

ADOPTION SECTION

COMMUNITY AFFAIRS

GOVERNMENT RECORDS COUNCIL

Notice of Readoption

Complaint Adjudication and Open Public Records Act (OPRA) Information Inquiry

Procedures

Readoption: N.J.A.C. 5:105

Authority: N.J.S.A. 47:1A-7 and 52:14B-3.

Authorized By: Government Records Council, Joseph Glover, Executive Director.

Effective Date: April 5, 2015.

New Expiration Date: April 5, 2022.

Take notice that pursuant to N.J.S.A. 52:14B-5.1, N.J.A.C. 5:105, the rules concerning complaint adjudication and OPRA information inquiry procedures, are scheduled to expire on May 5, 2015. These rules serve as a systematic and user-friendly guide to the Government Records Council's processes.

The Government Records Council has reviewed this chapter and finds that it continues to be necessary and appropriate for the purpose for which it was adopted, which is the proper regulation and supervision by the Government Records Council of procedures related to the Open Public Records Act, and is therefore readopting the chapter without change. The rules are necessary, reasonable, and proper for the purpose for which they were originally promulgated. Therefore, pursuant to N.J.S.A. 52:14B-5.1.c(1), these rules are readopted and shall continue in effect for a seven-year period.

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TITLE 5. DEPARTMENT OF COMMUNITY AFFAIRS
CHAPTER 105. COMPLAINT ADJUDICATION AND OPEN PUBLIC RECORDS ACT (OPRA) INFORMATION
INQUIRY PROCEDURES

N.J.A.C. 5:105 (2008)

Title 5, Chapter 105 -- Chapter Notes

CHAPTER AUTHORITY: *N.J.S.A. 47:1A-7* and *52:14B-3*.

CHAPTER SOURCE AND EFFECTIVE DATE

R.2008 d.115, effective May 5, 2008.

See: *39 N.J.R. 1557(a)*, *40 N.J.R. 2237(a)*.

CHAPTER EXPIRATION DATE

Chapter 105, Complaint Adjudication and Open Public Records Act (OPRA) Information Inquiry Procedures, expires on May 5, 2013.

CHAPTER HISTORICAL NOTE

Chapter 105, Complaint Adjudication and Open Public Records Act (OPRA) Information Inquiry Procedures, was adopted as new rules by R.2008 d.115, effective May 5, 2008. See: Source and Effective Date.

NOTES:

Chapter Notes

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SUBCHAPTER 1. GENERAL PROVISIONS

N.J.A.C. 5:105-1.1 (2008)

§ 5:105-1.1 Purpose and scope

(a) The rules in this chapter are for the purpose of establishing procedures for the consideration of complaints filed pursuant to the Act, and for the benefit of any person seeking to utilize the Council as an information resource for understanding the Act and/or the functions of the Council.

(b) Any aspect of the adjudicatory process for denial of access complaints not covered by this chapter shall be governed by the Administrative Procedures Act, *N.J.S.A. 52:14B-1* et seq., and the Uniform Administrative Procedure Rules, *N.J.A.C. 1:1*. To the extent that these rules are inconsistent with the Administrative Procedures Act and Uniform Administrative Procedure Rules, the rules in this chapter shall apply.

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N.J.A.C. 5:105-1.2 (2008)

§ 5:105-1.2 Construction of the rules

The rules in this chapter shall be liberally construed to permit the Council to discharge its statutory function.

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N.J.A.C. 5:105-1.3 (2008)

§ 5:105-1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

"Act" or "OPRA" means the New Jersey Open Public Records Act, *N.J.S.A. 47:1A-1* et seq.

"Administrative Complaint Disposition" means a decision of the Council as to whether to accept or reject the Executive Director's recommendation of dismissal based on jurisdictional, procedural or other defects of the complaint.

"Advisory opinion" means an opinion issued by the Council regarding the accessibility of a particular record as a government record pursuant to *N.J.S.A. 47:1A-7.b*.

"Chairperson" means the presiding officer of the Government Records Council.

"Complaint" or "OPRA Complaint" means a denial of access complaint submitted to the Council on a form authorized by the Council in which a requestor claims that a custodian has unlawfully denied the requestor access to a government record.

"Complainant" means a person who made an OPRA request of a public agency and filed a denial of access complaint with the Council.

"Custodian of a Government Record" or "Custodian" means in the case of a municipality, the municipal clerk and in the case of any other public agency, the officer officially designated by formal action of that agency's director or governing body, as the case may be.

"Effective date" means the date upon which the Council renders a decision related to a matter awaiting adjudication, or such other date upon which the Council desires to make a decision effective.

"Fair preponderance of the credible evidence" means superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

"Hearing Officer" means a Council member, or the Executive Director, who receives testimony and documentary evidence regarding a denial of access complaint, inspects records or receives testimony in camera, and assembles a record of those proceedings for later review and adjudication by the Council.

"Government record" or "record" means any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of official business by any such officer,

commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof pursuant to *N.J.S.A. 47:1A-1.1*.

"Government Records Council" or "Council" means the public agency established by the Act to adjudicate denial of access complaints and provide information regarding the Act and the Council to requestors of government records, custodians and the general public pursuant to *N.J.S.A. 47:1A-7.a*.

"*In camera*" or "*in camera* inspection" means a proceeding in which the Council or hearing officer inspects a government record and receives testimony, if any is necessary for the Council to determine whether the record requested by the complainant should be publicly accessible under the Act over the custodian's objection or claim that the record is exempt from disclosure by virtue of a provision in the Act, or other applicable law.

"Inquiry" means a request from the public or a custodian, submitted to the Council in writing or from the toll-free helpline, for information regarding or assistance with the Act, the Council, and issues and matters regarding access to government records.

"Interim order" means an order issued by the Council requiring the records custodian or the complainant to perform some act in accordance with OPRA the compliance of which must be reported back to the Council.

"Letter of Representation" means a letter submitted to the Council by a person representing a party in a proceeding before the Council.

"Mediation" means an informal, non-adversarial process led by a mediator and having the objective of helping the parties to a denial of access complaint reach a mutually acceptable, voluntary agreement pursuant to *N.J.S.A. 47:1A-7.b.*, *47:1A-7.d.* and *47:1A-7.e.*

"Mediation Settlement Agreement" means a written agreement between the complainant and the custodian reached during the mediation process memorializing a resolution of some or all of the issues presented during the mediation process.

"Mediator" means a neutral person who is trained in dispute resolution techniques and who was selected by the Council to intervene between parties to a denial of access complaint in an effort to help them resolve their differences pursuant to *N.J.S.A. 47:1A-7.b.*

"Party" means a complainant or custodian.

"Penalty" means the civil penalty which may be imposed upon an official, officer, employee or custodian who knowingly and willfully violates the Act, and is found to have unreasonably denied access to the requested government record under the totality of the circumstances pursuant to *N.J.S.A. 47:1A-11*.

"Person" means natural person, partnership, corporation, limited liability company, association or society.

"*Prima facie* evidence" means evidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.

"Public agency" or "agency" means any of the principal departments in the executive branch of State government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the legislature of the State and any office, board, bureau or commission within or created by the legislative branch; and any independent State authority, commission, instrumentality or agency pursuant to *N.J.S.A. 47:1A-1.1*. The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.

"Representative" means a person who has the authority from the Council or the State of New Jersey to represent a party in a proceeding before the Council.

"Requestor" means a person who delivers to a public agency an OPRA request to copy, examine or inspect a government record pursuant to the Act.

"Secretary" means Secretary of the Council.

"Staff" or "Council staff" means the professional and clerical staff that the Council may employ as it deems necessary pursuant to *N.J.S.A. 47:1A-7.a*.

"Statement of Information" means a written response to a complaint, and all attachments thereto, submitted to the Council by a custodian or his or her representative.

"*Sua sponte*" means the Council's ability to raise issues, legal defenses or other matters not raised by the parties to a denial of access complaint.

"Supplemental decision" or "revised final decision" means a decision issued by the Council that follows a final decision.

"Vice Chairperson" means the presiding officer of the Council in the absence of the Chairperson.

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N.J.A.C. 5:105-1.4 (2008)

§ 5:105-1.4 Description of the Council

(a) The Council shall consist of the Commissioners of the Department of Community Affairs and the Department of Education, or their designees, and three members of the public (not more than two of which can be of the same political party) appointed by the Governor with the advice and consent of the Senate pursuant to *N.J.S.A. 47:1A-7.a*. The Council is supported by an Executive Director, and professional and clerical staff.

(b) Contact information for the Council:

State of New Jersey
Government Records Council
101 South Broad Street
P.O. Box 819
Trenton, New Jersey 08625-0819
Toll Free: (866) 850-0511
Direct Phone: (609) 292-6830
Fax: (609) 633-6337
Email: grc@dca.state.nj.us
Website: www.nj.gov/grc

(c) All communications to Council members, Executive Director or staff shall be delivered to the contact information listed above, or to any such other address that the Council may direct from time to time.

(d) The Council's website, www.nj.gov/grc, shall contain the Act, the Council's public meeting schedule, denial of access complaint forms, Council and legal decisions, frequently asked questions and other reference materials that the Council deems appropriate.

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N.J.A.C. 5:105-1.5 (2008)

§ 5:105-1.5 Powers and duties of the Council

- (a) The Council shall have the following powers and duties pursuant to *N.J.S.A. 47:1A-7.b.*:
1. Adjudicate complaints filed with the Council regarding access to government records;
 2. Make mediation services available free of charge to complainants and custodians;
 3. Respond to inquiries about the Act or the Council from the public and public agencies;
 4. Provide information about the Act and services available from the Council;
 5. Maintain a toll-free help-line and website to assist the public and custodians in obtaining information about the Act, the Council and issues and matters regarding access to government records;
 6. Issue advisory opinions on the accessibility of government records;
 7. Make training opportunities available to custodians, public officers, public employees and officials concerning the provisions of the Act; and
 8. Prepare for custodians lists of the types of records in possession of public agencies, which are government records accessible under the Act.

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N.J.A.C. 5:105-1.6 (2008)

§ 5:105-1.6 Conformance

These rules shall conform to the requirements of the Administrative Procedure Act, *N.J.S.A. 52:14B-1* et seq., and the Uniform Administrative Procedure Rules, *N.J.A.C. 1:1*, except as provided in these rules.

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N.J.A.C. 5:105-2.1 (2008)

§ 5:105-2.1 General provisions

(a) Any requestor who is denied access, in whole or in part, to a government record by a custodian, at the option of the requestor, may file a complaint with the Council pursuant to *N.J.S.A. 47:1A-6* of the Act.

(b) The right to institute a proceeding before the Council shall solely be the right of the requestor pursuant to *N.J.S.A. 47:1A-6* of the Act.

(c) The Council will handle complaints in a summary or expedited manner pursuant to *N.J.S.A. 47:1A-6* of the Act.

(d) Upon receipt of a complaint, the Council will first determine whether any portion of the complaint is outside its jurisdiction, frivolous, or without factual basis. If the complaint falls within any of said categories, the Council shall reduce its determinations to writing and transmit a copy thereof to the complainant and to the custodian against whom the complaint was filed pursuant to *N.J.S.A. 47:1A-7e*.

(e) If the Council concludes that the complaint is within its jurisdiction and is neither frivolous nor without factual basis, the Council shall proceed with the adjudication process.

(f) At the request of the Council, any party shall produce documents and legal certifications to the facts and/or arguments presented with respect to matters before the Council pursuant to *N.J.S.A. 47:1A-7.c*.

(g) Discovery shall be limited to the submissions of the parties submitted to the Council.

(h) In response to the complaint before it, the Council may raise issues and defenses pertaining to that complaint on a *sua sponte* basis if it deems such action appropriate or necessary and if said action on behalf of the Council would be in the interest of furthering the provisions and intent of the Act.

(i) The Council shall not charge any party a fee in regard to actions filed with or proceedings before the Council pursuant to *N.J.S.A. 47:1A-7.f*.

(j) Council votes adjudicating a complaint shall be rendered at open public meetings of the Council. Parties are not permitted to make oral or written presentations to the Council regarding the complaint at the meetings unless requested by the Council to do so.

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N.J.A.C. 5:105-2.2 (2008)

§ 5:105-2.2 Parties to a complaint

The complainant and custodian shall always be parties to a complaint and, along with their legal representatives, shall be notified of all decisions or orders issued by the Council concerning a complaint. If a party secures representation following submission of a denial of access complaint, the party must notify the Council and all other parties immediately. The representatives of any party named in a complaint shall file with the Council written notification and a copy of same shall be served upon all parties at the same time the Council receives the notification.

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N.J.A.C. 5:105-2.3 (2008)

§ 5:105-2.3 Complainant document submissions to the Council

(a) The complainant submitting a completed denial of access complaint to the Council and custodian initiates the complaint process.

(b) All submissions must be in writing.

(c) Complaints should be submitted on the Council's denial of access complaint form.

(d) Complaint forms may be obtained from the Council's staff or downloaded from the Council's website.

(e) The complainant shall include in the complaint or the attachments thereto any information, issues, and arguments that the complainant wishes to bring to the Council's attention for consideration in the adjudication of the complaint.

(f) The complaint may also include any attachments, affidavits, certifications or other documentation deemed relevant or supportive of the allegations set forth in the complaint.

(g) The Council shall provide a copy of all complaints to the custodian if the complainant fails to do so.

(h) The following concern complaint amendments:

1. A complainant may amend his or her complaint as a matter of right within 30 business days after the filing of the initial complaint. Such amendments must be submitted in writing to the Council with copies served simultaneously on all parties.

2. Additional amendments or supplements to a complaint submitted beyond the 30-business-day amendment period shall only be accepted for consideration in the adjudication of a complaint when such acceptance is authorized by the Executive Director.

3. The Council shall provide custodians with copies of complaint amendments if the complainant fails to do so.

(i) Objections to representation: Objections to a party's representative by another party, and a party's response thereto, to the complaint must be in writing, presented to the Council, served on all parties, and include:

1. The Council's case reference name and number;

2. Clear identification of the representative in question; and

3. A detailed explanation of the reasons for the objections, or conversely the response to such objections.

(j) A party may respond to any challenge to its representative within five business days of receipt of the challenge.

(k) The Council, acting through its Executive Director, may require complainants to submit, within prescribed time limits, additional information deemed necessary for the Council to adjudicate the complaint.

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N.J.A.C. 5:105-2.4 (2008)

§ 5:105-2.4 Custodian document submissions to the Council

(a) Custodians shall submit a completed and signed statement of information (SOI) form to the Council and the complainant simultaneously that details the custodians' position for each complaint filed with the Council in all instances for which mediation is declined, mediation is not accepted by either party, or in which mediation is accepted but through which the parties do not fully resolve the issues presented. The custodian shall sign the completed SOI even if it is completed by his or her legal representative. SOI forms will be provided by Council's staff or may also be downloaded from the GRC website (www.nj.gov/grc).

(b) All submissions shall be in writing.

(c) (Reserved)

(d) The custodian shall include in the SOI or the attachments thereto any information, defenses, and arguments that the custodian wishes to bring to the Council's attention for consideration in the adjudication of the complaint.

(e) The custodian may also include with the SOI any attachments, affidavits, certifications or documentation deemed appropriate or supportive of the defenses set forth in the SOI.

(f) Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than five business days from the date of receipt of the SOI form from the Council's staff. Custodians must sign the SOI. The Council will not accept additional submissions from the custodian unless the Executive Director orders same or offers its express approval for same. Failure to comply with this time period may result in the complaint being adjudicated based solely on the submissions of the complainant.

(g) A custodian's failure to submit a completed and signed SOI, and to serve the complainant with the SOI, may result in the Council's issuing a decision in favor of the complainant.

(h) The Council shall provide the complainant with copies of the completed and signed SOI if the custodian fails to do so.

(i) If a complainant amends his or her complaint, the custodian shall have five business days from the date of receipt of same to submit his or her position regarding the complaint amendment with the Council. The Council will not accept additional submissions beyond said time period unless the Executive Director orders same or offers his or her express approval for same. Failure to comply with this time period may result in the case being adjudicated based solely on the submissions of the complainant.

(j) Objections to representation: Objections to a party's representative by another party, and a party's response thereto, to the complaint must be in writing, presented to the Council, served on all parties, and include:

1. The Council's case reference name and number;
2. Clear identification of the representative in question; and

3. A detailed explanation of the reasons for the objections, or conversely the response to such objections.

(k) A party may respond to any challenge to its representative within five business days of receipt of the challenge.

(l) The Council, acting through its Executive Director, may require custodians to submit, within prescribed time limits, additional information deemed necessary for the Council to adjudicate the complaint.

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N.J.A.C. 5:105-2.5 (2008)

§ 5:105-2.5 Mediation

- (a) Upon receipt of a complaint, the Council shall offer the services of a mediator without charge to the parties.
- (b) A complaint will be referred to a mediator only if the complainant and custodian agree to enter into mediation.
- (c) A party who fails to respond to an offer of mediation within five business days from the date of its receipt shall be deemed to have rejected the offer to mediate the complaint.
- (d) A mediator selected by the Council will conduct all mediation proceedings.
- (e) Mediation practices shall be governed by the Uniform Mediation Act, *N.J.S.A. 2A:23C-1* et seq.
- (f) Neither the mediator nor any party to mediation shall divulge to anyone the content of any mediation session or share any document produced in the course of or resulting from mediation without the written consent of the party who made the statement or produced the document. No party may use the statements made or documents produced during mediation proceedings against another party in any proceeding before the Council if mediation fails to resolve all issues presented in the complaint and the complaint is referred to the Council for adjudication.
- (g) Representatives of the parties may attend mediation proceedings and shall be bound by the regulations with respect to mediation as set forth in this section.
- (h) Parties may cease participation in the mediation process at any time and elect to have their complaint referred back to the Council for adjudication.
- (i) The mediator may cease proceedings and refer the complaint back to the Council if he or she determines that the process is not productive.
- (j) The Council shall not consider any statement made or document submitted to the mediator during the mediation proceedings if the complaint is referred back to the Council for adjudication.
- (k) The Council shall administratively adjudicate any complaint upon receipt of a written mediation agreement fully executed by the parties which indicates that the matters presented in the complaint have been either resolved or voluntarily dismissed by all parties. Such mediation agreements shall be deemed confidential.
- (l) The Council shall provide the parties notice of any dismissal by issuing an administrative complaint disposition in the matter.

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N.J.A.C. 5:105-2.6 (2008)

§ 5:105-2.6 Council complaint deliberations - no hearing

(a) The Council members shall review the findings and recommendations of the Executive Director, as well as all party submissions, and vote to modify, reject or accept such findings and recommendations during open public meetings.

(b) The Council shall convene in closed session as necessary in accordance with the Open Public Meetings Act, *N.J.S.A. 10:4-6 to 10:4-21*.

(c) Parties are not permitted to make oral or written presentations to the Council regarding complaints at Council meetings unless expressly requested to do so by the Council.

(d) The Council will issue its decision as soon as practicable following the adjudicatory proceedings.

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N.J.A.C. 5:105-2.7 (2008)

§ 5:105-2.7 Council complaint deliberations - hearing

(a) If the Council is unable to make a determination as to the accessibility of a record based upon the complaint and the custodian's response thereto, the Council may conduct a hearing, pursuant to *N.J.S.A. 47:1A-7.e*, and in conformity with the rules provided for administrative hearings by a public agency in contested cases pursuant to the Administrative Procedures Act, *N.J.S.A. 52:14B-1* et seq., and the Uniform Administrative Procedures Rules, *N.J.A.C. 1:1*, insofar as they may be applicable and practicable.

(b) The following concern the filing of additional documentation or arguments:

1. The Council reserves the right not to consider documentation submitted by a complainant or custodian unless it has been submitted to the Council and the other parties named in the complaint not later than 10 business days in advance of the scheduled hearing.

2. A written statement by the party shall accompany each such submission explaining the relevance of such submission.

3. Parties filing submissions must provide copies to all parties to the complaint and provide proof of service to the Council simultaneously therewith.

4. The Council will not accept any submissions at the hearing that have not been provided to all parties pursuant to these rules, unless the Chairperson authorizes said submissions.

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*** NEW JERSEY REGISTER, VOL. 40, NO. 10, MAY 19, 2008 ***

TITLE 5. DEPARTMENT OF COMMUNITY AFFAIRS
CHAPTER 105. COMPLAINT ADJUDICATION AND OPEN PUBLIC RECORDS ACT (OPRA) INFORMATION
INQUIRY PROCEDURES
SUBCHAPTER 2. COMPLAINT PROCESS

N.J.A.C. 5:105-2.8 (2008)

§ 5:105-2.8 *In camera* inspections

(a) The Council may, in its discretion, order an *in camera* inspection of the documents that are the subject of a denial of access complaint. Both parties will be notified that an *in camera* inspection has been ordered through an interim order of the Council.

(b) Notice of inspection: The Council shall provide the custodian with advance written notice of the *in camera* inspection. The notice shall include, in addition to such other information as may be deemed relevant:

1. A statement of the time, place and nature of the document inspection;
2. The documents requested to be inspected; and
3. The manner in which the documents are to be presented to the Council for inspection.

(c) Presentation of documents to the Council: The custodian, or his or her representative, shall:

1. Deliver the documents for inspection, in a sealed envelope, to the Executive Director of the Council, or such other person as the Council may designate; and

2. Deliver to the Executive Director of the Council, or such other person as the Council may designate, and to the complainant a certification signed by the custodian stipulating that the copies of the documents delivered to the Council are true and complete copies of the documents in question with no alterations or redactions, and an *in camera* inspection index that:

- i. Gives the title or name of each document, or any parts thereof, claimed to be exempt from disclosure;
- ii. Provides a general description of each document. The descriptions should be general enough to explain the exemptions without compromising the alleged reason for their exemption from disclosure;
- iii. Lists the reasons that each document, or any parts thereof, are alleged to be exempt from disclosure; and
- iv. Lists a full explanation why the alleged reason for exemption from disclosure applies to each document.

3. The requirements in (c)2 above shall be presented in the format of a document index consistent with the document index required on the Statement of Information form that may be obtained from Council's staff or downloaded from the GRC website (www.nj.gov/grc).

(d) Complainants will be permitted to respond to the certification and the document index in (c)2 above within five business days.

(e) Neither the Council, nor anyone else authorized to inspect the documents, shall make copies of same.

(f) Anyone authorized to access the documents shall not take any notes making reference to specific information contained in the documents.

(g) The Council shall review the documents in closed session at any of its regular monthly meetings or at a special meeting conducted pursuant to the Open Public Meetings Act, *N.J.S.A. 10:4-6 to 10:4-21*.

(h) The Council shall have the option, at its discretion and while in the public session of any its regular monthly meetings conducted pursuant to the Open Public Meetings Act, *N.J.S.A. 10:4-6 to 10:4-21*, of asking the custodian questions regarding the document(s) in question.

(i) Neither the complainant nor the custodian, nor any of their representatives, shall be present during the *in camera* inspection.

(j) After inspecting the documents, the Council shall announce its decision at an open public meeting and provide written notice of its decision to all parties to the complaint.

(k) During public session, anyone involved in the *in camera* inspection shall forego all mention of the specific contents of the documents. Reference shall only be made to the assigned reference number or to the general descriptions of the documents listed in the *in camera* inspection index.

(l) Upon completion of the *in camera* inspection, the Council will seal the documents and return them to the custodian.

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N.J.A.C. 5:105-2.9 (2008)

§ 5:105-2.9 Decisions of the Council

(a) The Council shall issue the following types of decisions:

1. Interim orders;
2. Final decisions;
3. Supplemental decisions;
4. Revised final decisions; and
5. Administrative complaint dispositions.

(b) Unless the Council directs otherwise, the Executive Director shall stipulate the effective date of the Council's decisions for purposes of calculating all deadlines set forth in a decision and calculating when motions for reconsideration and appeals must be filed.

(c) Enforcement. The Council shall, pursuant to New Jersey Rules Governing the Courts, *R. 4:67-6*, have the authority to enforce compliance with the orders and decisions issued by the Council.

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N.J.A.C. 5:105-2.10 (2008)

§ 5:105-2.10 Relief from Council decisions - reconsideration

- (a) The Council, at its own discretion, may reconsider any decision it renders.
- (b) Requests for reconsideration must be filed within 10 business days following receipt of a Council decision.
- (c) Requests must be in writing, delivered to the Council and served on all parties.
- (d) Parties must file any objection to the request for reconsideration within 10 business days following receipt of the request.
- (e) The Council will provide all parties with written notification of its determination regarding the request for reconsideration.

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N.J.A.C. 5:105-2.11 (2008)

§ 5:105-2.11 Relief from Council decisions - appeals

(a) A final decision of the Council may be appealed to the Appellate Division of the Superior Court within 45 days from the date the decision is issued to the parties in accordance with New Jersey Rules Governing the Courts. (See *N.J.S.A. 47:1A-7.e.*).

(b) Prior to filing an appeal, the appealing party shall request a stay of the Council's final decision which orders disclosure of government records.

(c) A request for a stay is not required when a prevailing party complainant appeals a final decision only with regard to the amount of attorney's fees awarded.

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N.J.A.C. 5:105-2.12 (2008)

§ 5:105-2.12 Stays of Council's interim orders and final decisions

(a) Requests for a stay of a final decision must be in writing, delivered to the Council and simultaneously served upon all parties.

(b) Parties must file any objection to the request for a stay from a final decision within 10 business days following receipt of the request.

(c) The Executive Director may grant a stay from a final decision based on consideration of the request and any objection to the request submitted to the Council.

(d) Requests for a stay of the effective date of a Council's interim orders must be made prior to the last day by which action was to have been taken in accordance with the Council's decision. Appeals of interim orders may be made to the Appellate Division of New Jersey Superior Court in accordance with *N.J. Court Rule 2:5-6*.

1. Requests must be in writing, delivered to the Council and simultaneously served upon all parties.

2. Parties must file any objection to the request for a stay from an interim order within 10 business days following receipt of the request.

(e) The Executive Director may grant a stay of an interim order for the period of time requested, but in no event for a period of time longer than the date of the next regularly scheduled meeting of the Council.

(f) A request for a stay of interim orders or final decisions must be in writing and include a detailed analysis of the issue(s), which includes an analysis of the following factors that the Council will include in its decision-making process:

1. The clear likelihood of success on the merits of the claim;
2. The danger of irreparable harm in the absence of a stay;
3. The harm to others if a stay is not granted; and
4. The public interest.

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N.J.A.C. 5:105-2.13 (2008)

§ 5:105-2.13 Prevailing party attorney's fees

(a) Reasonable attorney's fees shall be awarded when the requestor is successful (or partially successful) in obtaining access to government records after a denial of access complaint filed with the Council, access was improperly denied and the requested records are disclosed pursuant to a determination of the Council or voluntary settlement agreement between the parties.

(b) The complainant, or his or her attorney, shall submit an application to the Council for an award of attorney's fees within 20 business days following the effective date of a decision by the Council or a voluntary settlement agreement. The application must include a certification from the attorney(s) representing the complainant that includes:

1. The Council's complaint reference name and number;
2. Law firm affiliation;
3. A statement of client representation;
4. The hourly rates of all attorneys and support staff involved in the complaint;
5. Copies of weekly time sheets for each professional involved in the complaint, which includes detailed descriptions of all activities attributable to the project in 0.1 hour (six-minute) increments;
6. Evidence that the rates charged are in accordance with prevailing market rates in the relevant community. Such evidence shall include:
 - i. Years of related or similar experience;
 - ii. Skill level; and
 - iii. Reputation; and
7. A detailed listing of any expense reimbursements with supporting documentation for such costs.

(c) The complainant, or his or her attorney, must serve all parties with the application for attorney's fees and all attachments thereto.

(d) The custodian shall have 10 business days from the date of service to object to the attorney's fees requested.

(e) All objections to applications for attorney's fees must be in writing to the Council and served upon all the parties.

(f) The Council shall:

1. Consider all submissions of the parties concerning the attorney's fees application;
2. Determine the amount of reasonable attorney's fees to be awarded to complainant's attorney; and

3. Predicate the attorney's fees award upon the number of hours and rate based on:

- i. Applicable law;
- ii. Submissions of the parties; and
- iii. The Council's own discretion.

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N.J.A.C. 5:105-2.14 (2008)

§ 5:105-2.14 Knowing and willful violations of the Act; penalties

(a) Public officials, officers, employees or custodians who knowingly and willfully violate the Act and are found to have unreasonably denied access under the totality of the circumstances shall be subject to a civil penalty pursuant to *N.J.S.A. 47:1A-11*.

(b) Penalty amounts are as follows:

1. \$ 1,000 for initial violation;
2. \$ 2,500 for a second violation that occurs within ten (10) years of an initial violation; and
3. \$ 5,000 for a third violation that occurs within ten (10) years of an initial violation.

(c) The Council shall not impose a penalty unless it has undertaken, or caused the Office of Administrative Law to have undertaken, an expedited or summary hearing to determine whether a public official, officer, employee or custodian knowingly and willfully violated the Act and unreasonably denied access under the totality of the circumstances.

(d) Penalties shall be collected and enforced in proceedings in accordance with the Penalty Enforcement Law of 1999, *N.J.S.A. 2A:58-10* et seq., and the rules of court governing actions for the collection of civil penalties.

(e) The New Jersey Superior Court shall have jurisdiction of proceedings for the collection and enforcement of the penalty imposed by the Council.

(f) Appropriate disciplinary proceedings may be initiated by a public agency against a public official, officer, employee or custodian against whom a penalty has been imposed.

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N.J.A.C. 5:105-3.1 (2008)

§ 5:105-3.1 Inquiries

(a) Any person may telephone or write the Council with a request for information regarding the Act and Council procedures. All written communications to the Council shall be dated, state the name of the sender, the street and/or P.O. Box address of the sender, and the facsimile number or e-mail address to which replies shall be sent.

(b) The Council, where possible, will direct inquirers to available resources such as Council decisions, court decisions, Act citations, publications available through the Council, etc., that might assist inquirers.

(c) Guidance offered during the inquiry process is based solely on the facts provided and shall not constitute final decisions of the Council, is not legal advice and shall not alter any legal right or liability already existing in New Jersey or under Federal law.

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SUBCHAPTER 4. ADVISORY OPINIONS

N.J.A.C. 5:105-4.1 (2008)

§ 5:105-4.1 Advisory opinions

(a) The Council shall, in its discretion, issue advisory opinions as to whether a particular type of record is a government record which is accessible to the public pursuant to *N.J.S.A. 47:1A-7.b*.

(b) Advisory opinions address whether general categories of records are disclosable and do not serve as complaint-specific decisions of the Council.

(c) Advisory opinions do not constitute final decisions of the Council, are not legal advice and shall not alter any legal right or liability already existing in New Jersey or under Federal law.

(d) The issuance of advisory opinions shall not prejudice any party's rights to file a complaint with the Council.