Scheduled for Individual Complaint Adjudication

A. Individual Complaint Adjudications with Recusals:

A summary of the Executive Director’s recommended action is under each complaint:

1. **Michael Doss v. Borough of Bogota (Bergen) (2013-315) (SR Recusal)**
2. **Michael Doss v. Borough of Bogota (Bergen) (2014-152) (SR Recusal) Consolidated**

- The Council should reject the ALJ’s March 9, 2017 Initial Decision. Due process was not effectuated when the Custodian did not appear at the hearing, and the evidence of record indicates that the prior Borough Administrator had no knowledge that he was found to be culpable of a knowing and willful violation and could be subject to a personal fine. Moreover, there is no proof that the custodial agency had authority to speak for the prior Administrator in stipulating to a knowing and willful violation
- The GRC should remand the cases back to the OAL to afford proper due process.
- Borough Clerk Jeanne Cook or her designee shall provide a certification pursuant to New Jersey Court Rule 1:1-4, naming and providing the address of record for the former Business Administrator, former Borough Clerk, and any other official of the Borough that is, or was, intended to be defended and indemnified pursuant to the provisions of Borough of Bogota Resolution No. 16-138.
- The GRC shall issue a notice to the Custodian and former Business Administrator, advising them of the stipulated violation and penalty and affording them an opportunity for a hearing at the OAL.
- The OAL shall impose a civil penalty, as might be appropriate, and shall determine an award of reasonable attorney’s fees, as might be appropriate.
- Ms. Tabakin called for any discussion on the Executive Director’s findings and recommendations as written. Mr. Stewart advised the Council that he made changes to the proposed findings consistent with discussions in during closed session. Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as amended. Mr. Huber made a motion, and Mr.

Martucci seconded the motion. The motion passed by a majority vote; Mr. Ritardi was recused.

3. **Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2014-218) (JM Recusal)**
4. **Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2014-219) (JM Recusal) Consolidated**

- Complainant's Counsel has failed in part to establish valid grounds for reconsideration.
 - Complainant's Counsel is successful in part to establish that the portion of the Council's Order regarding the October 13, 2013 text message should be reconsidered.
 - The Complaint should be referred to the Office of Administrative Law (OAL) for a fact-finding hearing to resolve: 1) How the Custodian omitted the responsive October 13, 2013 text message from his compliance dated October 29, 2015; and 2) How the Custodian could have omitted a responsive text message after the parties were alerted to the issue on July 9, 2015, by Complainant's Counsel's letter brief.
 - The OAL should perform an *in camera* review of the text message to determine whether the Custodian lawfully denied access.
 - Based on the referral to OAL, the Council should rescind conclusion No. 3 of the Interim Order and defer the knowing and willful analysis, pending the OAL's ruling.
 - The Complainant is a prevailing party based on the reconsideration and is entitled to attorney's fees that are limited to that issue, but the Council should defer analysis of those fees pending the OAL's ruling. The supplemental fee award shall not include fees accrued prior to the request for reconsideration because the parties previously reached a fee agreement.
 - Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Huber made a motion, and Mr. Ritardi seconded the motion. The motion passed by a majority vote; Mr. Martucci was recused.
5. **Jeffrey S. Feld v. NJ Division of Local Government Services (2015-333) (JM Recusal)**
- The Custodian complied with the Interim Order.
 - The Council's *in camera* review reveals that the Custodian lawfully denied access to the records, or portions thereof, listed in the document index.
 - Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Huber made a motion, and Mr. Ritardi seconded the motion. The motion passed by a majority vote; Mr. Martucci was recused.

B. Individual Complaint Adjudications with no Recusals:

1. Carolyn Breslin v. Burlington County Special Services School District (2013-295)

- The Council should adopt the Administrative Law Judge's ("ALJ") Initial Decision by which the ALJ approved the settlement agreement, ordered the parties to comply, and concluded the proceedings.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made a motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

2. Jeff Carter v. Franklin Fire District No. 1 (Somerset) (2015-166)

- The Council tabled the matter because legal counsel has requested more time for review.
- Ms. Tabakin called for a motion to table the above matter. Mr. Huber made a motion and Mr. Martucci seconded the motion. The motion passed by a unanimous vote.

3. Jason Marshall Litowitz v. NJ Department of Transportation (2015-301)

- The Custodian failed to respond within the extended timeframe, thus resulting in a "deemed" denial.
- Item Nos. 1 and 2 of the OPRA request are invalid because they fail to include the subject matter or content of the requested e-mails.
- Item Nos. 3 and 4 of the OPRA request are valid.
- The content within the e-mail that pertains to an employee's health insurance is not subject to disclosure. However, the Custodian unlawfully denied access to all other disclosable portions of the records (*i.e.*, the sender, recipients, date, time, subject line, and closing salutations) and must disclose same to the Complainant.
- The Council must conduct an *in camera* review of the withheld e-mail correspondence to validate the Custodian's reason for denial.
- The Council defers the knowing and willful analysis, pending the Custodian's compliance.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made a motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

4. Mark Demitroff v. Buena Vista Township (Atlantic) (2015-304)

- The Council has no authority over the integrity of the invoices provided by the Custodian.
- There is no unlawful denial of access because the Custodian certified that she provided all responsive records, and the Complainant provided no competent, credible evidence to refute the Custodian's certification.

- Ms. Tabakin called for any discussion on the Executive Director’s findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. Mr. Huber made a motion, and Mr. Martucci seconded the motion. The motion passed by a unanimous vote.
5. **Michael Feaster v. Buena Borough (Atlantic) (2015-308)**
 - The Council must conduct an *in camera* review of the withheld records to validate the Custodian’s reasons for denial.
 - The knowing and willful analysis is deferred, pending the Custodian’s compliance.
 - Ms. Tabakin called for any discussion on the Executive Director’s findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. Mr. Martucci made a motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.
 6. **Christina Moreira v. Elizabeth Board of Education (Union) (2015-313)**
 - The Council tabled the matter for further legal review.
 - Ms. Tabakin called for a motion to table the above matter. Mr. Huber made a motion and Mr. Martucci seconded the motion. The motion passed by a unanimous vote.
 7. **Luis F. Rodriguez v. Kean University (2015-339)**
 - There is no unlawful denial of access because no responsive records exist.
 - Ms. Tabakin called for any discussion on the Executive Director’s findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. Mr. Martucci made a motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.
 8. **John Paff v. County of Salem (2015-342)**
 - The parties failed to reach a fee agreement, thus requiring the Council to determine the reasonable amount of attorney’s fees.
 - The Council should award a fee in the adjusted amount of \$2,310, representing 7.7 hours of service at \$300 per hour.
 - Ms. Tabakin called for any discussion on the Executive Director’s findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. Mr. Huber made a motion, and Mr. Martucci seconded the motion. The motion passed by a unanimous vote.
 9. **James Keenan v. NJ Department of Labor and Workforce, Division of Disability Determination Services (2015-388)**
 - The Custodian did not timely respond, thus resulting in a “deemed” denial.

- The Custodian unlawfully denied access to the records responsive to requested item No. 1. However, the Council need not order disclosure because all responsive records were subsequently provided.
- The Custodian lawfully denied access to records responsive to requested item No. 2 because such items are exempt from disclosure pursuant to Federal and State laws.
- The Custodian unlawfully denied access to personnel information requested in item No. 3. However, the Council need not order disclosure because the record was subsequently disclosed.
- The Custodian might have unlawfully denied access to contracts responsive to requested item Nos. 4 and 7. The Custodian must therefore either disclose those records or otherwise certify that no responsive records exist.
- The Custodian lawfully denied access to requested item No. 5 because employment applications are exempt from public access under N.J.S.A. 47:1A-10.
- The Custodian provided all records responsive to requested item No. 6.
- The knowing and willful analysis is deferred, pending the Custodian's compliance.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made a motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

10. Demetrius Minor v. NJ Department of Corrections (2016-3)

- The Custodian complied with the Interim Order.
- There is no knowing and willful violation.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Huber made a motion, and Mr. Martucci seconded the motion. The motion passed by a unanimous vote.

11. Jesse Wolosky v. Borough of Washington (Warren) (2016-19)

- The Council tabled the matter for further review.
- Ms. Tabakin called for a motion to table the above matter. Mr. Huber made a motion and Mr. Martucci seconded the motion. The motion passed by a unanimous vote.

12. Lisa A. Tilton (d.b.a. Galloway Township News) v. City of Cape May (Cape May) (2016-97)

- The current Custodian complied with the Interim Order.
- There is no knowing and willful violation.
- The Complainant is a prevailing party and is therefore eligible for an award of reasonable attorney's fees.
- The parties shall confer in an effort to decide the amount of reasonable attorney's fees to be paid within 20 business days and notify the GRC in writing if an

agreement is reached. If the parties cannot agree on an amount, Complainant's Counsel shall submit a fee application in accordance with N.J.A.C. 5:105-2.13.

- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Huber made a motion, and Mr. Martucci seconded the motion. The motion passed by a unanimous vote.

13. **David Sellow v. NJ Department of Corrections (2016-104)**

- There is no unlawful denial of access to the May 18, 2015 OPRA request because no responsive records exist.
- The Custodian did not unlawfully deny access to the requested user manual, which he sought in both his undated and his November 8, 2015 request, because it does not meet the definition of a government record under OPRA.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made a motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

14. **Kenneth E. Langdon, Sr. v. Township of Toms River (Ocean) (2016-105)**

- The Custodian did not timely respond, thus resulting in a "deemed" denial.
- There is no unlawful denial of access because no responsive records exist, the Custodian is not required to research and compile information that might be responsive, and the Custodian has no duty to create a record containing the requested information.
- There is no knowing and willful violation.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made a motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

15. **Aakash Dalal v. County of Bergen (2016-116)**

- The Council must conduct an *in camera* review of the responsive bills in order to validate the Custodian's assertion that the records are exempt from disclosure.
- The knowing and willful analysis is deferred, pending the Custodian's compliance.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made a motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

16. **David J. Meenan v. Township of Edgewater Park (Burlington) (2016-178)**

- There is no unlawful denial of access because the requested letters are personnel records that do not fall within any of the categories delineated at N.J.S.A. 47:1A-10 and the Complainant showed no proof that he is an “individual in interest.”
- Ms. Tabakin called for any discussion on the Executive Director’s findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. Mr. Huber made a motion, and Mr. Martucci seconded the motion. The motion passed by a unanimous vote.

17. **Kevin Alexander v. NJ Department of Corrections (2016-191)**

- There is no “deemed” denial because the Custodian timely responded.
- The record is exempt from public access because disclosure could jeopardize the security of the correctional facility or the persons therein.
- Ms. Tabakin called for any discussion on the Executive Director’s findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. Mr. Martucci made a motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

VII. Court Decisions of GRC Complaints on Appeal: None.

VIII. Complaints Adjudicated in NJ Superior Court & NJ Supreme Court:

- Serringer v. Office of the Governor of N.J., 2017 N.J. Super. Unpub. LEXIS 1459 (App. Div. 2017): Here, the Appellate Division affirmed the Law Division’s decision that plaintiff’s OPRA request was invalid. In reaching its conclusion, the Court reasoned that:

Plaintiff's failure to identify a subject matter for the correspondence exchanged between defendant and Choose NJ would have required every employee in defendant's office to engage in a search of all of defendant's files to locate responsive documents, including a search of documents sent between every one of defendant's present and past employees and Choose NJ. "This was no 'routine search of files pertaining to a very narrowly specified topic.'" [Lagerkvist v. Office of Governor of State, 443 N.J. Super. 230, 236 (App. Div. 2015)

Id. at 8

- Paff v. Galloway Twp., 2017 N.J. LEXIS 680 (2017): The Supreme Court previously accepted plaintiff’s appeal from the Appellate Division’s decision that the defendant municipality was not required to coalesce basic e-mail information into an e-mail log and disclose same. The Appellate Court reached its conclusion by determining that such an action was akin to creating a record, which OPRA did not require (notwithstanding that the e-mail log would have taken a few key strokes to create). The Supreme Court reversed and remanded, holding that basic e-mail information

stored electronically is a “government record” under OPRA, unless an exemption applies to that information. The Court reasoned that:

A document is nothing more than a compilation of information -- discrete facts and data. By OPRA’s language, information in electronic form, even if part of a larger document, is itself a government record. Thus, electronically stored information extracted from an email is not the creation of a new record or new information; it is a government record.

...

With respect to electronically stored information by a municipality or other public entity, we reject the Appellate Division's statement that “OPRA only allows requests for records, not requests for information.” Paff, 444 N.J. Super. at 503, (*quoting Bent*, 381 N.J. Super. at 37). That position cannot be squared with OPRA’s plain language or its objectives in dealing with electronically stored information.

Id. at 24, 28.

IX. Public Comment: None

X. Adjournment:

Ms. Tabakin called for a motion to end the Council meeting. Mr. Huber made a motion, which was seconded by Mr. Martucci. The motion passed unanimously.

The meeting adjourned at 3:04 p.m.

Respectfully submitted,

Robin Berg Tabakin, Esq., Chair

Date Approved: July 25, 2017