



Minutes of the Government Records Council April 29, 2009 Public Meeting – Open Session

The meeting was called to order at 9:24 a.m. at the Department of Community Affairs, Conference Room 126, Trenton, New Jersey. The Open Public Meetings Act statement was read.

The pledge of allegiance was recited while standing by all.

The meeting notice and fire emergency procedure was read by Ms. Tabakin.

Ms. Hairston called the roll:

Present: Robin Berg Tabakin, Chairwoman, Janice Kovach (designee of Department of Community Affairs Commissioner Joseph V. Doria) and Kathryn Forsyth (designee of Department of Education Commissioner Lucille Davy).

GRC Staff In Attendance: Executive Director Catherine Starghill, In-House Counsel Karyn Gordon, GRC Secretary Brigitte Hairston, Case Managers: Dara Lownie, Frank Caruso, John Stewart, Sherin Keys, Elizabeth Ziegler-Sears, IT Specialist Jyothi Pamidimukkala, Designated Outside Counsel Kelley Lake, and Deputy Attorney General Debra Allen.

A motion was made by Ms. Forsyth and seconded by Ms. Kovach to approve the open session minutes of the February 25, 2009 meeting. The motion passes by an unanimous vote. A motion was made by Ms. Forsyth and seconded by Ms. Kovach to approve the closed session minutes of the February 25, 2009 meeting. The motion passes by an unanimous vote.

There was not a quorum to approve the open and closed session minutes of the March 25, 2009 meeting, therefore Ms. Tabakin did not call for a motion to approve these minutes.

Council Adjudication:

The following complaints were presented to the Council for summary administrative adjudication:

1. Loretta Dibble v. Highlands Business Partnership, Inc. (2007-258)
2. Bob Cullinane v. NJ Department of Treasury (2008-43)
3. Hector Sanabria v. Passaic County Prosecutor's Office (2009-03)
4. Paul Adezio v. NJ Department of Law & Public Safety Office of the Attorney General, Div. of Criminal Justice (2009-20)
5. Richard Rivera v. Cape May County Prosecutor's Office (2009-33)
6. Lonnie Griffin v. Salem Police Department (2009-36) (Salem)
7. Benjamin Spivack v. Passaic County Sheriff's Department (2009-80)

8. Laura Danis v Garfield Board of Education (2009-83) (Bergen)
9. Louis Toscano v. NJ Department of Labor, Division of Vocational Rehabilitation Services (2009-99)
10. Louis Toscano v. NJ Department of Labor, Division of Vocational Rehabilitation Services (2009-100)
11. Cynthia McBride v. Township of Wayne (2009-110) (Passaic)

Ms. Tabakin called for a motion to accept the Executive Director's recommendations as written in all of the above Administrative Complaint Dispositions. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

The following complaints were presented to the Council for individual adjudication:

James D'Andrea v. NJ Department of Community Affairs, Division of Local Government Services (2007-64)

This matter was not put to a vote due to the lack of a quorum.

William Gettler v. Wantage Regional Schools, Board of Education (2007-105) (Sussex)

This matter was not put to a vote due to the lack of a quorum.

Vesselin Dittrich v. City of Hoboken (2007-193) (Hudson)

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

The Executive Director respectfully recommends the Council find:

1. Pursuant to N.J.S.A. 47:1A-1.1., Michelson v. Wyatt and the City of Plainfield, 379 N.J.Super. 611, 619 (App. Div.), and Donal Meyers v. Borough of Fair Lawn, GRC Complaint No. 2005- 127 (December 2005), the license application is not a government record as defined in OPRA and therefore is not disclosable under OPRA. Mr. Bahun did not make, maintain or keep on file the license application in the ordinary course of his duties as a plumber inspector. Therefore, the license application does not meet the definition of a government record as set forth in N.J.S.A. 47:1A-1.1.
2. Because the Complainant has received the actual record requested and the license application is not a government record, neither Mr. Bahun nor the Custodian has unlawfully denied the Complainant access to the requested record.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Alfred Sallie v. NJ Department of Banking & Insurance (2007-226)

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

The Executive Director respectfully recommends the Council find:

1. Because the Complainant's cause of action was not ripe at the time he verified his Denial of Access Complaint; to wit, the Custodian had not at that time denied the Complainant access to a government record, the complaint is materially defective and therefore should be dismissed.
2. Because the Custodian certified that no records existed responsive to the Complainant's request except for a record incident to a completed investigation involving a licensee in which no formal disciplinary action was taken, and because *N.J.A.C. 11:17-2.15 (b) 6* provides that a licensee's investigative files in any completed investigation in which no formal disciplinary action was taken are not public records, and because that regulation contains provisions not abrogated by OPRA pursuant to *N.J.S.A. 47:1A-9.a.*, said provisions exempt the licensee's investigative files from the definition of a government record actionable under OPRA. Accordingly, the Custodian lawfully denied the Complainant access to the record responsive to the Complainant's request.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Alfred Sallie v. NJ Department of Banking & Insurance (2007-227)

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

The Executive Director respectfully recommends the Council find:

1. Because the Custodian certified that the investigation of case #200700136 was still pending at the time of the Complainant's request, and because *N.J.A.C. 11:17-2.15 (b) 6* provides that a licensee's investigative files in any matter pending investigation are not public records, and because that regulation contains provisions not abrogated by OPRA pursuant to *N.J.S.A. 47:1A-9.a.*, said provisions exempt the licensee's investigative files from the definition of a government record disclosable under OPRA. Accordingly, the Custodian lawfully denied the Complainant access to records comprising case #200700136.
2. Because *N.J.A.C. 11:17-2.15 (b) 6* provides that a licensee's investigative files in any completed investigation in which no formal disciplinary action was taken are not public records, and because that regulation contains provisions not abrogated by OPRA pursuant to *N.J.S.A. 47:1A-9.a.*, said provisions exempt the licensee's investigative files from the definition of a government record disclosable under OPRA. The Custodian therefore lawfully denied the Complainant access to such record.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Martin O'Shea v. Township of Stillwater (2007-253) (Sussex)

Ms. Lownie reviewed 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 recommends the Council find:

1. Because the Custodian failed to release all records responsive to the Complainant, failed to provide a document index which identifies the specific lawful basis for the redacted portions of the requested records, failed to amend the Township's OPRA request form to comply with N.J.S.A. 47:1A-5.f., and failed to provide the Executive Director with certified confirmation of compliance within the ordered five (5) business days, the Custodian has not complied with the Council's November 19, 2008 Interim Order.
2. Because the Custodian failed to provide a sufficient document index that includes a general nature description of the redacted portions of the records responsive in addition to the specific lawful basis for said redactions, the GRC does not have enough information to determine whether the redactions are appropriate and warranted pursuant to OPRA. As such, pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the executive session minutes dated August 21, 2007, September 4, 2007 and October 2, 2007 to determine the validity of the redactions made to said records.
3. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see # 2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4³, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. Pursuant to the Council's decision in Windish v. Mount Arlington Public Schools, GRC Complaint No. 2005-216 (August 2006), as well as the Appellate Division's decision in Windish v. Mount Arlington Board of Education, 2007 WL 4334858 (N.J.Super.A.D.) (Unpublished), small public agencies may charge the enumerated paper copy fees established under N.J.S.A. 47:1A-5.b. rather than determining the actual cost of providing such copies. Because Stillwater's population is less than 5,000 according to the 2000 Census, the Township

¹ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

qualifies as a small municipality pursuant to N.J.S.A. 47:1A-5.a. Additionally, because the Custodian certified that the paper copy fees established in the Township's code were based on the rates of neighboring municipalities, and thus are not based on the Township's actual cost of providing paper copies, the Township may charge OPRA's enumerated rates for paper copies pursuant to the Appellate Division's decision in Windish v. Mount Arlington Board of Education, 2007 WL 4334858 (N.J.Super.A.D.) (Unpublished). As such, the copy cost for the twelve (12) pages received by the Complainant is \$8.50 (\$0.75 for pages 1-10 and \$0.50 for pages 11-12). However, the Custodian only charged the Complainant for ten (10) pages. Said charge is reasonable under OPRA and the Custodian has not violated N.J.S.A. 47:1A-5.b.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

John Pusterhofer v. Shrewsbury Borough Board of Education (2007-270)
(Monmouth)

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

The Executive Director respectfully recommends the Council find:

1. The Custodian responded on the sixth (6th) business day after receipt of Complainant's September 20, 2007 request stating that no records responsive to request Item No. 1 existed and subsequently certified in the Statement of Information that no records exist which are responsive to request Item No. 1 and there is no credible evidence in the record to refute the Custodian's certifications. Therefore, there was no unlawful denial of access pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
2. Because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days as to when the determination of the special service charge would be available, the Custodian's October 1, 2007 written response to the Complainant requesting an extension of time is insufficient under N.J.S.A. 47:1A-5.i. See Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
3. Item No. 2 of the Complainant's September 20, 2007 OPRA requests sought records demonstrating the Board of Education had an authorized interest purpose and did not seek to retaliate against the Complainant in connection with the Board of Education's accusation that the Complainant violated federal trademark law. This is not a request for specific identifiable government records. Because the Custodian would have had to research all files and evaluate all records contained therein to determine whether any records existed which related to the subject matter set forth in the Complainant's OPRA request, the Complainant's request Item No. 2 is invalid because it is overly broad pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (March 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30,

37 (App. Div. 2005). Further, the Custodian has borne her burden of proving that the denial of access to Item No. 2 of the Complainant's OPRA requests was authorized by law pursuant to N.J.S.A. 47:1A-6.

4. In order to fully develop the record with regard to the reasonableness of the Custodian's asserted special service charge, this complaint should be referred to the Office of Administrative Law for a hearing to resolve the facts. Also, this complaint should be referred to the Office of Administrative Law for determination of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Stephen Jung v. Borough of Roselle (2007-299) (Union) and Joseph O'Halloran v. Borough of Roselle (2007-307) (Union)

Ms. Lownie reviewed 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 recommends the Council find:

1. The Custodian has carried her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6, to the requested meeting minutes which have not yet been approved by the governing body because said minutes constitute inter-agency, intra-agency advisory, consultative, or deliberative material and are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Township, GRC Complaint No. 2006-51 (August 2006). However, the Custodian's failure to provide the Complainants with an itemized list of the minutes withheld from disclosure results in an insufficient response to the request pursuant to N.J.S.A. 47:1A-5.g.
2. The Custodian has carried her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6, to the fingerprint cards responsive to the Complainants' requests because said cards are exempt from public access pursuant to Executive Order No. 69 (Whitman 1997).
3. The Custodian has borne her burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6, to the requested criminal background checks because said records are exempt from public access as personnel records pursuant to N.J.S.A. 47:1A-10.
4. Pursuant to Feggans v. City of Newark (Essex), GRC Complaint No. 2007-238 (October 2008), because the Zoning Board of Adjustment, Finance Department and Administration Department maintain physical custody of the records responsive to items # 6-7 of the Complainants' OPRA requests, said departments must release the records responsive to the Complainants, or provide a certification that no records responsive exist.

5. **The Zoning Board of Adjustment, Finance Department and Administration Department shall comply with item # 4 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
6. Although the Custodian paid the \$1,000.00 civil penalty, released records responsive to the Complainants' requests, provided evidence of her multiple attempts to obtain the records responsive from various departments, carried her burden of proving a lawful denial of access to the records withheld from disclosure, or certified that the records requested do not exist, the Custodian failed to provide certified confirmation of compliance to the Executive Director within the ordered five (5) business days. As such, the Custodian has not fully complied with the Council's Interim Order dated December 18, 2008.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Kovach. The motion passed unanimously.

Joan McGee v. Township of East Amwell (2007-305) (Hunterdon)

Ms. Ziegler-Sears reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Ziegler-Sears presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the twenty (20) undisclosed e-mails to determine the validity of the Custodian's assertion that the e-mails contain attorney-client privileged information or advisory, consultative or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested documents (see #2 above) as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

⁴The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

4. The Council defers analysis of whether the Custodian or any other official knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Kovach. The motion passed unanimously.

Nick Sunday v. City of Paterson (2008-11) (Passaic)

Ms. Ziegler-Sears reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Ziegler-Sears presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. The Custodian's failure to provide the requested records on the date stated or respond in writing requesting a further extension of time on or before the date set forth in the first (1st) extension of time to respond to Complainant's request results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007) and Kohn v Township of Livingston Library, GRC Complaint No. 2007-124 (March 2008).
2. Because the Custodian certified in the Statement of Information that no records responsive existed at the time of the Complainant's request, and there is no credible evidence to refute the Custodian's certification, therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., there is no unlawful denial of access pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian's failure to provide the requested records on the date stated or provide a written response seeking a further extension of time to respond to the Complainant's OPRA request resulted in a "deemed" denial, because the Custodian responded in writing seeking an extension of time the first (1st) day after receiving the request and ultimately certified that no records responsive could be found, it is concluded that 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. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Kovach. The motion passed unanimously.

Tina Renna v. Township of Warren (2008-40) (Somerset)

Ms. Lownie reviewed 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 recommends the Council find that this complaint should be dismissed because the Complainant voluntarily withdrew her complaint from the Office of Administrative Law via letter to the GRC dated April 7, 2009. Therefore, no further adjudication is required.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

David Herron v. Township of Montclair (2008-46) (Essex)

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

The Executive Director respectfully recommends the Council find:

1. Because the Custodian failed to attempt a reasonable accommodation of the Complainant's OPRA request before denying access to the requested records on the basis that the request would substantially disrupt the Township's operations, the Custodian's response is insufficient under OPRA pursuant to N.J.S.A. 47:1A-5.g.
2. Because the Complainant's request does not specify an identifiable government record and would require the Custodian to conduct research and create a new record, the Complainant's OPRA request is invalid pursuant to MAG Entertainment LLC. V. Div. of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005).
3. Although the Custodian failed to provide the correct lawful basis for denying the Complainant access to the records requested in the timely response, the Custodian's denial of access was lawful because the Complainant's request was not for identifiable government records. N.J.S.A. 47:1A-6.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Rudy Rosenberg v. Bergen County Sheriff's Office (2008-96) (Bergen)

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

The Executive Director respectfully recommends the Council find:

1. Captain Jackson's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007). *See also* Grauer v. New Jersey Department of Children and Families, GRC Complaint No. 2006-214 (November 2007).
2. Because Captain Jackson performed an inadequate initial search to locate all records responsive, Captain Jackson unlawfully denied access to the additional records responsive to the Complainant's February 25, 2008 OPRA request, which were provided on April 16, 2008. *See* Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008).
3. Captain Jackson and Lieutenant Moody certified in the Statement of Information that all records responsive were provided to the Complainant on April 9, 2008 and April 16, 2008 and there is no credible evidence in the record to refute the Custodians' certification. Therefore, while Captain Jackson violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., there was no unlawful denial of access pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
4. Although Captain Jackson's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Complainant was provided with all records responsive on April 9, 2008 and April 16, 2008 and because Captain Jackson and Lieutenant Moody subsequently certified in the Statement of Information that all records responsive had been provided, it is concluded that Captain Jackson'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. However, Captain Jackson's unlawful "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Kovach. The motion passed unanimously.

Dean Feasel v. City of Trenton (2008-103) (Mercer)

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

The Executive Director respectfully recommends the Council find:

1. The Custodian's April 9, 2008 request for an extension is insufficient under OPRA because the Custodian did not request a specific extension of time on which access to the requested records would be granted or denied. Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request

- either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Similar to the U.S. District Court’s decision in John Does & PKF-Mark III, Inc. v. City of Trenton Dep’t of Pub. Works - Water Div., 565 F. Supp. 2d 560 (D.N.J. 2008), the evidence of record shows that the Complainant’s need for access does not outweigh the Custodian’s need to safeguard the personal information contained in the requested certified payroll records. The release of the employee names and addresses may result in unsolicited contact between the Complainant and the individuals whose names and addresses are being requested. Therefore, the Custodian did not unlawfully deny the Complainant access to the names and addresses contained in the requested certified payroll records pursuant to N.J.S.A. 47:1A-1, which states that a public agency has a responsibility and an obligation to safeguard from public access a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy.
 3. Although the Custodian’s April 9, 2008 request for an extension failed to specify a time period requested, thus resulting in a deemed denial of the Complainant’s OPRA request, a violation of N.J.S.A. 47:1A-5.i. and the Council’s decision in Hardwick n. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the Custodian did not unlawfully deny the Complainant access to the names and addresses contained in the requested certified payroll records pursuant to N.J.S.A. 47:1A-1. Therefore, it is concluded that 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. However, the Custodian’s deemed denial of the Complainant’s OPRA request appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Thomas Healy v. NJ Department of Labor & Workforce Development (2008-108)

Mr. Caruso reviewed the GRC’s analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Caruso presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of all records responsive to determine the validity of the Custodian’s assertion that disclosure of the requested records would reveal personnel information otherwise exempt from disclosure pursuant to N.J.S.A. 47:1A-10.

2. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see No. 1 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁷, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Kovach. The motion passed unanimously.

Robert Verry v. Borough of South Bound Brook (2008-161) (Somerset)

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

The Executive Director respectfully recommends the Council find:

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of all five (5) records responsive to the Complainant's May 3, 2008 OPRA request in order to determine the validity of the Custodian's assertion that the records constitute the exemptions cited by the Custodian pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver⁸ to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see No. 1 above), a document or redaction index⁹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4¹⁰, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

⁵ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁶ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁸ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁹ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹⁰ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Kovach. The motion passed unanimously.

Robert Verry v. Borough of South Bound Brook (2008-166) (Somerset)

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

The Executive Director respectfully recommends the Council find:

1. Although the Custodian responded in writing to the Complainant's June 8, 2007 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response was legally insufficient because he failed to respond to each request item contained in the request individually and provide a specific denial for each. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. The Custodian certified in the Statement of Information that no April Executive Session meeting minutes which were responsive to the request relevant to this complaint existed at the time of the Complainant's OPRA request because no April Executive meeting was held, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to cite a specific lawful basis for the denial within the statutorily required seven (7) business days resulting in a deemed denial, the untimely denial of access is lawful pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian failed to respond to each request item individually within the statutorily mandated seven (7) business days, the Custodian ultimately bore the burden of proving that the February 2008 Executive Session meeting minutes are exempt from disclosure under OPRA and that the Executive Session meeting minutes for April 2008 do not exist. Therefore, it is concluded that 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. However, the Custodian's unlawful denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

U'Bay K Lumumba v. NJ Department of Corrections (2008-196)

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

The Executive Director respectfully recommends the Council find that the requested Special Investigation Division report is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-9.a., Executive Order No. 26 (McGreevey, 2002) and *N.J.A.C.* 10A:1-1.4 through 31-6.13.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Kovach. The motion passed unanimously.

Chris Rogers v. Roxbury Board of Education (2008-228) (Morris)

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

The Executive Director respectfully recommends the Council find:

1. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the "Assessment of the Custodial, Maintenance and Grounds Functions," produced by Edvocate Solutions to determine the validity of the Custodian's assertion that the record constitutes information that would hinder the Board's position in collective negotiations or advisory, consultative, or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. *See also* Haemmerle v. Washington Township (Mercer), GRC Complaint No. 2006-106 (June 2007).
2. **The Custodian must deliver¹¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see No. 1 above), a document or redaction index¹², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4¹³, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

¹¹ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

¹² The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

Chris Rogers v. Roxbury Board of Education (2008-229) (Morris)

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

The Executive Director respectfully recommends the Council find:

1. Pursuant to N.J.S.A. 47:1A-6, the Custodian has borne her burden of proving that the user's manual for the Board's accounting software is exempt from disclosure as "administrative or technical information regarding computer software...which, if disclosed, would jeopardize computer security" pursuant to N.J.S.A. 47:1A-1.1.
2. The Custodian has not unlawfully denied access to the requested user's manual pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), because the Custodian certified that no records responsive exist and there is no credible evidence in the record to refute the Custodian's certification.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Kovach. The motion passed unanimously.

Ursula Cargill v. NJ Department of Education (2009-09)

This matter was not put to a vote due to the lack of a quorum.

Complaints Adjudicated on NJ Superior Court & NJ Supreme Court:

1. John Bart v. County of Passaic, Public Housing Agency (2007-215), GRC affirmed on appeal.
2. Stephon Downer v. Camden County Prosecutor's Office (2008-03), GRC affirmed on appeal.

Executive Director's Report and New Business:

Ms. Starghill discussed the necessity of rescheduling the June 2009 GRC meeting. The new date is Tuesday, June 23, 2009 at 9:30 a.m. Also, Ms. Starghill asked the Council members if they received the correspondence she forwarded from Mr. John Paff and if there were any questions.

Public Comment: Mr. George Burdick had comments.

A motion to end the Council's meeting was made by Ms. Forsyth and seconded by Ms. Kovach. The motion passed unanimously.

Meeting adjourned at 10:24 a.m.

Respectfully submitted,

Robin Berg Tabakin, Chairwoman

Date Approved: