

**Minutes of the Government Records Council
January 27, 2006 Public Meeting – Open Session**

The meeting was called to order at 9:40 a.m. at the Department of Community Affairs, Room 129, Trenton, New Jersey. The Open Public Meetings Act statement was read. Ms. Davies called the roll:

Present: Ms Diane Schonyers (designee of Acting Commissioner Lucille Davy Department of Education), Charles Richman (designee of Commissioner Susan Bass Levin, Department of Community of Affairs), Ms. Robin Berg-Tabakin, Executive Director Paul Dice, Assistant Executive Director Gloria Luzzatto, In-House Counsel Catherine Starghill, Deputy Attorney General Debra Allen, GRC Staff: Chris Malloy, Kimberly Gardner, Dara Lownie, Jennifer Arozamena, Colleen McGann and Marion Davies.

Not in Attendance: Mr. Maltese - Chairman

Ms. Schonyers called for a motion to go into closed session for legal advice. A motion was made by Ms. Tabakin and seconded by Mr. Richman. The motion was adopted by a unanimous vote.

The Council met in closed session from 9:45 a.m. to 10:05 a.m.

Open Session reconvened at 10:10 a.m.

Ms. Schonyers called for a motion to go into open session. A motion was made by Ms. Tabakin and seconded by Mr. Richman. The motion was adopted by a unanimous vote.

Ms. Davies called the roll:

In attendance:

Ms. Schonyers, Ms. Tabakin, Mr. Richman

Not In Attendance:

Mr. Maltese

The pledge of allegiance was recited.

Ms. Schonyers stated that the Government Records Council needs to appoint a secretary. Ms. Tabakin volunteered for the position of secretary.

Ms. Schonyers and Ms. Tabakin made changes to the closed session minutes of October 28, 2005. These minutes were not adopted at this meeting.

Robert Tombs v. Brick Township Municipal Authorities (2003-123)

Mr. Dice stated that there were two (2) documents not listed in the Supplemental Findings and Recommendations:

1. December 23, 2005 exceptions from Mr. Tombs which had been distributed and discussed with the Council.
2. January 4, 2006 late submission from the Custodian.

Mr. Dice stated that since all submissions have not been reviewed by the Council he suggested that this case be postponed until the next meeting so that all information could be considered.

Mr. Richman made a motion to postpone the decision on Robert Tombs v. Brick Township Municipal Authorities to request a 45-day extension of time from the Office of Administrative Law for issuing the final decision in order to give thorough and complete consideration to the parties' submissions (exceptions and replies) subsequent to the issuing of the initial decision. Ms. Tabakin seconded the motion. The motion passed unanimously.

William Osterman v. City of Trenton/Trenton Police Department (2004-96) and (2004-107)

Ms. Gardner reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in the Second Supplemental Findings and Recommendations of the Executive Director. Ms. Gardner presented the following recommendation to the Council:

The Executive Director respectfully recommended that the Council adopt the Initial Decision of the Office of Administrative Law and conclude that the Custodian did not knowingly and willfully violate OPRA and unreasonably deny access under the totality of the circumstances.

Ms. Schonyers called for a motion to accept the Executive Director's recommendation with the administrative changes as amended. A motion was made by Ms. Tabakin and seconded by Mr. Richman. Motion passed unanimously.

Bert Wailoo v. Kean University of New Jersey (2004-196)

Mr. Malloy reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Malloy presented the following recommendation to the Council:

The Executive Director respectfully recommended that the Council find that because the document requested was not made, maintained or kept on file...or received at the time of the request, as well as the ruling in Mag, the Custodian did not unlawfully deny access to the records requested.

Ms. Schonyers called for a motion to accept the Executive Director's recommendation as written. A motion was made by Mr. Richman and seconded by Ms. Tabakin. Motion passed unanimously.

Frances O'Loughlin v. Ocean Gate Board of Education (2005-43)

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

The Executive Director respectfully recommended that the Council find:

1. The Custodian should redact the exempt information contained in the October 20, 2004 BOE meeting minutes, providing a detailed and lawful basis for each redacted part thereof and provide access to those redacted minutes within ten (10) business days from receipt of the Council's decision and provide confirmation to the Executive Director.
2. The Custodian has not borne the burden of proving that the denial of access to Board minutes was authorized by law pursuant to N.J.S.A. 47:1A-6.
3. The Custodian is in violation of N.J.S.A. 47:1A-5.i. for failing to respond to the December 16, 2004, January 7, 2005, January 20, 2005, and January 30, 2005 OPRA requests within the statutorily mandated seven (7) business days.
4. The Custodian is in violation of N.J.S.A. 47:1A-5.g. for failing to provide a written response to the January 7, 2005 and January 20, 2005 OPRA requests as well as failing to provide a specific and lawful basis for the denial of access in the January 21, 2005 and March 8, 2005 responses.
5. The Custodian is in violation of N.J.S.A. 47:1A-5.e. for failing to provide immediate access to bills.
6. The Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of circumstances due to her certification that any delay in access was caused by the high turnover in office, and the fact that the Complainant has been provided with all requested records except the October 20, 2004 meeting minutes.

Ms. Schonyers called for a motion to accept the Executive Director's recommendation as written. A motion was made by Mr. Richman and seconded by Ms. Tabakin. Motion passed unanimously.

Akbar Na'im v. Union County Prosecutor's Office (2005-66)

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

The Executive Director respectfully recommended the Council find that there was no unlawful denial of access as the requested records are criminal investigatory records pursuant to N.J.S.A. 47:1A-1.1 and are exempt from disclosure.

Ms. Schonyers called for a motion to accept the Executive Director's recommendation as amended to include citation. A motion was made by Ms. Tabakin and seconded by Mr. Richman. Motion passed unanimously.

Michael DeLuca v. Town of Guttenberg (2005-76)

Mr. Malloy reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Malloy presented the following recommendation to the Council:

The Executive Director respectfully recommended the Council find that based on the fact that the Custodian has certified that all documents in question have either been provided, or do not exist, she has borne her burden of proving that there was no unlawful denial of access to any of the records requested on April 15, 2005.

Ms. Schonyers called for a motion to accept the Executive Director's recommendation as written. A motion was made by Ms. Tabakin and seconded by Mr. Richman. Motion passed unanimously.

John McCormack v. New Jersey Department of Treasury (2005-104)

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

The Executive Director respectfully recommended the Council find that:

1. The Custodian has complied with the Council's December 8, 2005 Interim Decision in providing access to the requested memoranda and supplying the Council with the requested "handwritten notes taken of meeting between Edward Scheingold, John McCormack and Linda B. Hickey; notes taken by Linda Hickey" within ten (10) business days of receiving the Council's decision.
2. The Custodian should disclose the requested "handwritten notes taken of meeting between Edward Scheingold, John McCormack and Linda B. Hickey; notes taken by Linda Hickey," except Section 2, Portion "D" and "E" as indicated by the GRC staff, which are exempt from disclosure as "personnel" pursuant to N.J.S.A. 47:1A-10 and should be redacted.
3. The Custodian shall comply with "2" of the Conclusions and Recommendations within ten (10) business days from receipt of this decision on the basis of the Council's above determination and provide confirmation to the Executive Director that the Custodian has complied with the Council's decision.

Ms. Schonyers called for a motion to accept the Executive Director's recommendation as amended. A motion was made by Ms. Tabakin and seconded by Mr. Richman. Motion passed unanimously.

John Brennan v. Monmouth County Prosecutor (2005-119)

Mr. Malloy reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in the Supplemental Findings and Recommendations of the Executive Director. Mr. Malloy presented the following recommendation to the Council:

The Executive Director respectfully recommended that the Council vote to approve the Monmouth County Prosecutors Office's request for a stay.

Ms. Schonyers called for a motion to accept the Executive Director's recommendation as written. A motion was made by Mr. Richman and seconded by Ms. Tabakin. Motion passed unanimously.

David Allen v. New Jersey Department of Corrections (2005-126)

Ms. McGann reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. McGann presented the following recommendation to the Council:

The Executive Director respectfully recommended the Council find that while Custodian's reasons for denying access to the requested protective custody documents are compelling there is insufficient evidence to determine if the documents are exempt from access and so the Council should perform an *in camera* inspection of the requested documents.

Ms. Schonyers called for a motion to accept the Executive Director's recommendation as written. A motion was made by Ms. Tabakin and seconded by Mr. Richman. Motion passed unanimously.

David Mann v. New Jersey Department of Environmental Protection (2005-129)

Ms. McGann reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. McGann presented the following recommendation to the Council:

The Executive Director respectfully recommended the Council find that pursuant to N.J.S.A. 47:1A-9.a and based on *N.J.A.C. 7:1D-3.4* and the unpublished decision in Newark Morning Ledger Co., Publisher of the Star-Ledger the proposed rule disallowing facsimile transmittal of OPRA requests does apply. Therefore, the facsimile request for records submitted by the Complainant is not a valid OPRA request and there is no denial of access.

Ms. Schonyers called for a motion to accept the Executive Director's recommendation as written. A motion was made by Ms. Tabakin and seconded by Mr. Richman. Motion passed unanimously.

Akil Hayward v. ARC – Union County (2005-136)

Ms. Luzzatto reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Luzzatto presented the following recommendation to the Council:

The Executive Director respectfully recommended the Council find that in considering the meaning of a public agency as explained by the court in the Lafayette Yard cases and all the document submissions of the Custodian, the ARC-Union is not a public agency pursuant to N.J.S.A. 47:1A-1.1. Therefore, ARC-Union is not subject to the provisions of OPRA and is not required to respond to OPRA requests for records.

Ms. Schonyers called for a motion to accept the Executive Director's recommendation as written. A motion was made by Ms. Tabakin and seconded by Mr. Richman. Motion passed unanimously.

John Paff v. Cumberland County Sheriff's Office (2005-159)

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

The Executive Director respectfully recommended the Council find that:

1. While the Custodian did ultimately grant access to all records requested, the response to the request came after the seven (7) business days allowed for a response pursuant to the OPRA; violating N.J.S.A. 47:1A-5.i., and resulting in an unlawful denial of access.
2. Based on the fact that the Complainant was ultimately given access to the records requested, and there is no evidence that the Custodian's actions were consistent with the legal standards established for knowing and willful conduct by the New Jersey judiciary, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.
3. The Custodian should not be placed on the time matrix based on the Council's decision in Renna, as well as the fact that the time matrix is now defunct.

Ms. Schonyers called for a motion to accept the Executive Director's recommendation as written. A motion was made by Ms. Tabakin and seconded by Mr. Richman. Motion passed unanimously.

Asjlynn Loder v. County of Passaic (2005-161)

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

The Executive Director respectfully recommended that the Council find that while a reasonable special service charge of \$799.32 is warranted pursuant to OPRA and Lenape, the Custodian may only charge the \$400.00 special service charge that the Complainant agreed to pay in August 2004 because the Custodian violated N.J.S.A. 47:1A-5.c. by not providing the Complainant the opportunity to review and object to the charge prior to it being incurred.

Ms. Schonyers called for a motion to accept the Executive Director's recommendation as written. A motion was made by Ms. Tabakin and seconded by Mr. Richman. Motion passed unanimously.

William Hart, Jr. v. Hillside Township Tax Assessor (2005-168)

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

The Executive Director respectfully recommended that the Council find the Council does not have jurisdiction to make a determination in this complaint pursuant to Mosee v. Atlantic City Police Department, GRC Case No. 2005-33 (September, 2005) as well as N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.g.

Ms. Schonyers called for a motion to accept the Executive Director's recommendation as written. A motion was made by Ms. Tabakin and seconded by Mr. Richman. Motion passed unanimously

Louis Toscano v. New Jersey Department of Law & Public Safety, Division on Civil Rights (2005-188)

Ms. Luzzatto reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Luzzatto presented the following recommendation to the Council:

The Executive Director respectfully recommended the Council find that:

1. No records responsive to the request exist except for the computer screens that were provided to the Complaint on September 9, 2005 as certified by the Custodian. Therefore, there is no unlawful denial of access.
2. Pursuant to N.J.S.A. 47:1A-7.b. the Council does not have the authority to determine whether the Complainant withdrew a complaint filed with the Division.

Ms. Schonyers called for a motion to accept the Executive Director's recommendation as written. A motion was made by Ms. Tabakin and seconded by Mr. Richman. Motion passed unanimously.

John Paff v. Office of the Governor (2005-197)

Ms. Luzzatto reviewed the parties' respective positions and the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Luzzatto presented the following recommendation to the Council:

The Executive Director respectfully recommended the Council find that:

1. The Custodian certifies there are no records responsive to the request and the Complainant does not dispute same.
2. While the Custodian provided a written response to the OPRA request stating that there were no records responsive to the request, the response was not provided within the statutorily required time period. Pursuant to N.J.S.A. 47:1A-5.i. a failure to respond to a request within the seven business days, whether or not there are records responsive to the request, is a "deemed" denial of access. Therefore, the Custodian violated N.J.S.A. 47:1A-5.i. by not responding to the request within the statutorily required time period.
3. Since the Complainant has retracted the portion of his complaint regarding the "Matrix," there is no action required by the Council.

Ms. Schonyers called for a motion to accept the Executive Director's recommendation as amended. A motion was made by Ms. Tabakin and seconded by Mr. Richman. Motion passed unanimously.

Danielle DeMaio v. Township of Jackson (2005-204)

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

The Executive Director respectfully recommended that the Council find:

1. Pursuant to the fact that the plans requested did not exist at the time of the request, there would not have been an unlawful denial of access except that the Custodian's delay in properly responding to the Complainant's request resulted in a "deemed" denial of access pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
2. The Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Ms. Schonyers called for a motion to accept the Executive Director's recommendation as amended. A motion was made by Ms. Tabakin and seconded by Mr. Richman. Motion passed unanimously.

Aaron Back v. Township of River Vale (2005-209)

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

The Executive Director respectfully recommended that the Council find:

1. The Custodian has borne the burden of proving that the denial of access was lawful pursuant to N.J.S.A. 47:1A-6 by certifying to the best of her knowledge that the documents not provided do not exist.
2. The Custodian has provided immediate access to contracts pursuant to N.J.S.A. 47:1A-5.e. as she made the requested contract available the day it was discovered.
3. The Council does not have jurisdiction over the accuracy of the documents pursuant to N.J.S.A. 47:1A-7.b.

Ms. Schonyers called for a motion to accept the Executive Director's recommendation as amended. A motion was made by Ms. Tabakin and seconded by Mr. Richman. Motion passed unanimously.

Thomas Caggiano v. Borough of Stanhope (2005-211, 2005-226, 2005-227, 2005-228, 2005-229, 2005-230, 2005-231, 2005-232, 2005-233, 2005-234, 2005-235, 2005-250 and 2005-252)

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

The Executive Director respectfully recommended that the Council find that:

1. The Custodian's response that the records were previously provided to the Complainant on several occasions is not a lawful basis to deny access to the November 1, 2005, November 14, 2005 and December 8, 2005 records requests pursuant to N.J.S.A. 47:1A-6.
2. The November 1, 2005, November 14, 2005, December 8, 2005 and December 9, 2005 records requests were broad and unclear requests for information that sought "any" and "all" documents without identifying the record or records with sufficient specificity and which would necessitate some form of research or searching on the part of the Custodian. Therefore, on the basis of Mag and the

GRC decision and the Court ruling in Bent, there was no unlawful denial of access pursuant to OPRA.

Ms. Schonyers called for a motion to accept the Executive Director's recommendation as amended. A motion was made by Ms. Tabakin and seconded by Mr. Richman. Motion passed unanimously.

Administrative Adjudication:

1. Jeffrey Sauter v. Township of Colts Neck (2004-68)
2. Kathleen Fazzari v. Plainfield Board of Education (2005-111)
3. David Gerkens v. Borough of Riverside (2005-121)
4. Maria Fornaro v. Morristown Police (2005-151)
5. Duncan Warner v. Monmouth Beach (2005-177)
6. George Goros v. Hillside Township (2005-190)
7. DeSanctis v. Township of Ocean (2005-194)
8. John Paff v. Elizabeth Board of Education (2005-210)
9. John Paff v. Westfield Police Department (2005-221)
10. Askia Nash v. Essex County Courts (2005-224)
11. Elise Young v. New Jersey Department of Health & Senior Services (2005-236)
12. John Paff v. New Jersey Department of Treasury (2005-239)
13. Beverly Warde v. New Jersey Department of Corrections (2005-245)
14. Beverly Warde v. New Jersey Department of Corrections (2005-246)
15. Janet Pizar v. Millburn Township (2005-253)

Ms. Schonyers called for a motion to accept the Executive Director's administrative case dispositions. A motion was made by Mr. Richman and seconded by Ms. Tabakin. Motion passed unanimously.

Executive Director Report and New Business:

None

Public Comment:

Mr. Robert Tombs – Point Pleasant, NJ

Elizabeth Mason – President for the NJFOG

Mr. Bernard Lufgas – Barnegat, NJ

Bruce Solomon – Department of Law and Public Safety.

Ms. Schonyers called for a motion to go into closed session at 12:05 p.m. to discuss legal issues. A motion was made by Ms. Tabakin and seconded by Mr. Richman. Motion passed unanimously.

The Council returned from closed session at 12:10 p.m.

Ms. Schonyers called for a motion to adjourn. There was a unanimous vote to adjourn. The meeting adjourned at 12:15 p.m.

Respectfully submitted,

A handwritten signature in cursive script that reads "Robin Berg Tabakin".

Robin Berg Tabakin, Secretary

Dated Approved: April 11, 2006