



## **Minutes of the Government Records Council February 27, 2018 Public Meeting – Open Session**

### **I. Public Session:**

- **Call to Order**

The meeting was called to order at 1:42 p.m. by Ms. Robin Berg 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. Berg 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 February 22, 2018.”

Ms. Berg Tabakin read the fire emergency procedure.

- **Roll Call**

Ms. Bordzoe called the roll:

Present: Robin Berg Tabakin, Esq. (Chairwoman), Jennifer Simons, Esq. (designee of Department of Education Acting Commissioner Dr. Richard Lamont Repollet), Jason Martucci, Esq. (designee of Department of Community Affairs Commissioner, Lt. Governor Sheila Y. Oliver), and Steven Ritardi, Esq. (Public Member).

**\*\*\*Steven Ritardi, Esq. (Public Member) participated telephonically from 1:42 p.m. until 2:29 p.m. for the purposes of voting on GRC Complaint No. 2011-331 and the January 30, 2018 Open and Closed Session Meeting Minutes.**

GRC Staff in Attendance: Frank F. Caruso (Communications Specialist/Resource Manager), Rosemond Bordzoe (Secretary), John Stewart (Mediator), Samuel Rosado (Staff Attorney), and Deputy Attorney General Debra Allen.

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

## **II. Communications Specialist/Resource Manager's Report:**

### **OPRA Trainings**

- As noted last month, the GRC is currently holding all requests for trainings due to staffing issues.

### **Current Statistics**

- Since OPRA's inception in July 2002, the GRC has received 4,799 Denial of Access Complaints. That averages about 309 annual complaints a little more than per 15½ program years. So far in the current program year, the GRC has received 136 Denial of Access Complaints.
- 474 of the 4,799 complaints remain open and active (10%). Of those open cases:
  - 13 complaints are on appeal with the Appellate Division (2.7%);
  - 11 complaints are currently in mediation (2.3%);
  - 36 complaints await adjudication by the Office of Administrative Law (7.6%);
  - 66 complaints are tentatively scheduled for adjudication at an upcoming GRC meeting, which includes the current meeting (13.9%); and,
  - 342 complaints are work in progress (72.2%).
  - 3 complaints are proposed for the Office of Administrative Law (.6%) and 3 complaints are being held in abeyance (.6%).
- Since Program Year 2004, the GRC has received 28,309 total inquiries, averaging about 1,952 annual inquiries per a little more than 14½ tracked program years (the GRC did not track inquiries in the agency's first year). So far in the current program year, the GRC has received 1,143 inquiries.
- From January 1, 2015, until present:
  - The GRC has received 1,024 Denial of Access Complaints, which equals 21% of all complaints filed in the agency's history. That means that the GRC has received 1.3 complaints on average for every business day (allowing for public holidays) during that period.
  - The GRC has adjudicated 1,276 cases (some cases require multiple adjudications). That number does not include today's adjudications.
  - The GRC has received and addressed 6,245 inquiries, which equals 22% of all inquiries received in the agency's history. That averages approximately 8 inquiries per every business day during that period.
  - The GRC has been successfully able to mediate 96 of 195 referred cases (49.2%), with 11 of those 195 cases currently in active mediation.

### **III. Closed Session:**

- Christina Moreira v. Elizabeth Board of Education (Union) (2015-313)

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

The Council met in closed session from 1:48 p.m. until 2:24 p.m.

Ms. Berg Tabakin called for a motion to end the closed session. Mr. Martucci made a motion, which was seconded by Ms. Simons. The Council adopted the motion by a unanimous vote. Open Session reconvened at 2:25 p.m., and Ms. Bordzoe called roll.

- Present: Ms. Berg Tabakin, Ms. Simons, Mr. Martucci, and Mr. Ritardi.

### **IV. Approval of Minutes of Previous Meetings:**

- **January 30, 2018 Open Session Meeting Minutes**

Ms. Berg Tabakin called for a motion to approve the draft open session minutes of the January 30, 2018 meeting. Mr. Martucci made a motion, which was seconded by Mr. Ritardi. The motion passed by a majority vote; Ms. Simons abstained.

- **January 30, 2018 Closed Session Meeting Minutes**

Ms. Berg Tabakin called for a motion to approve the draft closed session minutes of the January 30, 2018 meeting. Mr. Martucci made a motion, which was seconded by Mr. Ritardi. The motion passed by a majority vote; Ms. Simons abstained.

### **V. New Business – Cases Scheduled for Adjudication**

Ms. Berg Tabakin stated that an “Administrative Complaint Disposition” means a decision by the Council as to whether to accept or reject the Council Staff’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): None**
- C. Administrative Disposition of Uncontested, Voluntary Withdrawals by Complainant (No Adjudication of the Council is Required):**
  - 1. **Ann Stockton v. City of Hoboken (Hudson) (2015-163)**
    - Complaint Voluntarily Withdrawn

2. **Keith B. Kemery v. Voorhees Fire District (Camden) (2016-218)**
  - Complaint Voluntarily Withdrawn (previously a full adjudication item).
3. **Timothy E. Gay v. City of Cape May (Cape May) (2016-312)**
4. **Timothy E. Gay v. City of Cape May (Cape May) (2016-313)**
5. **Timothy E. Gay v. City of Cape May (Cape May) (2016-314) Consolidated**
  - Complaint Voluntarily Withdrawn
6. **Kayleen Egan v. NJ Department of Education (Camden County) (2017-80)**
  - Settled in Mediation
7. **Brandon Bernier v. Roselle Board of Education (Union) (2017-225)**
  - Settled in Mediation
8. **Ralph Shrom v. Township of Tabernacle (Burlington) (2017-234)**
  - Complaint Voluntarily Withdrawn
9. **Daniel Nero v. NJ Department of Environmental Protection (2018-01)**
  - Settled in Mediation

## VI. New Business – Cases Scheduled for Individual Complaint Adjudication

### A. Individual Complaint Adjudications with Recusals:

A brief summary of the Council Staff's recommended action is under each complaint:

1. **Joshua Lazarus v. NJ Department of Community Affairs (2011-331) (JM Recusal)**
  - The Complainant withdrew this complaint; therefore, it should be dismissed. No further adjudication is required.
  - Ms. Berg Tabakin called for any discussion on the Council Staff's findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Council Staff's findings and recommendations as written. Ms. Simons made a motion and Mr. Ritardi seconded the motion. The motion passed by a majority vote; Mr. Martucci recused.
2. **Robert A. Verry v. Borough of South Bound Brook (Somerset) (2015-133) (SR Recusal)**
  - Reconsideration should be denied.
  - The parties shall comply with the Council's December 19, 2017 Interim Order as it remains in effect.
  - Ms. Berg Tabakin called for any discussion on the Council Staff's findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Council Staff's findings and recommendations as written. Mr. Martucci made a motion and Ms. Simons seconded the motion. The motion passed by a majority vote; Mr. Ritardi recused.
3. **Robert A. Verry v. Borough of South Bound Brook (Somerset) (2015-370) (SR Recusal)**
  - The Custodian complied with the Council's January 30, 2018 Interim Order.
  - There is no knowing and willful violation.

- The Complainant is a prevailing party. The parties shall confer on fees and advise the GRC within twenty (20) business days if an agreement is reached. If not, Complainant's Counsel shall submit a fee application in accordance with N.J.A.C. 5:105-2.13.
- Ms. Berg Tabakin called for any discussion on the Council Staff's findings and recommendations. Mr. Rosado noted that an edit had been made to prevailing party analysis to remove an artifact; however, the recommendations remained unchanged. Ms. Berg Tabakin called for a motion to accept the Council Staff's findings and recommendations as edited. Ms. Simons made a motion and Mr. Martucci seconded the motion. The motion passed by a majority vote; Mr. Ritardi recused.

**B. Individual Complaint Adjudications with no Recusals:**

1. **Shawn G. Hopkins v. Loch Arbour Village (Monmouth) (2014-48)**

- The current Custodian complied with the Council's December 19, 2017 Interim Order.
- There is no knowing and willful violation.
- Ms. Berg Tabakin called for any discussion on the Council Staff's findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Council Staff's findings and recommendations as written. Mr. Martucci made a motion and Ms. Simons seconded the motion. The motion passed by a unanimous vote.

2. **Michael Feaster v. Buena Borough (Atlantic) (2015-308)**

- The Custodian complied with the Council's January 30, 2018 Interim Order.
- There is no knowing and willful violation.
- Ms. Berg Tabakin called for any discussion on the Council Staff's findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Council Staff's findings and recommendations as written. Ms. Simons made a motion and Mr. Martucci seconded the motion. The motion passed by a unanimous vote.

3. **Jesse Wolosky v. Borough of Washington (Warren) (2016-29)**

- The Custodian's extension was reasonable and warranted; however, her failure to respond before its expiration resulted in a "deemed" denial.
- The Custodian did not unlawfully deny access to OPRA request item Nos. 1, 2, or 3.
- The Custodian unlawfully denied access to a portion of OPRA request item No. 4, and must either convert the records to the medium requested or some other meaningful medium.
- The knowing and willful and prevailing party analyses are deferred pending compliance.
- Ms. Berg Tabakin called for any discussion on the Council Staff's findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Council Staff's findings and recommendations as written. Mr.

Martucci made a motion and Ms. Simons seconded the motion. The motion passed by a unanimous vote.

4. **Luis F. Rodriguez v. Kean University (2016-40)**

- The Custodian complied with the Council's January 30, 2018 Interim Order.
- There is no knowing and willful violation.
- Ms. Berg Tabakin called for any discussion on the Council Staff's findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Council Staff's findings and recommendations as written. Ms. Simons made a motion and Mr. Martucci seconded the motion. The motion passed by a unanimous vote.

5. **Talbot B. Kramer, Jr., Esq. (o/b/o William Juliana) v. Township of Washington (Gloucester) (2016-113)**

- The current Custodian complied with the Council's January 30, 2018 Interim Order.
- There is no knowing and willful violation.
- The Complainant is a prevailing party. The parties shall confer on fees and advise the GRC within twenty (20) business days if an agreement is reached. If not, Complainant's Counsel shall submit a fee application in accordance with N.J.A.C. 5:105-2.13.
- Ms. Berg Tabakin called for any discussion on the Council Staff's findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Council Staff's findings and recommendations as written. Mr. Martucci made a motion and Ms. Simons seconded the motion. The motion passed by a unanimous vote.

6. **Jason Harry Komis v. Camden County (2016-143)**

- The Custodian lawfully denied the subject OPRA request because no responsive records exist.
- Ms. Berg Tabakin called for any discussion on the Council Staff's findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Council Staff's findings and recommendations as written. Ms. Simons made a motion and Mr. Martucci seconded the motion. The motion passed by a unanimous vote.

7. **Jeremy Ryan Mawhinney v. Township of Galloway Police Department (Atlantic) (2016-153)**

- The Custodian lawfully denied access to both OPRA requests.
- Ms. Berg Tabakin called for any discussion on the Council Staff's findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Council Staff's findings and recommendations as written. Ms. Simons made a motion and Mr. Martucci seconded the motion. The motion passed by a unanimous vote.

8. **Luis F. Rodriguez v. Kean University (2016-159)**

- The Custodian's response was insufficient because she failed to respond to each request item.
- The Council must conduct an *in camera* review of the Form attachment.
- The knowing and willful analysis is deferred.
- Ms. Berg Tabakin called for any discussion on the Council Staff's findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Council Staff's findings and recommendations as written. Mr. Simons made a motion and Mr. Martucci seconded the motion. The motion passed by a unanimous vote.

9. **Eric Warner, Esq. (o/b/o David Trotman) v. City of Trenton (Mercer) (2016-163)**

- The Complainant withdrew this complaint; therefore, it should be dismissed. No further adjudication is required.
- Ms. Berg Tabakin called for any discussion on the Council Staff's findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Council Staff's findings and recommendations as written. Ms. Simons made a motion and Mr. Martucci seconded the motion. The motion passed by a unanimous vote.

10. **Luis F. Rodriguez v. Kean University (2016-196)**

- The Custodian's extension of the first OPRA request was reasonable and warranted.
- The Custodian's failure to immediately respond to the Complainant's second OPRA request seeking "immediate" access records resulted in a violation of OPRA.
- The Custodian lawfully denied access to the Complainant's two (2) OPRA requests because no responsive records existed.
- There is no knowing and willful violation.
- Ms. Berg Tabakin called for any discussion on the Council Staff's findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Council Staff's findings and recommendations as written. Ms. Simons made a motion and Mr. Martucci seconded the motion. The motion passed by a unanimous vote.

11. **Frank Berman v. Township of Rockaway (Morris) (2016-206)**

- The Custodian lawfully denied access to the requested e-mail address list held by a campaign committee because it was not received or maintained by the Township.
- Ms. Berg Tabakin called for any discussion on the Council Staff's findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Council Staff's findings and recommendations as written. Mr. Martucci made a motion and Ms. Simons seconded the motion. The motion passed by a unanimous vote.

**12. Eric Petr v. Town of Morristown (Morris) (2017-96)**

- The Custodian's failure to timely respond resulted in a "deemed" denial of access.
- The Complainant's OPRA request is invalid.
- There is no knowing and willful violation.
- Ms. Berg Tabakin called for any discussion on the Council Staff's findings and recommendations as written. Hearing none, Ms. Berg Tabakin called for a motion to accept the Council Staff's findings and recommendations as written. Ms. Simons made a motion and Mr. Martucci seconded the motion. The motion passed by a unanimous vote.

**VII. Court Decisions of GRC Complaints on Appeal:**

- Lynn v. Middlesex Cnty. Prosecutor's Office, 2018 N.J. Super. Unpub. LEXIS 370 (App. Div. 2018): The Appellate Division upheld a GRC ruling, which found that the Appellant-Requestor's request for a Prosecutor's entire file pertaining to his indictment, including any photographs contained therein, was invalid. The Court agreed with the GRC that the request was invalid because it failed to "reasonably identify" the records sought. See Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005). The Court also held that the requested file was also exempt from disclosure as criminal investigatory records under N.J.S.A. 47:1A-1.1. Additionally, the photographs were exempt from disclosure under Executive Order No. 69 (Gov. Whitman 1997) and N.J.S.A. 47:1A-9(a). Lastly,

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

- Geiger v. Borough of Englewood Cliffs, Docket No. BER-L-7240-17 (January 19, 2018): Plaintiff-Requestor sought an e-mail or other correspondence between the Englewood Cliffs ("Borough") Mayor and local media regarding a report on a police department employee between August 1 and August 16, 2017. The Defendant-Custodian denied access, claiming that the e-mail in question was written by the Mayor in his individual capacity and not as a public official in the performance of his official duties. The Court held that because the e-mail was via the Mayor's e-mail address and pertained to disciplinary matter of a Borough employee, it was a "government record" under OPRA. Additionally, while the Court acknowledged that executive privilege could apply to government records, it did not apply here because the e-mail was not soliciting formal or informal advice, but rather a comment on actions taken by the Borough. Lastly, the Court rejected the argument that New Jersey's Shield Law applied here because the privilege belonged to the newsperson and not the source.
- Wronko v. NJ SPCA, 2018 N.J. Super. LEXIS 13 (App. Div. 2018) (Approved for Publication): The Appellate Division held that the New Jersey Society for the Prevention of Cruelty to Animals ("NJSPCA") is a public agency within the definition under OPRA and therefore must comply with OPRA's disclosure requirements. The Court noted that the NJSPCA was created by the Legislature, overseen by the State, and collected public funds via fines and penalties it assesses under its designated police powers.

- Libertarians for Transparent Gov't v. Gov't Records Council, 2018 N.J. Super. LEXIS 14 (App. Div. 2018) (Approved for Publication): The Appellate Division re-affirmed the long-standing view that draft meeting minutes are pre-decisional and closely related to the formation and/or process of public policy in accordance with the deliberative process privilege. Therefore, the Court held that draft meeting minutes were considered “inter-agency or intra-agency, advisory, consultative, and/or deliberative material,” and thus exempt from disclosure under OPRA. See N.J.S.A. 47:1A-1.1.

**IX. Public Comment: None**

**X. Adjournment:**

Ms. Berg Tabakin called for a motion to end the Council meeting. Mr. Martucci made a motion, which was seconded by Ms. Simmons. The motion passed by a majority vote (Mr. Ritardi having exited the meeting at 2:29 p.m.).

The meeting adjourned at 2:44 p.m.

Respectfully submitted,

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Robin Berg Tabakin, Esq., Chair

Date Approved: March 27, 2018