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STATE OF NEW JERSEY  
DEPARTMENT OF COMMUNITY AFFAIRS  
GOVERNMENT RECORDS COUNCIL

PUBLIC SESSION

TRANSCRIPT OF PROCEEDINGS

AT: DEPARTMENT OF COMMUNITY AFFAIRS  
101 South Broad Street - Room 129  
Trenton, New Jersey 08625-0819

DATE: WEDNESDAY, JULY 30, 2008

TIME: 9:36 A.M. TO 11:38 A.M.

GUY J. RENZI & ASSOCIATES  
CERTIFIED COURT REPORTERS & VIDEOGRAPHERS  
GOLDEN CREST CORPORATE CENTER  
2277 STATE HIGHWAY #33, SUITE 410  
TRENTON, NEW JERSEY 08690-1700  
TEL: (609) 989-9199 TOLL FREE: (800) 368-7652  
www.renziassociates.com

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C O U N C I L M E M B E R S:  
ROBIN BERG TABAKIN, Chairperson  
DAVID FLEISHER, (financial planner and Executive  
with the financial services firm  
of Firstrust Financial  
Page 1

- 6 Resources, LLC)
- 7 KATHRYN FORSYTH (designee of Commissioner
- 8 Lucille Davy, Department
- 9 of Education)
- 10 JANICE L. KOVACH (designee of Acting Commissioner
- 11 Joseph V. Doria, Jr., Department
- 12 of Community Affairs)
- 13 C O U N C I L P R O F E S S I O N A L S:
- 14 CATHERINE STARGHILL, ESQ., Executive Director
- 15 DEBRA A. ALLEN, ESQ., D.A.G.
- 16 KARYN GORDON, ESQ., (In-House Counsel)
- 17 GINA R. OROSZ, ESQ., (Outside Counsel)
- 18 FRANK F. CARUSO, (Case Manager)
- 19 DARA LOWNIE, (Senior Case Manager)
- 20 SHERIN KEYS, ESQ., (Case Manager/Staff Attorney)
- 21 JYOTHI PAMIDIMUKKALA, (Resource Manager)
- 22 JOHN E. STEWART, ESQ., (Case Manager/
- 23 In Camera Attorney)
- 24 ELIZABETH ZIEGER-SEARS, ESQ. (Case Manager)
- 25 BRIGITTE HAIRSTON, (Council Secretary)

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4 MEETING NOTICE..... 7

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8 Closed Session Resolution..... 8

9 APPROVAL OF MINUTES:

10 June 25, 2008 - Closed Session Minutes.. 11

11 June 25, 2008 - Open Session Transcript. 11

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- 14 (Taken as one motion.)..... 12
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- 16 Defender (2007-231)
- 17 2. George Vasquez v. Passaic County
- 18 Prosecutor's Office (2007-293)
- 19 3. Cynthia McBride v. Borough of Leonia
- 20 (Bergen)(2007-308)
- 21 4. Christopher Andrews v. Township of
- 22 Fairfield (Essex) (2008-9)
- 23 5. Colleen O'Hara v. NJ Department of
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4	Corrections (2008-82)	
5	7. Ray Betterbid v. Kean University	
6	(2008-83)	
7	8. Susan O'Neill v. Borough of Haddon	
8	Heights (Camden)(2008-114)	
9	9. David Weiner v. County of Essex	
10	(2008-126)	
11	10. Edward Leblond v. NJ Department of	
12	Labor, Division of Vocational Rehabilitation	
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20 Treasury (2006-191)..... 15  
 21 4. Janet Pizar v. Township of Millburn  
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 23 5. Paul Bellan-Boyer v. NJ department of  
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7                   This meeting was called pursuant to  
8     the provisions of the Open Public Meeting Act.  
9     Notices of this meeting were faxed to the Newark  
10    Star-Ledger, Trenton Times, Courier-Post of  
11    Cherry Hill, the Secretary of State and e-mailed  
12    to the New Jersey Foundation for Open Government,  
13    July 28, 2008.

14                   Proper notice having been given, the  
15    secretary is directed to include this statement  
16    in the minutes of this meeting.

17                   In the event of a fire alarm  
18    activation, please exit the building following  
19    the exit signs located within the conference room  
20    and throughout the building. The exit signs will  
21    direct you to the two fire evacuation stairways  
22    located in the building. Upon leaving, please  
23    follow the fire wardens which can be located by  
24    the yellow helmets. Please follow the flow of  
25    traffic away fro the building.

8

1                   Roll call.  
2                   MS. HAIRSTON: Robin Berg Tabakin?  
3                   CHAIRPERSON TABAKIN: Yes.  
4                   MS. HAIRSTON: Janice Kovach?  
5                   MS. KOVACH: Yes.  
6                   MS. HAIRSTON: Kathryn Forsyth?  
7                   MS. FORSYTH: Yes.  
8                   MS. HAIRSTON: And Dave Fleisher?  
9                   MR. FLEISHER: Here.  
10                   CHAIRPERSON TABAKIN: WHEREAS,  
11    N.J.S.A. 10:4-12 permits a public body to go into  
12    closed session during a public meeting; and  
13                   WHEREAS, the Government Records  
                    Page 6

14 Council has deemed it necessary to go into closed  
15 session to discuss certain matters which are  
16 exempt from public discussion under the Open  
17 Public Meetings Act; and

18 WHEREAS, the regular meeting of the  
19 Council will reconvene at the conclusion of the  
20 closed meeting;

21 NOW, THEREFORE, BE IT RESOLVED,  
22 that the Council will convene in closed session  
23 to receive legal advice and discuss anticipated  
24 litigation in which the Council may become a  
25 party pursuant to N.J.S.A. 10:4-12.b(7) in the

9

1 following matters:

2 Ali Morgano v. Essex County  
3 Prosecutor's Office (2007-156) for an In-camera  
4 review.

5 Cynthia Feiler-Jampel v. Office of  
6 the Somerset County Prosecutor's Office  
7 (2007-190) In-camera review.

8 Kevin Starkey v. NJ Department of  
9 Transportation (2007-314).

10 Kevin Starkey v. NJ Department of  
11 Transportation (2007-318).

12 BE IT FURTHER RESOLVED, that the  
13 Council will disclose to the public the matters  
14 discussed or determined in closed session as soon  
15 as possible after final decisions are issued in  
16 the above cases.

17 Could I have a motion, please?

18 MS. FORSYTH: So moved.

19 MS. KOVACH: Second.

20 CHAIRPERSON TABAKIN: Thank you.

21 roll call.  
22 MS. HAIRSTON: Robin Berg Tabakin?  
23 CHAIRPERSON TABAKIN: Yes.  
24 MS. HAIRSTON: Janice Kovach?  
25 MS. KOVACH: Yes.

10

1 MS. HAIRSTON: Kathryn Forsyth?  
2 MS. FORSYTH: Yes.  
3 MS. HAIRSTON: Dave Fleisher?  
4 MR. FLEISHER: Yes.  
5 CHAIRPERSON TABAKIN: Thank you.  
6 we're in closed.  
7 (Whereupon, the Council goes into  
8 closed session. The time is 9:40 a.m.)  
9 (Back in public session. The time  
10 is 10:59 a.m.)  
11 CHAIRPERSON TABAKIN: Okay. Could I  
12 have roll call?  
13 MS. HAIRSTON: Robin Berg Tabakin?  
14 CHAIRPERSON TABAKIN: Yes.  
15 MS. HAIRSTON: Janice Kovach?  
16 MS. KOVACH: Yes.  
17 MS. HAIRSTON: Kathryn Forsyth?  
18 MS. FORSYTH: Yes.  
19 MS. HAIRSTON: Dave Fleisher?  
20 MR. FLEISHER: Yes.  
21 CHAIRPERSON TABAKIN: Could I have a  
22 motion, please? Could I have a motion please to  
23 go back into to open session.  
24 MS. FORSYTH: So moved.  
25 MS. KOVACH: Second.

11

1 MS. HAIRSTON: Robin Berg Tabakin?  
2 CHAIRPERSON TABAKIN: Yes.  
3 MS. HAIRSTON: Janice Kovach?  
4 MS. KOVACH: Yes.  
5 MS. HAIRSTON: Kathryn Forsyth?  
6 MS. FORSYTH: Yes.  
7 MS. HAIRSTON: Dave Fleisher?  
8 MR. FLEISHER: Yes.  
9 CHAIRPERSON TABAKIN: Okay. Now  
10 could I have a motion to approve the closed  
11 session minutes of June 25, 2008?  
12 MS. KOVACH: So moved.  
13 MS. FORSYTH: Second.  
14 MS. HAIRSTON: Robin Berg Tabakin?  
15 CHAIRPERSON TABAKIN: Yes.  
16 MS. HAIRSTON: Janice Kovach?  
17 MS. KOVACH: Yes.  
18 MS. HAIRSTON: Kathryn Forsyth?  
19 MS. FORSYTH: Yes.  
20 MS. HAIRSTON: Dave Fleisher?  
21 MR. FLEISHER: Yes.  
22 CHAIRPERSON TABAKIN: Could I have a  
23 motion to approve the open session transcript  
24 from June 25, 2008?  
25 MR. FLEISHER: So moved.

12

1 MS. KOVACH: Second.  
2 MS. HAIRSTON: Robin Berg Tabakin?  
3 CHAIRPERSON TABAKIN: Yes.  
4 MS. HAIRSTON: Janice Kovach?  
5 MS. KOVACH: Yes.  
6 MS. HAIRSTON: Kathryn Forsyth?  
7 MS. FORSYTH: Yes.  
Page 9

8 MS. HAIRSTON: Dave Fleisher?

9 MR. FLEISHER: Yes.

10 CHAIRPERSON TABAKIN: Okay. On the  
11 Administrative Complaint Council Adjudication and  
12 we have ten cases. Could I have a motion to  
13 accept those?

14 MS. FORSYTH: So moved.

15 MS. KOVACH: Second.

16 CHAIRPERSON TABAKIN: Kathryn made a  
17 motion and Janice Seconded.

18 MS. HAIRSTON: Robin Berg Tabakin?

19 CHAIRPERSON TABAKIN: Yes.

20 MS. HAIRSTON: Janice Kovach?

21 MS. KOVACH: Yes.

22 MS. HAIRSTON: Kathryn Forsyth?

23 MS. FORSYTH: Yes.

24 MS. HAIRSTON: Dave Fleisher?

25 MR. FLEISHER: Yes.

13

1 CHAIRPERSON TABAKIN: Okay. Now we  
2 will move onto the Individual Complaint Council  
3 Adjudication.

4 Jennifer Dressel v. Monroe  
5 Township, Board of Education  
6 (Middlesex)(2005-249).

7 MS. LOWNIE: The Executive Director  
8 respectfully recommends the Council accept the  
9 Administrative Law Judge's Initial Decision dated  
10 June 23, 2008. No further adjudication is  
11 required.

12 MR. FLEISHER: So moved.

13 MS. KOVACH: Second.

14 CHAIRPERSON TABAKIN: Roll call.

15 MS. HAIRSTON: Robin Berg Tabakin?  
16 CHAIRPERSON TABAKIN: Yes.  
17 MS. HAIRSTON: Janice Kovach?  
18 MS. KOVACH: Yes.  
19 MS. HAIRSTON: Kathryn Forsyth?  
20 MS. FORSYTH: Yes.  
21 MS. HAIRSTON: Dave Fleisher?  
22 MR. FLEISHER: Yes.  
23 CHAIRPERSON TABAKIN: Joseph  
24 Elcavage v. West Milford Township  
25 (Passaic)(2006-55).

14

1 MR. STEWART: The Executive Director  
2 respectfully recommends the Council find that:  
3 1. The Custodian has complied with  
4 the provisions of the Council's May 28, 2008  
5 Interim Order by disclosing to the Complainant  
6 the records responsive to the Complainant's  
7 request within the required time frame pursuant  
8 to Items No. 1 and No.3 of the Interim Order.  
9 No. 2. Because the Complainant has  
10 failed to present sufficient proof to  
11 substantiate his assertion that more than one  
12 e-mail responsive to his request exist in  
13 Councilman Warden's personal account, as  
14 certified by the Custodian, the Custodian has not  
15 unlawfully denied the Complainant access to any  
16 additional records which may be contained within  
17 said account.  
18 3. Because the Custodian relied  
19 upon advice from Counsel in making available only  
20 the summary information from the unopened  
21 e-mails, see *In re Zisa*, 385 N.J. Super. 188  
Page 11

22 (App. Div. 2006), and because the Custodian  
23 promptly released the contents of the records  
24 once she received a copy of the Council's May 28,  
25 2008 Interim Order, the Custodian's delay in

15

1 granting access to the requested records does not  
2 rise to the level of a knowing and willful  
3 violation of OPRA and unreasonable denial of  
4 access under the totality of the circumstances.

5 CHAIRPERSON TABAKIN: Could I have a  
6 motion to accept?

7 MS. KOVACH: So moved.

8 MS. FORSYTH: Second.

9 MS. HAIRSTON: Robin Berg Tabakin?

10 CHAIRPERSON TABAKIN: Yes.

11 MS. HAIRSTON: Janice Kovach?

12 MS. KOVACH: Yes.

13 MS. HAIRSTON: Kathryn Forsyth?

14 MS. FORSYTH: Yes.

15 MS. HAIRSTON: Dave Fleisher?

16 MR. FLEISHER: Yes.

17 CHAIRPERSON TABAKIN: Jerald

18 Albrecht v. New Jersey Department of Treasury

19 (2006-191)

20 MS. LOWNIE: The Executive Director  
21 respectfully recommends the Council find that:

22 No. 1. Because the Custodian  
23 provided the Complainant with redacted copies and  
24 a privilege log of the Department of Corrections  
25 time reports for the month of July 1, 2004 and

16

1 the week of July 4, 2004 as outlined in the  
Page 12

2 Council's Interim Order, as well as provided a  
3 copy of the Chest Pain Assessment in its  
4 entirety, and because the Custodian provided  
5 certified confirmation of compliance to the  
6 Executive Director within the time period as  
7 ordered by the Council and extended by the GRC,  
8 the Custodian has complied with the Council's May  
9 28, 2008 Interim Order.

10 No. 2. Although the Custodian  
11 unlawfully denied access to the Chest Pain  
12 Assessment and failed to provide said record to  
13 the Complainant as ordered by the Council on July  
14 25, 2007 until June 16, 2008, after disclosure  
15 was again ordered by the Council on May 28 2008,  
16 because the Custodian lawfully denied access to  
17 the requested financial statements and lawfully  
18 denied access to portions of the Department of  
19 Correction time reports, as well as because the  
20 Custodian complied with the Council's May 28,  
21 2008 Interim Order, it is concluded that the  
22 Custodian's actions do not rise to the level of a  
23 knowing and willful violation of OPRA and  
24 unreasonable denial of access under the totality  
25 of the circumstances.

17

1 However, the Custodian's failure to  
2 comply with the Council's July 25, 2007 Interim  
3 Order by not releasing the Chest Pain Assessment  
4 until June 16th, 2008 appears negligent and  
5 heedless since he is vested with the legal  
6 responsibility of granting and denying access in  
7 accordance with the law.

8 CHAIRPERSON TABAKIN: Thank you.  
Page 13

9 Motion to accept?  
10 MS. FORSYTH: So moved.  
11 MR. FLEISHER: Second.  
12 CHAIRPERSON TABAKIN: Thank you.  
13 Roll call.  
14 MS. HAIRSTON: Robin Berg Tabakin?  
15 CHAIRPERSON TABAKIN: Yes.  
16 MS. HAIRSTON: Janice Kovach?  
17 MS. KOVACH: Yes.  
18 MS. HAIRSTON: Kathryn Forsyth?  
19 MS. FORSYTH: Yes.  
20 MS. HAIRSTON: Dave Fleisher?  
21 MR. FLEISHER: Yes.  
22 CHAIRPERSON TABAKIN: Janet Pizar  
23 v. Township of Millburn, Essex County 2006-196.  
24 MS. LOWNIE: The Executive Director  
25 respectfully recommends the Council find that:

18

1 No. 1. The Custodian's failure to  
2 grant access, deny access, seek clarification or  
3 request an extension of time in writing within  
4 the statutorily mandated seven business days  
5 results in a "deemed" denial pursuant to OPRA  
6 Section 5.g. and 5.i. and Kelley v. Township of  
7 Rockaway, GRC Complaint No. 2007-11 (October  
8 2007).  
9 No. 2. Because the Complainant's  
10 OPRA request is not a request for specific  
11 identifiable government records and because the  
12 Custodian is not required to conduct research in  
13 response to an OPRA request, the Complainant's  
14 request is invalid and the Custodian has not  
15 unlawfully denied access to the requested records

16 pursuant to MAG Entertainment, LLC v. Division of  
17 Alcoholic Beverage Control (Appellate Division  
18 2005), Bent v. Stafford Police Department  
19 (Appellate Division 2005) and New Jersey Builders  
20 Association versus New Jersey Council of  
21 Affordable Housing (Appellate Division 2007).

22 As such, such it is not required to  
23 determine whether the records identified by the  
24 Custodian constitute attorney-client privilege or  
25 advisory, consultative or deliberative material.

19

1 CHAIRPERSON TABAKIN: Thank you.

2 Motion to accept, please?

3 MR. FLEISHER: So moved.

4 MS. KOVACH: Second.

5 CHAIRPERSON TABAKIN: Roll call.

6 MS. HAIRSTON: Robin Berg Tabakin?

7 CHAIRPERSON TABAKIN: Yes.

8 MS. HAIRSTON: Janice Kovach?

9 MS. KOVACH: Yes.

10 MS. HAIRSTON: Kathryn Forsyth?

11 MS. FORSYTH: Yes.

12 MS. HAIRSTON: Dave Fleisher?

13 MR. FLEISHER: Yes.

14 CHAIRPERSON TABAKIN: Paul

15 Bellan-Boyer v. New Jersey Department of

16 Community Affairs --

17 MS. KOVACH: I have to recuse

18 myself.

19 CHAIRPERSON TABAKIN: Okay.

20 -- Commissioners Office (2007-143).

21 And Janice Kovach is recused.

22 (Janice Kovach is recused and leaves  
Page 15

23 the room.)

24 MS. LOWNIE: The Executive Director  
25 respectfully recommends the Council find that:

20

1 No. 1. Because the Director of  
2 operations certified that she provided the  
3 Complainant with the redacted records on June 6,  
4 2008 as ordered by the Council and provided her  
5 certified confirmation of compliance to the  
6 Executive Director within the five business days  
7 as also ordered by the Council, the Custodian has  
8 complied with the Council's May 28, 2008 Interim  
9 Order.

10 No. 2. Because the original  
11 Custodian properly responded to the Complainant's  
12 OPRA request in regards to timeliness and form  
13 and provided all records responsive to the  
14 Complainant with the exception of the report from  
15 New Jersey Historic Trust to Commissioner Bass  
16 Levin, and even though the original Custodian  
17 unlawfully denied access to portions of said  
18 reports, because the current Custodian complied  
19 with the Council's May 28, 2008 Interim Order by  
20 providing the redacted reports to the Complainant  
21 within the ordered five business days, it is  
22 concluded that neither the original nor the  
23 current Custodian's actions rise to the level of  
24 a knowing and willful violation of OPRA and  
25 unreasonable denial of access under the totality

21

1 of the circumstances.

2 However, the original Custodian's  
Page 16

3 unlawful denial of access to portions of the New  
4 Jersey Historic Trust reports appears negligent  
5 and heedless since he is vested with the legal  
6 responsibility of granting and denying access in  
7 accordance with the law.

8 MR. FLEISHER: So moved.

9 MS. FORSYTH: Second.

10 CHAIRPERSON TABAKIN: Roll call.

11 MS. HAIRSTON: Robin Berg Tabakin?

12 CHAIRPERSON TABAKIN: Yes.

13 MS. HAIRSTON: Janice Kovach?

14 MS. KOVACH: Yes.

15 MS. HAIRSTON: Kathryn Forsyth?

16 MS. FORSYTH: Yes.

17 MS. HAIRSTON: Dave Fleisher?

18 MR. FLEISHER: Yes.

19 CHAIRPERSON TABAKIN: All right,  
20 let's skip down to number 14 because Janice is  
21 out in the hall.

22 David Hinchcliffe v. New Jersey  
23 Department of Community Affairs, Division of  
24 Local Government Services (2008-306).

25 And not that Janice Kovach is

22

1 recused.

2 (Janice Kovach is recused from this  
3 complaint adjudication.)

4 MS. KEYS: The Executive Director  
5 respectfully recommends the Council find that:

6 1. Because the Custodian's response  
7 to the Complainant's OPRA request came on  
8 December 5th, four business days after the  
9 extended deadline for the Custodian's response,  
Page 17

10 the Custodian's belated response to Complainant's  
11 request is therefore a deemed denial pursuant to  
12 Section 5.i. of OPRA and 5.g. See Tucker Kelley  
13 v. Township of Rockaway, GRC Complaint No.  
14 2007-11(October 2007).

15 2. Because the Custodian has  
16 asserted that the requested records are exempt  
17 from disclosure under OPRA as advisory,  
18 consultative or deliberative material, the  
19 Council must determine whether the legal  
20 conclusions asserted by the Custodian are  
21 properly applied to the records at issue pursuant  
22 Paff v. New Jersey Department of Labor, Board of  
23 Review (Appellate Division 2005).

24 Therefore, the GRC must conduct an  
25 in camera review of the requested records to

23

1 determine the validity of the Custodian's  
2 assertion that the records are advisory,  
3 consultative or deliberative material which is  
4 exempt pursuant to OPRA Section 1.1.

5 3. The Custodian must deliver to  
6 the Council in a sealed envelope nine copies of  
7 the requested unredacted document, a document or  
8 redaction index, as well as a legal certification  
9 from the Custodian in accordance with N.J. Court  
10 Rule 1:4-4, that the document provided is the  
11 document requested by the Council for the in  
12 camera inspection. Such delivery must be  
13 received by the GRC within five business days  
14 from receipt of the Council's Interim Order.

15 4. The Council defers analysis of  
16 whether the Custodian knowingly and willfully

17 violated OPRA and unreasonably denied access  
18 under the totality of the circumstances pending  
19 the Custodian's compliance with the Council's  
20 Interim Order.

21 CHAIRPERSON TABAKIN: Motion to  
22 accept?

23 MS. FORSYTH: So moved.

24 MR. FLEISHER: Second.

25 CHAIRPERSON TABAKIN: Roll call.

24

1 MS. HAIRSTON: Robin Berg Tabakin?

2 CHAIRPERSON TABAKIN: Yes.

3 MS. HAIRSTON: Kathryn Forsyth?

4 MS. FORSYTH: Yes.

5 MS. HAIRSTON: And Dave Fleisher?

6 MR. FLEISHER: Yes.

7 CHAIRPERSON TABAKIN: Okay, Roberto  
8 Mejias v. New Jersey Department of Corrections  
9 (2007-181).

10 (Janice Kovach returns.)

11 MS. LOWNIE: The Executive Director  
12 respectfully recommends the Council find that  
13 because the Custodian informed the Complainant in  
14 writing that she would provide the requested  
15 records upon payment of the copy fee and because  
16 the Custodian is not required to release the  
17 requested record until payment is received  
18 pursuant to OPRA Section 5.b. and Paff v. City of  
19 Plainfield, GRC Complaint No. 2006-54 (July  
20 2006), as well as because the Custodian provided  
21 certified confirmation of compliance to the  
22 Executive Director within five business days as  
23 ordered by the Council, the Custodian has

24 complied with the Council's May 28, 2008 Interim  
25 Order.

25

1 MR. FLEISHER: So moved.

2 MS. KOVACH: Second.

3 MS. HAIRSTON: Robin Berg Tabakin?

4 CHAIRPERSON TABAKIN: Yes.

5 MS. HAIRSTON: Janice Kovach?

6 MS. KOVACH: Yes.

7 MS. HAIRSTON: Kathryn Forsyth?

8 MS. FORSYTH: Yes.

9 MS. HAIRSTON: Dave Fleisher?

10 MR. FLEISHER: Yes.

11 CHAIRPERSON TABAKIN: Okay. And for  
12 the record, we pulled Ali Morgano v. Essex County  
13 Prosecutor's Office (2007-156).

14 Cynthia Feiler-Jampel v. Somerset  
15 County Prosecutor's Office (2007-190).

16 MR. STEWART: The Executive Director  
17 respectfully recommends that the Council find  
18 that:

19 1. The Custodian has complied with  
20 the Council's March 26, 2008 Interim Order by  
21 providing the Council with all records set forth  
22 in paragraph 7 of the Order within five business  
23 days of receiving the Council's Order.

24 2. The In Camera Examination set  
25 forth in the above table reveals the Custodian

26

1 has lawfully denied access to, or lawfully  
2 redacted portions of the records listed in the  
3 document index pursuant to OPRA Section 6.

4                   3. Although the Custodian's failure  
5 to provide a written response to the  
6 Complainant's OPRA request within the statutorily  
7 mandated seven business day period resulted in a  
8 "deemed" denial, because the Custodian verbally  
9 responded to the Complainant's request on the  
10 sixth business day following receipt of such  
11 request informing the Complainant that the  
12 records responsive to her request would be  
13 available by the end of the week, it is concluded  
14 that the Custodian's actions do not rise to the  
15 level of a knowing and willful violation of OPRA  
16 and unreasonable denial of access under the  
17 totality of the circumstances.

18                   However, the Custodian's unlawful  
19 "deemed" denial of access appears negligent and  
20 heedless since he is vested with the legal  
21 responsibility of granting and denying access in  
22 accordance with the law.

23                   CHAIRPERSON TABAKIN: Motion,  
24 please?

25                   MR. FLEISHER: So moved.

27

1                   MS. KOVACH: Second.

2                   MS. HAIRSTON: Robin Berg Tabakin?

3                   CHAIRPERSON TABAKIN: Yes.

4                   MS. HAIRSTON: Janice Kovach?

5                   MS. KOVACH: Yes.

6                   MS. HAIRSTON: Kathryn Forsyth?

7                   MS. FORSYTH: Yes.

8                   MS. HAIRSTON: Dave Fleisher?

9                   MR. FLEISHER: Yes.

10                  CHAIRPERSON TABAKIN: David Mylowe  
                    Page 21

11 v. New Jersey Higher Education Student Assistance  
12 Authority (2007-218).

13 MS. ZIEGLER-SEARS: The Executive  
14 Director respectfully recommends the Council find  
15 that because the Complainant's OPRA request is  
16 overly broad and does not specify particular  
17 identifiable government record, the request is  
18 invalid and the Custodian has not unlawfully  
19 denied access to the requested records pursuant  
20 to MAG Entertainment, LLC v. Division of  
21 Alcoholic Beverage Control (Appellate Division  
22 2005) and Bent v. Stafford Police Department  
23 (Appellate Division 2005).

24 CHAIRPERSON TABAKIN: Need a motion?

25 MS. KOVACH: So moved.

28

1 MR. FLEISHER: Second.

2 MS. HAIRSTON: Robin Berg Tabakin?

3 CHAIRPERSON TABAKIN: Yes.

4 MS. HAIRSTON: Janice Kovach?

5 MS. KOVACH: Yes.

6 MS. HAIRSTON: Kathryn Forsyth?

7 MS. FORSYTH: Yes.

8 MS. HAIRSTON: Dave Fleisher?

9 MR. FLEISHER: Yes.

10 CHAIRPERSON TABAKIN: Martin O' Shea  
11 v. Township of West Milford (Passaic)(2007-237).

12 MS. LOWNIE: The Executive Director  
13 respectfully recommends the Council find that:

14 No. 1. Because the Custodian  
15 amended the Township's OPRA request form to  
16 include the language of Section 10 and provided  
17 certified confirmation of compliance to the

18 Executive Director within five business days as  
19 ordered by the Council, the Custodian has  
20 complied with the Council's May 28, 2008 order.

21 No. 2. Because the Custodian did  
22 not unlawfully deny access to the requested  
23 records, and because the Custodian provided the  
24 requested records to the Complainant in the  
25 medium requested, as well because the Custodian

29

1 complied with the Council's May 28, 2008 Interim  
2 Order, it is concluded that the Custodian's  
3 actions do not rise to the level of a knowing and  
4 willful violation of OPRA and unreasonable denial  
5 of access under the totality of the  
6 circumstances.

7 However, the Custodian's  
8 misrepresentation of OPRA's personnel records  
9 exemption on the Township's OPRA request form  
10 appears negligent and heedless since she is  
11 vested with the legal responsibility of granting  
12 and denying access in accordance with the law.

13 No. 3. Pursuant to *Teeters v. DYFS*  
14 (Appellate Division 2006) and the Council's May  
15 28, 2008 Interim Order, the Complainant has  
16 achieved "the desired results because the  
17 complaint brought about a change (voluntary or  
18 otherwise) in the custodian's conduct.

19 Therefore, the Complainant is a  
20 prevailing party entitled to an award of a  
21 reasonable attorney's fee pursuant to OPRA  
22 Section 6 and *Teeters*. Thus, this complaint  
23 should be referred to the Office of  
24 Administrative Law for the determination of

25 reasonable prevailing party attorney's fees.

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1 CHAIRPERSON TABAKIN: Motion?

2 MR. FLEISHER: So moved.

3 MS. FORSYTH: Second.

4 MS. HAIRSTON: Robin Berg Tabakin?

5 CHAIRPERSON TABAKIN: Yes.

6 MS. HAIRSTON: Janice Kovach?

7 MS. KOVACH: Yes.

8 MS. HAIRSTON: Kathryn Forsyth?

9 MS. FORSYTH: Yes.

10 MS. HAIRSTON: Dave Fleisher?

11 MR. FLEISHER: Yes.

12 CHAIRPERSON TABAKIN: Martin O'Shea

13 v. Township of Long Hill (Morris)(2007-252).

14 MS. LOWNIE: The Executive Director  
15 respectfully recommends the Council find that?

16 No. 1. Although the Custodian did  
17 not inform the complainant that the requested  
18 record did not exist until he certified to such  
19 in his Statement of Information dated November  
20 20, 2007, the Custodian did provide the  
21 Complainant with two written responses to the  
22 OPRA request within the statutorily mandated  
23 seven business days in which the Custodian  
24 indicated that the Complainant's request was  
25 unclear, but attempted to accommodate the

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1 Complainant's request anyway. As such, the  
2 Custodian properly responded to the Complainant's  
3 pursuant to OPRA Sections 5.g. and 5.i. as well  
4 as Vessio v. Barnegat Township, Building and

5 Zoning Department, GRC Complaint No. 2006-70  
6 (April 2007).

7                   No. 2. Because Item No. 2 of the  
8 Complainant's OPRA request is not a request for  
9 specific identifiable government records and  
10 because the Custodian is not required to conduct  
11 research in response to an OPRA request, the  
12 Complainants' request is invalid and the  
13 Custodian has not unlawfully denied access to the  
14 requested record pursuant to *MAG Entertainment,*  
15 *LLC v. Division of Alcoholic Beverage Control*  
16 *(Appellate Division 2005)*, *Bent v. Stafford*  
17 *Police Department (Appellate Division 2005)*, and  
18 *New Jersey Builders Association v. New Jersey*  
19 *Council of Affordable Housing (Appellate Division*  
20 *2007)*.

21                   No. 3. Because the Custodian  
22 certified that the requested record did not exist  
23 at the time of the request and because the  
24 Complainant's request is invalid because it is  
25 not a request for an identifiable government

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1 record, a special service charge is not at issue  
2 in this matter. See *Pusterhofer v. New Jersey*  
3 *Department of Education, GRC Complaint No.*  
4 *2005-49 (July 2005)* (stating that the Custodian  
5 did not unlawfully deny access because the  
6 Custodian certified that the requested records  
7 did not exist at the time of the request).

8                   No. 4. Because the Complainant did  
9 not use the Township's old request form to submit  
10 the OPRA request which is the subject of this  
11 complaint and because the Custodian certified

12 that the Township adopted the GRC's model request  
13 from approximately one month prior to the date of  
14 the Complainant's OPRA request, this portion of  
15 the Complainant's request in which the  
16 Complainant asserts that the Township's old OPRA  
17 request form violated OPRA, is moot.

18 No. 5. Because public agencies are  
19 expressly directed to adopt an official OPRA  
20 request form, and because the Township of Long  
21 Hill has already adopted the GRC's model request  
22 form as its own form, as well because the GRC's  
23 Advisory Opinion No. 2006-01 states that a  
24 requestor may use the model form when a public  
25 agency has not adopted an official form, it is

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1 unnecessary for the Council to order the Township  
2 to adopt the model request form.

3 No. 6. Because the Custodian did  
4 not unlawfully deny access to the requested  
5 records because the request is invalid as it was  
6 not a request for a specific identifiable  
7 government record, and because the portion of  
8 this complaint regarding the OPRA request form is  
9 moot due to the Township's abandonment of the  
10 previous OPRA request form and the adoption of  
11 the GRC's model request form, it is concluded  
12 that the Custodian's actions do not rise to the  
13 level of a knowing and willful violation of OPRA  
14 and unreasonable denial of access under the  
15 totality of the circumstances.

16 No. 7. The Complainant has not  
17 achieved the desired result because the complaint  
18 did not bring about change (voluntary or

19 otherwise) in the Custodian's conduct and as such  
20 the as such the Complainant is not a prevailing  
21 party entitled to an award of a reasonable  
22 attorney's fee pursuant to OPRA Section 6 and  
23 Teeters (Appellate Division 2006).

24 CHAIRPERSON TABAKIN: Motion,  
25 please?

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1 MS. FORSYTH: So moved.

2 MS. KOVACH: Second.

3 MS. HAIRSTON: Robin Berg Tabakin?

4 CHAIRPERSON TABAKIN: Yes.

5 MS. HAIRSTON: Janice Kovach?

6 MS. KOVACH: Yes.

7 MS. HAIRSTON: Kathryn Forsyth?

8 MS. FORSYTH: Yes.

9 MS. HAIRSTON: Dave Fleisher?

10 MR. FLEISHER: Yes.

11 CHAIRPERSON TABAKIN: Charles  
12 Slaughter v. New Jersey Department of Law &  
13 Public Safety, Division of Criminal Justice  
14 (2007-274).

15 MS. KEYS: The Executive Director  
16 respectfully recommends the Council find that  
17 pursuant to OPRA Section 9.a., Executive Order  
18 21, and N.J.A.C. 13:1E-3.2(a)2, which exempts  
19 from disclosure the Standard Operating Procedures  
20 (the document responsive to Complainant's  
21 request), the Custodian's denial of access to the  
22 requested records is supported by law. See also  
23 Newark Morning Star Co., Publisher of the  
24 Star-Ledger v. Division of the State Police of  
25 the New Jersey Department of Law and Public

1 Safety, Law Division (Decided July 5, 2005) and  
2 Edward Buttimore v. New Jersey Department of Law  
3 & Public Safety, Division of Criminal Justice,  
4 GRC Complaint No. 2005-90 (March 2006). As such,  
5 the Custodian has carried her burden of proving a  
6 lawful denial of access pursuant to OPRA  
7 section 6.

8 Also there is a typo in page 7, the  
9 last sentence of paragraph 2.

10 It should read:

11 Government records subject to OPRA  
12 is a lawful basis for the Custodian's denial.

13 The word "records" is missing.

14 MS. GORDON: Actually, that it's  
15 page 6, bottom of page 6.

16 MR. CARUSO: It's actually seven.

17 MS. GORDON: Not on our copy.

18 MS. STARGHILL: Is it in the  
19 recommendations of conclusions?

20 MS. KEYS: No, it was just a typo  
21 that was a --

22 CHAIRPERSON TABAKIN: Could I have a  
23 motion please to accept?

24 MS. KOVACH: So moved.

25 MR. FLEISHER: Second.

1 MS. HAIRSTON: Robin Berg Tabakin?

2 CHAIRPERSON TABAKIN: Yes.

3 MS. HAIRSTON: Janice Kovach?

4 MS. KOVACH: Yes.

5 MS. HAIRSTON: Kathryn Forsyth?

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MS. FORSYTH: Yes.

MS. HAIRSTON: Dave Fleisher?

MR. FLEISHER: Yes.

CHAIRPERSON TABAKIN: Okay, Dave  
Fleisher is recused from this next Abdiel Avuka  
v. Camden County Prosecutor's Office (2007-287).  
(Dave Fleisher recuses himself and  
leaves the room.)

MR. CARUSO: The Executive Director  
respectfully recommends the Council find that:

1. The Custodian has not unlawfully  
denied access to request Items No. 1, No.2 and  
No.3 because the Custodian certified in the SOI  
that the Camden County Prosecutor's Office was  
not in possession of the records requested. See  
Pusterhofer v. New Jersey Department of  
Education, GRC Complaint No. 2005-49 (July 2005).
2. The Custodian has not unlawfully  
denied access to request Items No. 4 and No. 5  
because the Custodian certified that no OPRA

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request was ever received from the Complainant.

CHAIRPERSON TABAKIN: Motion?

MS. FORSYTH: So moved.

MS. KOVACH: Second.

MS. HAIRSTON: Robin Berg Tabakin?

CHAIRPERSON TABAKIN: Yes.

MS. HAIRSTON: Janice Kovach?

MS. KOVACH: Yes.

MS. HAIRSTON: Kathryn Forsyth?

MS. FORSYTH: Yes.

CHAIRPERSON TABAKIN: Okay. Richard  
Iorio v. New Jersey Department of Labor,  
Page 29

13 Commissioner's Office (2007-310).

14 (Dave Fleisher returns.)

15 MS. STARGHILL: David Hinchcliffe?

16 CHAIRPERSON TABAKIN: We did that  
17 one.

18 MS. GORDON: The Executive Director  
19 respectfully recommends the Council find that:

20 1. Because the Custodian provided  
21 the Complainant with a copy of the memorandum  
22 dated April 10, 2007 from Maggie Moran and Hope  
23 Cooper to Cabinet Members entitled "Management  
24 Salary Program: Fiscal Year 2007" with redactions  
25 directed by the GRC in its June 25, 2008 Interim

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1 Order, within the extended period of time for  
2 compliance required by the GRC, the Custodian has  
3 complied with the Council's June 25, 2008 Interim  
4 Order.

5 2. Although the Custodian violated  
6 OPRA by failing to respond in writing the  
7 Complainant's OPRA request within the statutorily  
8 mandated seven business day time period, and  
9 failed to bear his burden of proof that access to  
10 the memorandum dated April 10, 2007 from Maggie  
11 Moran and Hope Cooper to Cabinet members entitled  
12 "Management Salary Program: Fiscal Year 2008" was  
13 lawfully denied, the Custodian provided the  
14 memorandum to the Complainant with redactions  
15 directed by the GRC in its June 25, 2008 Interim  
16 Order within the extended period of time for  
17 compliance required by the GRC, and has borne his  
18 burden of proof that access to the remainder of  
19 the requested Items was lawfully denied.

20                   Therefore, it is concluded that the  
21                   Custodian's actions do not rise to the level of a  
22                   knowing and willful violation of OPRA and  
23                   unreasonable denial of access under the totality  
24                   of the circumstances.

25                   CHAIRPERSON TABAKIN: Thank you.

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1                   Next time slow down.

2                   MR. FLEISHER: Motion.

3                   CHAIRPERSON TABAKIN: Second?

4                   MS. KOVACH: Second.

5                   MS. HAIRSTON: Robin Berg Tabakin?

6                   CHAIRPERSON TABAKIN: Yes.

7                   MS. HAIRSTON: Janice Kovach?

8                   MS. KOVACH: Yes.

9                   MS. HAIRSTON: Kathryn Forsyth?

10                  MS. FORSYTH: Yes.

11                  MS. HAIRSTON: Dave Fleisher?

12                  MR. FLEISHER: Yes.

13                  CHAIRPERSON TABAKIN: The next two  
14                  cases we do together. Kevin Starkey v. New  
15                  Jersey Department of Transportation (2007-314)  
16                  and Kevin Starkey v. New Jersey Department of  
17                  transportation (2007-318).

18                  MS. LOWNIE: The Executive Director  
19                  respectfully recommends the Council find that:

20                  No. 1. Because the Custodian failed  
21                  to notify the Complainant in writing within the  
22                  statutorily mandated seven business days of when  
23                  the requested records would be made available  
24                  pursuant to OPRA Section 5.i., the Custodian's  
25                  written response to the Complainant's requests

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1 dated September 12, 2007 in which the Custodian  
2 requested an extension of time is inadequate  
3 under OPRA pursuant to Hardwick v. New Jersey  
4 Department of Transportation, GRC Complaint No.  
5 2007-164 (February 2008) and the Complainant's  
6 requests are "deemed" denied pursuant to OPRA  
7 Section 5.g. and 5.i. as well as Kelly v.  
8 Township of Rockaway, GRC Complaint No. 2007-11  
9 (October 2007).

10 No. 2. Because the Complainant in  
11 this matter identified a type of government  
12 record (list or record which identifies the DOT's  
13 projects in the construction or design phase)  
14 within a specific date (1997-2002), the requests  
15 are not overly broad. See MAG Entertainment, LLC  
16 v. Division of Alcoholic Beverage Control  
17 (Appellate Division 2005), Bent v. Stafford  
18 Police Department (Appellate Division 2005), and  
19 New Jersey Builders Association v. New Jersey  
20 Council on Affordable Housing (Appellate Division  
21 2007).

22 The Custodian certified that no  
23 records responsive beyond those contained in the  
24 archived database exist without the Custodian  
25 having to conduct research, which is not required

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1 under OPRA. As such, the Custodian's search is  
2 not open-ended, nor does it require research, but  
3 rather requires the Custodian to locate the  
4 corresponding list of specific government records  
5 from an archived database and print said list.

6 No. 3. Pursuant to OPRA Section  
Page 32

7 7.b., *Kwanzaa v. Department of Corrections*, GRC  
8 Complaint No. 2004-167 (March 2005), and  
9 *Gillespie v. Newark Public Schools*, GRC Complaint  
10 No. 2004-105 (November 2004), the Council does  
11 not have the authority to adjudicate the portion  
12 of this complaint in which the Complainant  
13 challenges the accuracy or completeness of a  
14 record's content.

15 No. 4. Although the Custodian's  
16 written request for an extension of time to  
17 fulfill the Complainant's requests was inadequate  
18 under OPRA and resulted in a "deemed" denial of  
19 said requests, because the Custodian provided the  
20 requested records from an archived database to  
21 the Complainant and waived a portion of the copy  
22 fee as well as made other records available upon  
23 payment of the copy fee, it is concluded that the  
24 Custodian's actions do not rise to the level of a  
25 knowing and willful violation of OPRA and

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1 unreasonable denial of access under the totality  
2 of the circumstances.

3 However, the Custodian's unlawful  
4 "deemed" denial of access appears negligent and  
5 heedless since he is vested with the legal  
6 responsibility of granting and denying access in  
7 accordance with the law.

8 No. 5. Based on the fact that the  
9 courts of the State have determined that the  
10 State's fee-shifting statutes are intended to  
11 compensate an attorney hired to represent a  
12 plaintiff not an attorney who is the plaintiff  
13 representing himself, as well as the GRC's

14 decision in Pitts v. New Jersey Department of  
15 Corrections, GRC Complaint No. 2005-71 (April  
16 2006), the Complainant is not entitled to  
17 reasonable attorney's fees pursuant to OPRA.

18 CHAIRPERSON TABAKIN: Motion?

19 MS. KOVACH: So moved.

20 MS. FORSYTH: Second.

21 MS. HAIRSTON: Robin Berg Tabakin?

22 CHAIRPERSON TABAKIN: Yes.

23 MS. HAIRSTON: Janice Kovach?

24 MS. KOVACH: Yes.

25 MS. HAIRSTON: Kathryn Forsyth?

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1 MS. FORSYTH: Yes.

2 MS. HAIRSTON: Dave Fleisher?

3 MR. FLEISHER: Yes.

4 CHAIRPERSON TABAKIN: Larry Kohn v.  
5 Township of Livingston (Essex)(2007-319).

6 MR. CARUSO: The Executive Director  
7 respectfully recommends the Council find that:

8 1. The Custodian's failure to  
9 respond in writing to the Complainant's OPRA  
10 request granting access, denying access, seeking  
11 clarification or requesting an extension of time  
12 within the statutorily mandated seven business  
13 days, as required by Section 5.g. and 5.i. of  
14 OPRA results in a "deemed" denial of the  
15 Complainant's OPRA request. Kelly v. Township of  
16 Rockaway, GRC Complaint No. 2007-11 (October  
17 2007).

18 2. The unapproved draft site and  
19 floor plans constitute inter-agency or  
20 intra-agency advisory, consultative or

21 deliberative material and thus are not government  
22 records pursuant to the definition of a  
23 government record and are exempt from disclosure  
24 under Section 1.1 of OPRA and Parave-Fogg v.  
25 Lower Alloways Creek Township, GRC Complaint No.

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1 2006-51 (August 2006).

2 3. The requested floor plans are  
3 exempt from disclosure for containing security  
4 information of procedures for any building  
5 facility which, if disclosed, would jeopardize  
6 security of the building or facility or persons  
7 therein pursuant to Section 1.1 of OPRA and  
8 Cardillo v. City of Hoboken (Zoning Office), GRC  
9 Complaint No. 2005-158 (December 2006).

10 4. Although the Custodian's failure  
11 to respond in writing within the statutorily  
12 mandated seven business day time frame resulted  
13 in a deemed denial of access to the requested  
14 record, the Custodian's denial of access to the  
15 requested plans was supported by law.

16 Therefore, it is concluded that the  
17 Custodian's actions do not rise to the level of a  
18 knowing and willful violation of OPRA and  
19 unreasonable denial of access under the totality  
20 of the circumstances.

21 However, the Custodian's deemed  
22 denial does appear to be negligent and heedless  
23 since he is vested with the legal responsibility  
24 of granting and denying access in accordance with  
25 the law.

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1 CHAIRPERSON TABAKIN: Motion?

2 MS. KOVACH: So moved.

3 MS. FORSYTH: Second.

4 MS. HAIRSTON: Robin Berg Tabakin?

5 CHAIRPERSON TABAKIN: Yes.

6 MS. HAIRSTON: Janice Kovach?

7 MS. KOVACH: Yes.

8 MS. HAIRSTON: Kathryn Forsyth?

9 MS. FORSYTH: Yes.

10 MS. HAIRSTON: Dave Fleisher?

11 MR. FLEISHER: Yes.

12 CHAIRPERSON TABAKIN: Santiago Zayas

13 v. City of Trenton (Mercer)(2008-31).

14 MR. CARUSO: The Executive Director  
15 recommends the Council find that:

16 1. The Custodian did not respond to  
17 the Complainant's OPRA request for the record  
18 relevant to this complaint until December 7,  
19 2007, eleven business days following receipt of  
20 the Complainant's November 16, 2007 OPRA request.

21 Therefore, the Custodian's failure  
22 to respond in writing to the Complainant's OPRA  
23 request granting access, denying access, seeking  
24 clarification or requesting an extension of time  
25 within the statutorily mandated seven business

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1 days, as required by Section 5.g. and 5.i. of  
2 OPRA results in a "deemed" denial of the  
3 Complainant's OPRA request. Kelly v. Township of  
4 Rockaway, GRC Complaint No. 2007-11(October  
5 2007).

6 No. 2. Because the Custodian failed  
7 to notify the Complainant in writing within the

8 statutorily mandated seven business days when the  
9 requested record would be made available, the  
10 Custodian's December 7, 2007 written response to  
11 the Complainant requesting an extension of time  
12 is insufficient under Section 5.i. of OPRA. See  
13 *Hardwick v. New Jersey Department of*  
14 *Transportation*, GRC Complaint No. 2007-164  
15 (February 2008).

16 3. Although the evidence of record  
17 shows that the Custodian made several attempts to  
18 obtain the record from the Trenton Police  
19 Department, the Department's confusion as to the  
20 location of the record materially hindered the  
21 Complainant's right of public access to  
22 government records as set forth in Section 1 of  
23 OPRA. This hindrance should not be borne by a  
24 requestor.

25 And that's Section 1 of OPRA. ("Any

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1 limitation on the right of access...should be  
2 construed in favor of the public's right of  
3 access.")

4 4. Although the Custodian's  
5 untimely response resulted in a deemed denial of  
6 access in this complaint, the evidence of record  
7 shows that the Custodian made several attempts to  
8 obtain the requested record from the Trenton  
9 Police Department, who hindered the Complainant's  
10 right to access by not being able to locate the  
11 requested record in a sufficient amount of time,  
12 and certified that no record responsive was  
13 available.

14 Therefore, it is concluded that the  
Page 37

15 Custodian's actions do not rise to the level of a  
16 knowing and willful violation of OPRA and  
17 unreasonable denial of access under the totality  
18 of the circumstances.

19 However, the Custodian's actions  
20 appear to be negligent and heedless since she is  
21 vested with the legal responsibility of granting  
22 and denying access in accordance with the law.

23 CHAIRPERSON TABAKIN: Thank you.  
24 Motion?

25 MS. KOVACH: So moved.

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1 MR. FLEISHER: Second.

2 MS. HAIRSTON: Robin Berg Tabakin?

3 CHAIRPERSON TABAKIN: Yes.

4 MS. HAIRSTON: Janice Kovach?

5 MS. KOVACH: Yes.

6 MS. HAIRSTON: Kathryn Forsyth?

7 MS. FORSYTH: Yes.

8 MS. HAIRSTON: Dave Fleisher?

9 MR. FLEISHER: Yes.

10 CHAIRPERSON TABAKIN: John Paff v.  
11 Borough of Sussex (Sussex) (2008-38).

12 MR. CARUSO: Before I begin I wanted  
13 to point out that we wanted to add one sentence  
14 and amend this F.R. to add one sentence to the  
15 end of the Conclusions and Recommendations No. 2.  
16 which read:

17 N.J.S.A. 47:1A-1, any limitations on  
18 the right of access should be construed in favor  
19 of the public's right of access.

20 That line was also added to page 6,  
21 the last paragraph right at the end of the page.

22 The Executive Director respectfully  
23 recommends the Council find that:

24 1. Although the Custodian responded  
25 in writing granting access to the requested

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1 record in a timely manner pursuant to Section  
2 5.i. of OPRA, the Custodian's response is  
3 insufficient because she failed to specifically  
4 address the Complainant's preference receipt of  
5 records.

6 Therefore, the Custodian has  
7 violated OPRA pursuant to Section 5.g. of OPRA  
8 and O'Shea v. Township of Fredon (Sussex) GRC  
9 Complaint No. 2007-251 (February 2008).

10 2. Sussex Borough's policy of  
11 mailing records does not supersede OPRA pursuant  
12 to Dittrich v. City of Hoboken, GRC Complaint No.  
13 2007-73 (October 2007). See also: Renna v.  
14 County of Union, GRC Complaint No. 2004-136 (July  
15 2005).

16 3. While the Custodian may not have  
17 had the ability to scan and e-mail the requested  
18 record at the time of the request, the Custodian  
19 still had the ability to transmit documents via  
20 facsimile. Because the Custodian had the proper  
21 means to produce the requested paper record via  
22 facsimile, the Custodian has violated Section  
23 5.d. of OPRA.

24 4. Although the Custodian's  
25 response was insufficient, the Custodian did

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1 provide the requested record in a timely manner.



9 MR. FLEISHER: So moved.  
10 MS. FORSYTH: Second.  
11 MS. HAIRSTON: Robin Berg Tabakin?  
12 CHAIRPERSON TABAKIN: Yes.  
13 MS. HAIRSTON: Janice Kovach?  
14 MS. KOVACH: Yes.  
15 MS. HAIRSTON: Kathryn Forsyth?  
16 MS. FORSYTH: Yes.  
17 MS. HAIRSTON: Dave Fleisher?  
18 MR. FLEISHER: Yes.  
19 CHAIRPERSON TABAKIN: Ali Morgano v.  
20 New Jersey Office of the Public defender  
21 (2008-79).  
22 MR. STEWART: The Executive Director  
23 respectfully recommends the Council find that:  
24 1. Because DPD Michael Marucci  
25 failed to forward the OPRA request to the

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1 Custodian or direct the Complainant to the  
2 Custodian, he violated OPRA Section 5.h. See  
3 also Mourning v. Department of Corrections, GRC  
4 complaint No. 2006-75 (August 2006) and Vessio v.  
5 New Jersey Department of Community Affairs,  
6 Division of Fire Safety, GRC Complaint No.  
7 2007-63 (May 2007).  
8 2. DPD Marucci's failure to respond  
9 in writing to the Complainant's OPRA request  
10 either granting access, denying access, seeking  
11 clarification or requesting and extension of time  
12 within the statutorily mandated seven business  
13 days results in a "deemed" denial pursuant to  
14 OPRA Section 5.g. and 5.i. and Kelley v. Township  
15 of Rockaway, GRC Complaint NO. 2007-11 (October  
Page 41

16 2007).

17 3. Because the records responsive  
18 to the Complainant's request are within files  
19 maintained by the Office of the Public defender  
20 and said files are confidential and shall not be  
21 opened to inspection by any person unless  
22 authorized by law, court order, or the State  
23 Public Defender pursuant to N.J.S.A. 47:1A-5.k.,  
24 and because the Custodian has certified that the  
25 Complainant cited no authorizing law, court order

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1 or permission from the Public Defender granting  
2 him access to said files and there is no evidence  
3 of record to the contrary; the Custodian has  
4 lawfully denied access to the requested records  
5 and has met his burden of proof pursuant to OPRA  
6 Section 6 that the denial of access was  
7 authorized by law.

8 No. 4. Although DPD Marucci  
9 violated OPRA by failing to forward the OPRA  
10 request to the Custodian or direct the  
11 Complainant to the Custodian and by failing to  
12 provide a specific basis for denying the  
13 Complaint access to the records which resulted in  
14 a "deemed denial," DPD Marucci did respond in  
15 writing denying the Complainant's request on the  
16 fourth business day following receipt of the  
17 request which was in fact an invalid request  
18 under OPRA.

19 Therefore, it is concluded that DPD  
20 Marucci's actions do not rise to the level of a  
21 knowing and willful violation of OPRA and  
22 unreasonable denial of access under the totality

23 of the circumstances.

24                   However, DPD Marucci's failure to  
25 forward the OPRA request to the Custodian or

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1 direct the Complainant to the Custodian as well  
2 as his failure to provide a specific basis for  
3 denying the Complainant access to the records  
4 which resulted in a "deemed denial" appears  
5 negligent and heedless since he is an officer or  
6 employee of a public agency required to comply  
7 with the provisions of OPRA.

8                   CHAIRPERSON TABAKIN: Motion?

9                   MS. KOVACH: So moved.

10                  MR. FLEISHER: Second.

11                  MS. HAIRSTON: Robin Berg Tabakin?

12                  CHAIRPERSON TABAKIN: Yes.

13                  MS. HAIRSTON: Janice Kovach?

14                  MS. KOVACH: Yes.

15                  MS. HAIRSTON: Kathryn Forsyth?

16                  MS. FORSYTH: Yes.

17                  MS. HAIRSTON: Dave Fleisher?

18                  MR. FLEISHER: Yes.

19                  CHAIRPERSON TABAKIN: Okay. That  
20 concludes the Individual Complaints Council  
21 Adjudication.

22                   There are no Complaints  
23 Reconsidered.

24                   There is one Complaint Adjudicated  
25 in Superior Court.

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1                   MS. STARGHILL: And that appeal was  
2 withdrawn.

3 CHAIRPERSON TABAKIN: Do you have a  
4 report?

5 MS. STARGHILL: I do. I've passed  
6 out to you all and I think I sent to you via  
7 e-mail our OPRA alert. And this is the GRC's new  
8 (and only) newsletter detailing some pertinent  
9 information about the law, the GRC's  
10 interpretation of the law, recent GRC decisions,  
11 as well as relevant Appellate Division and  
12 sometimes trial divisions or law division cases  
13 involving OPRA.

14 I have copies also for the public on  
15 the table if anyone in the audience is  
16 interested.

17 This newsletter was sent over  
18 gov connect anybody in, as well as Kathryn  
19 Forsyth was kind enough to send out to school  
20 district and Bruce Solomon, who's normally here,  
21 he's the Deputy Attorney General, sends to all  
22 state record custodians. And we sent OPRA alerts  
23 over these various means because we didn't have  
24 our List Serv, our GRC News List Serv up and  
25 running.

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1 We do now and we ask anyone to sign  
2 up who receive OPRA alerts through these various  
3 mediums. And just since our meeting started, I  
4 had 18 people sign up for the List Serv. We  
5 probably have upward of 300 or so people who have  
6 joined our GRC List Serv.

7 So future copies or versions of our  
8 newsletters will be sent over our new List Serv.  
9 Our List Serv and you can go to our web site to  
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10 sign up for our List Serv and from then on -- you  
11 just submit your e-mail address and from then on  
12 you receive pertinent news from the GRC.

13 The GRC in lieu of the September  
14 meeting will have a public outreach. I believe  
15 we talked about this the last meeting. I'm just  
16 mentioning it again. I will also mention it at  
17 the August meeting. That outreach will be held  
18 at the New Jersey State Museum much like our  
19 public outreach was held last October or last  
20 August's was.

21 Additionally, I have been requested  
22 and I agreed to give an OPRA training session to  
23 the legislature. The GRC did this maybe three or  
24 four years ago, and they actually contacted us.  
25 Because there are so many new legislators, as

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1 well as, I guess, new employees at the Office of  
2 Legislative Services and they wanted an update on  
3 OPRA. So I see that as a very positive thing;

4 Lastly, I have a memo which is going  
5 to go over gov connect -- I'm sorry, over the GRC  
6 List Serv detailing some findings from a recent  
7 New Jersey Supreme Court decision. It was very  
8 important only because rarely does an OPRA case  
9 go all the way up to the New Jersey Supreme  
10 Court. This matter is titled Elizabeth Mason v.  
11 City of Hoboken.

12 And in it the Supreme Court held of  
13 important general principles.

14 Brigitte, could you pass them to the  
15 staff and them make them available to the public?  
16 Thank you.

17                   The hot issue that we received many  
18 inquiries about relates to the court imposed  
19 45-day statute of limitations now on OPRA  
20 complaints. But that is only for actions brought  
21 in Superior Court. The court very clearly  
22 articulated that there is no statute of  
23 limitations for denial of access complaints filed  
24 with the GRC. The legislature did include it and  
25 the court chose not to acknowledge it in this

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1 court decision, which they could have, but they  
2 didn't.

3                   So that 45-day statute of  
4 limitations for filing denial of access  
5 complaints only applies to court actions, not to  
6 actions before the GRC.

7                   Also the court elaborated a little  
8 bit more on requirements for requestors  
9 qualifying for attorney's fees under the fee  
10 shifting provision in OPRA. Specifically, the  
11 court stated that under OPRA and common law, if  
12 the requestor can show that the lawsuit is  
13 causally related to the relief obtained and the  
14 relief is based in law, that's enough to make  
15 that requestor a prevailing party.

16                   However, the court did state that  
17 the burden of proof shifts to the record  
18 custodian. Meaning, the record custodian has to  
19 prove that their release of records before a  
20 judgment or before a settlement has nothing to do  
21 with the fact that the requestor filed a lawsuit  
22 of complaint with the GRC if the records  
23 custodian never responded to the OPRA request.

24                   So if the custodian never responded  
25                   within the seven days, never acknowledged

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1                   effectively to the OPRA request, then the burden  
2                   of proof shifts to the records custodian to  
3                   prove, Hey, this lawsuit that was filed did not  
4                   encourage you in anyway or was not the catalyst  
5                   to make you disclose the record.

6                   The court also stated a couple o  
7                   other things I thought was important. The took  
8                   the opportunity to state the purpose of OPRA  
9                   which I found very interesting. The court had  
10                  stated that OPRA's purpose is to maximize public  
11                  knowledge about public knowledge about public  
12                  affairs in order to ensure and informed citizenry  
13                  and to minimize the evils in here in the secluded  
14                  process.

15                  But more importantly the court went  
16                  on to say that various provisions in the statute  
17                  are designed to foster cooperation amongst the  
18                  requesters and agencies or records custodians and  
19                  reasonably accommodate both their interests.

20                  This is something that I always  
21                  state, and I'm sure Karyn does as well, when we  
22                  do OPRA training sessions is that the spirit of  
23                  the law requires custodians to cooperate and  
24                  communicate with requestors to help requestors  
25                  figure out what government records they want.

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1                   Because requestors don't know what we name our  
2                   records in state and local government.

3                   And so sometimes, you know, instead  
                    Page 47

4 of blowing off a request as broad and unclear,  
5 you know, it's important that a custodian kind of  
6 helps direct the requestor to the record. You  
7 know, what are you looking for; well, here's what  
8 we have; of those that we have, what do you  
9 really want to request.

10 The court went on to say the  
11 statute's designed both to promote, prompt access  
12 to government records and to encourage requestors  
13 and agencies to work together towards that end by  
14 accommodating one another.

15 The court also reiterated the  
16 penalty language in OPRA "knowing and willful"  
17 and made it quite clear that, I think, just in  
18 the specific word used that in fact that the  
19 civil penalty is assessed against the individual  
20 and not a custodial agency which has been an  
21 issue as of late.

22 So I think we have received enough  
23 inquiries, there are inquires reported I can  
24 attest to warrant that we send this memo out to  
25 all the folks on our List Serv. I was actually

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1 looking forward to not sending just yet over the  
2 List Serv just because it's all new, but maybe  
3 it's best that we test it right now to see how it  
4 goes. So this is going to go over the List Serv  
5 by the end of this week. And that is all that I  
6 have. Thank you.

7 CHAIRPERSON TABAKIN: Okay, it's  
8 time for public comments. If you wish to make a  
9 public comment, please step up to the table and  
10 state your name and address. In the interest of

11 time, speakers are limited to five minutes.  
12 Speakers with prepared testimony should provide  
13 eight copies for the Council.

14 Anyone?

15 Okay, could I have a motion to  
16 adjourn?

17 MS. FORSYTH: So moved.

18 MS. KOVACH: Second.

19 MS. HAIRSTON: Robin Berg Tabakin?

20 CHAIRPERSON TABAKIN: Yes.

21 MS. HAIRSTON: Janice Kovach?

22 MS. KOVACH: Yes.

23 MS. HAIRSTON: Kathryn Forsyth?

24 MS. FORSYTH: Yes.

25 MS. HAIRSTON: Dave Fleisher?

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1 CHAIRPERSON TABAKIN: Okay, we're  
2 adjourned.

3 MS. STARGHILL: Thank you.

4

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6 (HEARING CONCLUDED AT 11:58 A.M.)

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C E R T I F I C A T E

I, LINDA P. CALAMARI, a Professional  
Reporter and Notary Public of the State of New  
Jersey, do hereby certify the foregoing to be a  
true and accurate transcript of my original  
stenographic notes taken at the time and place  
hereinbefore set forth.

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LINDA P. CALAMARI

Dated: AUGUST 19, 2008.

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