



**Minutes of the Government Records Council
July 26, 2016 Public Meeting – Open Session**

I. Public Session:

• **Call to Order**

The meeting was called to order at 1:38 p.m. by Ms. Robin Tabakin at the Department of Community Affairs, Conference Room 129, Trenton, New Jersey.

• **Pledge of Allegiance**

All stood and recited the pledge of allegiance in salute to the American flag.

• **Meeting Notice**

Ms. Tabakin read the following Open Public Meetings Act statement:

“This meeting was called pursuant to the provisions of the Open Public Meeting Act. Notices of this meeting were faxed to the Newark Star Ledger (fax number out of service), Trenton Times, Courier-Post (Cherry Hill), and the Secretary of State on July 20, 2016.”

Ms. Tabakin read the fire emergency procedure.

• **Roll Call**

Ms. Bordzoe called the roll:

Present: Robin Tabakin, Esq. (Chairwoman), Jason Martucci, Esq. (designee of Department of Community Affairs Commissioner Charles A. Richman), and Christopher Huber, Esq. (designee of Department of Education Commissioner David C. Hespe)

Steven Ritardi, Esq. (Public Member) participated telephonically from 1:38 p.m. until 1:42 p.m. for the purposes of voting on the June minutes and GRC Complaint Nos. 2014-01, 2014-10, and 2014-11.

GRC Staff in Attendance: Joseph Glover (Executive Director), Rosemond Bordzoe (Secretary), Frank F. Caruso (Communications Specialist/Resource Manager), John Stewart (Mediator), Samuel Rosado (Staff Attorney), Ernest Bongiovanni (Staff Attorney), Husna Kazmir (Staff Attorney), Deputy Attorney General Debra Allen, and Deputy Attorney General Susan Scott.

Ms. Tabakin informed the public that copies of the agenda are available by the conference room door.

II. Executive Director's Report:

Time restraints prevented an Executive Director's Report at this meeting.

III. Closed Session:

Ms. Tabakin read the Closed Session Resolution to go into closed session pursuant to N.J.S.A. 10:4-12(b)(7) to receive legal advice in the following matters:

- Harry B. Scheeler, Jr. v. Greenwich Township (Warren) (2015-178)

Ms. Tabakin called for a motion to go into closed session. Mr. Huber made a motion, and Mr. Martucci seconded the motion. The Council adopted the motion by a majority vote; Mr. Ritardi was absent.

The Council met in closed session from 2:05 p.m. until 2:20 p.m.

Ms. Tabakin called for a motion to end the closed session meeting. Mr. Martucci made a motion, which was seconded by Mr. Huber. The Council adopted the motion by a majority vote; Mr. Ritardi was absent. Open Session reconvened at 2:22 p.m., and Ms. Bordzoe called roll.

Present: Ms. Tabakin, Mr. Martucci and Mr. Huber. Mr. Ritardi was absent.

IV. Approval of Minutes of Previous Meetings:

- **June 28, 2016 Open Session Meeting Minutes**

Ms. Tabakin called for a motion to approve the open session minutes of June 28, 2016 meeting. Mr. Martucci made a motion, seconded by Mr. Ritardi. The motion passed by a majority vote; Mr. Huber abstained.

- **June 28, 2016 Closed Session Meeting Minutes**

Ms. Tabakin called for a motion to approve the closed session minutes of June 28, 2016 meeting. Mr. Martucci made a motion, seconded by Mr. Ritardi. The motion passed by a majority vote; Mr. Huber abstained.

V. New Business – Cases Scheduled for Adjudication

Ms. Tabakin stated that an "Administrative Complaint Disposition" means a decision by 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. The reason for the Administrative Disposition is under each complaint below:

A. Administrative Disposition Adjudications with Recusals (Consent Agenda):

1. Wilbert Hannah v. Hudson County Prosecutor's Office (2016-91) (SR Recusal)

- The parties settled the matter through mediation.
- Ms. Tabakin called for a motion to accept the recommendations as written in the above Administrative Disposition. Mr. Martucci made a motion, which was seconded by Mr. Huber. The motion passed by a majority vote; Mr. Ritardi was absent.

B. Administrative Disposition Adjudications with no Recusals (Consent Agenda):

1. Eric Keys (o/b/o Site Enterprises, Inc.) v. Camden County Improvement Authority (2016-61)

- The parties settled the matter through mediation.
- Ms. Tabakin called for a motion to accept the recommendations as written in the above Administrative Disposition. Mr. Huber made a motion, which was seconded by Mr. Martucci. The motion passed by a majority vote.

C. Administrative Disposition of Uncontested, Voluntary Withdrawals by Complainant (No Adjudication of the Council is Required):

1. Steve Biss v. Borough of Riverdale (Morris) (2016-79)

VI. New Business – Cases Scheduled for Individual Complaint Adjudication

A. Individual Complaint Adjudications with Recusals:

A summary of the Executive Director's recommended action is under each complaint:

1. Michael Doss v. Borough of Bogota (Bergen) (2013-315) (SR Recusal)

2. Michael Doss v. Borough of Bogota (Bergen) (2014-152) (SR Recusal) Consolidated

- The GRC should refer the matter to the Office of Administrative Law (OAL) to afford the prior Business Administrator an opportunity for a hearing pursuant to the Administrative Procedures Act.
- As might be appropriate, the OAL should determine whether the Custodian knowingly and willfully violated OPRA and should, as might be appropriate, determine an award of reasonable counsel fees.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Mr. Stewart advised the Council that the last paragraph of the recommendations (as well as the conclusion) was amended. Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as amended. Mr. Huber made a motion, and Mr. Martucci seconded the motion. The motion passed by a majority vote; Mr. Ritardi was absent.

3. **Shawn G. Hopkins v. Monmouth County Board of Taxation (2014-1) (RBT Recusal)**
4. **Shawn G. Hopkins v. Sussex County Board of Taxation (2014-10) (RBT Recusal)**
5. **Shawn G. Hopkins v. Morris County Board of Taxation (2014-11) (RBT and SR Recusals) Consolidated**
 - The Council should deny Custodian Counsel’s motion to remand the consolidated complaint back to the Office of Administrative Law for further proceedings.
 - The Complainant or his attorney is entitled to submit an application for an award of reasonable attorney’s fees.
 - With respect to GRC Complaint Nos. 2014-1 and 2014-10, Mr. Huber called for any discussion on the Executive Director’s findings and recommendations as written. Hearing none, Mr. Huber called for a motion to accept the Executive Director’s findings and recommendations as written. Mr. Martucci made a motion, and Mr. Ritardi seconded the motion. The motion passed by a majority vote; Ms. Tabakin recused from GRC Complaint Nos. 2014-1 and 2014-10.
 - With respect to GRC Complaint No. 2014-11, the Council adopted the doctrine of necessity in order to achieve the necessary quorum. Ms. Tabakin called for any discussion on the Executive Director’s findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. Mr. Martucci made a motion, and Mr. Ritardi seconded the motion. The motion passed unanimously.
6. **Robert A. Verry v. Borough of South Bound Brook (Somerset) (2014-139) (SR Recusal)**
7. **Robert A. Verry v. Borough of South Bound Brook (Somerset) (2014-161) (SR Recusal) Consolidated**
 - The Custodian failed to establish valid grounds for reconsideration.
 - The Custodian’s failure to establish valid grounds for reconsideration notwithstanding, the Council should rescind conclusion No. 3 of the Interim Order.
 - The knowing and willful and prevailing party analyses should be limited to the Custodian’s failure to respond timely to the March 24 OPRA request.
 - Ms. Tabakin called for any discussion on the Executive Director’s findings and recommendations as written. Mr. Glover noted that an additional cite was added to the analysis section. Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as edited. Mr. Martucci made a motion, and Mr. Huber seconded the motion. The motion passed by a majority vote; Mr. Ritardi was absent.
8. **Robert A. Verry v. Borough of South Bound Brook (Somerset) (2015-57) (SR Recusal)**
9. **Robert A. Verry v. Borough of South Bound Brook (Somerset) (2015-60) (SR Recusal)**
10. **Robert A. Verry v. Borough of South Bound Brook (Somerset) (2015-70) (SR Recusal)**
 - The Custodian did not comply with the Council’s Interim Order.

- The matter should be referred to the Office of Administrative Law for a fact-finding hearing to determine whether the Custodian performed due diligence to duplicate the recordings at issue in GRC 2015-57 prior to offering inspection. The due diligence determination should include: (1) whether the Custodian could have reached out to multiple vendors to duplicate the requested recordings, whether tape-to-tape, tape to CD, or tape to digital file; and (2) whether he should have contacted the Borough's Information Technology vendor to duplicate the requested recordings, whether tape-to-tape, tape to CD, or tape to digital file.
- Further, and if necessary, the Office of Administrative Law should determine whether the Custodian knowingly and willfully violated OPRA under the totality of the circumstances.
- Finally, the Office of Administrative Law shall determine whether the Complainant is a prevailing party with respect to GRC 2015-57
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations. Mr. Glover noted that the recommendations were amended to memorialize a last second submission on pages 3-4. Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as amended. Mr. Huber made a motion, and Mr. Martucci seconded the motion. The motion passed by a majority vote; Mr. Ritardi was absent.

11. **Robert A. Verry v. Borough of South Bound Brook (Somerset) (2015-59) (SR Recusal)**

- The Custodian's failure to respond timely in writing within the extended deadline results in a "deemed" denial of access.
- The Custodian has borne his burden of proving that he lawfully denied access to the Complainant's OPRA request from February 4, 2015.
- There is no knowing and willful violation.
- The Complainant is not a prevailing party and is therefore not eligible for reasonable counsel fees.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made a motion, and Mr. Huber seconded the motion. The motion passed by a majority vote; Mr. Ritardi was absent.

12. **Robert A. Verry v. Borough of South Bound Brook (Somerset) (2015-147) (SR Recusal)**

- The Custodian timely responded to the OPRA request within seven days after receipt. Therefore, there is no "deemed" denial.
- The Custodian's initial failure to locate a record constitutes an insufficient search.
- The issue of whether the Custodian conducted a search for responsive OPRA requests on his computer should be held in abeyance pending the Appellate Division's ruling on the consolidated appeal in Scheeler, Jr. v. Office of the Governor, et al., Docket No. A-1236-14T3. Such an action will benefit all parties and give the GRC an adequate opportunity to apply the Appellate Division's decision.

- The knowing and willful and prevailing party analyses are deferred pending the Custodian's compliance.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations. Mr. Glover noted that this complaint receive a minor edit. Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as edited. Mr. Martucci made a motion, and Mr. Huber seconded the motion. The motion passed by a majority vote; Mr. Ritardi was absent.

13. **Vesselin Dittrich v. City of Hoboken (Hudson) (2015-214) (SR Recusal)**

- The Complainant failed to establish valid grounds for reconsideration.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Huber made a motion, and Mr. Martucci seconded the motion. The motion passed by a majority vote; Mr. Ritardi was absent.

B. Individual Complaint Adjudications with no Recusals:

1. **Jeff Carter v. Franklin Fire District No. 2 (Somerset) (2011-319)**

- The Complainant withdrew the Complaint at OAL.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

2. **Robert C. Scutro v. City of Linden (Union) (2014-254)**

- The Complainant withdrew his Complaint in writing to the GRC.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations. Mr. Glover stated that the previously prepared complaint was changed because the Complainant withdrew this complaint. Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as amended. Mr. Martucci made motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

3. **Thomas Vandergrift v. Pennsauken Public Schools (Camden) (2014-373)**

- The Custodian complied with the Interim Order.
- There is no knowing and willful violation.
- The Complainant is a prevailing party and eligible for reasonable attorney's fees.
- Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

4. **Gregory W. Kasko v. Town of Westfield (Union) (2014-389)**
 - The Custodian complied with the Interim Order.
 - There is no knowing and willful violation.
 - The Complainant is a prevailing party and eligible for reasonable attorney's fees.
 - Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations. Ms. Kazmir stated that she added a paragraph on page 2. Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as amended. Mr. Martucci made motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

5. **Shawn July v. NJ Department of Corrections (2015-6)**
 - The Custodian proved that he lawfully denied access to the requested reports, because the records are exempt by regulation.
 - Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

6. **Agostinho Livres v. Township of Bridgewater (Somerset) (2015-38)**
 - The Custodian's response was insufficient because she failed to state definitively that the requested records did not exist.
 - The GRC declines to order disclosure because it is clear that no such records exist.
 - There is no knowing and willful violation.
 - Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Martucci made motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

7. **José A. Vega, Jr. v. NJ Department of Corrections (2015-74)**
 - The Custodian proved that he lawfully denied access to the requested reports, because the records are exempt by regulation.
 - Ms. Tabakin called for any discussion on the Executive Director's findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. Mr. Huber made motion, and Mr. Martucci seconded the motion. The motion passed by a unanimous vote.

8. **Aakash Dalal v. Rutgers University (2015-123)**
 - The Custodian's failure to respond immediately to immediate access records results in a "deemed" denial under OPRA.
 - The GRC declines to order disclosure because the record indicates that the Custodian released all responsive records.
 - There is no knowing and willful violation.

- Ms. Tabakin called for any discussion on the Executive Director’s findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. Mr. Martucci made motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

9. **Richard Rizzo v. William Paterson University (2015-145)**

- The requested records are not considered government records subject to disclosure pursuant to N.J.S.A. 47:1A-6.
- Ms. Tabakin called for any discussion on the Executive Director’s findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. Mr. Huber made motion, and Mr. Martucci seconded the motion. The motion passed by a unanimous vote.

10. **Joan and Steven Baroczi v. NJ State Police (2015-149)**

- The Complaint is materially defective and must be dismissed. The Complainants are neither the requestors of the records nor the requestors’ legal representatives.
- Ms. Tabakin called for any discussion on the Executive Director’s findings and recommendations as written. Hearing none, Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. Mr. Martucci made motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

11. **Harry B. Scheeler, Jr. v. Greenwich Township (Warren) (2015-178)**

- The Custodian did not prove her burden that she timely responded in writing, thus resulting in a “deemed” denial of access.
- The Custodian’s failure to respond to the GRC’s request for information results in a violation of N.J.A.C. 5:105-2.4(a) and obstructed the GRC’s efforts to perform its statutory duties.
- The matter should be referred to the OAL to determine whether the Custodian unlawfully denied access, whether the Custodian knowingly and willfully violated OPRA, and whether the Complainant is a prevailing party and eligible for an award of reasonable attorney’s fees.
- Ms. Tabakin called for any discussion on the Executive Director’s findings and recommendations as written. Mr. Tabakin called for a motion to accept the Executive Director’s recommendations. Mr. Martucci made the motion, and Mr. Huber seconded the motion. The motion was rejected by a unanimous vote and the complaint was sent back to the GRC for further review.

12. **Richard F. Lane v. NJ Department of Corrections (2015-320)**

- The Custodian’s initial response was insufficient because a subsequent search revealed responsive records.
- There was no unlawful denial of access to Item No. 1 because the Custodian made the record available, and there is no evidence that the Complainant ever paid the copying fee.

- There was no unlawful denial of access to Items No. 2 and 3 because the records are exempt from disclosure under OPRA.
- Ms. Tabakin called for any discussion on the Executive Director’s findings and recommendations as written. Mr. Glover noted that a few cites were deleted. Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as amended. Mr. Martucci made motion, and Mr. Huber seconded the motion. The motion passed by a unanimous vote.

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

- The Custodian’s failure to respond timely in writing results in a “deemed” denial under OPRA.
- The Custodian must disclose the requested police reports following the Complainant’s payment of the special services charge.
- The knowing and willful and prevailing party analyses are deferred pending the Custodian’s compliance.
- Ms. Tabakin called for any discussion on the Executive Director’s findings and recommendations as written.
Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as edited. Mr. Huber made motion, and Mr. Martucci seconded the motion. The motion passed by a unanimous vote.

V. Court Decisions of GRC Complaints on Appeal:

- Killion v. Hammonton Police Dep't, 2016 N.J. Super. Unpub. LEXIS 1510 (App. Div. 2016): Here, the Appellate Division affirmed the Council’s decision in GRC Complaint No. 2013-228. The Court deferred to the Council’s expertise in determining that privacy interests of the victim and his/her family “presented a valid grounds for denial . . .” Id.

VI. Complaints Adjudicated in NJ Superior Court & NJ Supreme Court:

- Paff v. Ocean Cnty. Prosecutor's Office, 2016 N.J. Super. LEXIS 92 (App. Div. 2016)(Approved for Publication June 30, 2016): Here, the Appellate Division affirmed (by majority) the trial court’s decision ordering disclosure of mobile video recordings (“MVR”) showing a police pursuit that resulted in an officer’s indictment. The Court agreed that the records did not fit within the “criminal investigatory” exemption by apparently extending statutory power to a police chief’s internal order. Further, the Court determined that the records did not fall within the “investigation in progress” or “personal privacy” exemptions. The Court also discounted a few of Defendants’ other arguments because they did not raise same before the trial court.

One judge provided a dissenting opinion focused on the perceived misinterpretation of the “required by law” prong of the criminal investigatory exemption. The judge also dissented on the “investigation in progress” issue.

- Rivera v. N.J. State Police, 2016 N.J. Super. Unpub. LEXIS 1558 (June 30, 2016)(Consolidated): Here, Plaintiffs filed verified complaints after being denied access

to the names of police officers involved in 3 high profile incidents over a 2 year period to include unredacted use of force reports (“UFR”). The trial court, in looking to recent decisions regarding UFRs, “reluctantly” determined that those at issue met the “criminal investigatory” exemption. However, the Court also determined that the officers’ named on the report were not exempt from disclosure under N.J.S.A. 47:1A-3(b).

This case includes a highly organized game of pros and cons with Judge Jacobson ultimately falling in favor of only minimal disclosures while upholding a majority of Defendants’ denial of access.

- Brennan v. Bergen Cnty. Prosecutor's Office, 2016 N.J. Super. Unpub. LEXIS 1575 (App. Div. 2016): Here, the Appellate Division reversed the trial court’s order requiring disclosure of the names of successful bidders from an auction of seized sports memorabilia. The Court conducted a straight-forward balancing test to reach its conclusion. The Court noted that it was “. . . unpersuaded that disclosure of the bidders is relevant to government accountability. The bidders were not responsible for any government actions in connection with the auction, nor would their identity further an inquiry into those actions.” Id. at 20.

I’ll note that the trial court’s decision was previously presented to the Council in the March 30, 2015 Lexis Alert.

- New York Pub. Radio v. Office of the Governor, 2016 N.J. Super. Unpub. LEXIS 1612 (App. Div. 2016) Here, the Appellate Division reversed in part, vacated in part, and remanded the trial court’s decision requiring disclosure of a “Town Priority List” (“TPL”). The Court determined that the TPL was exempt from disclosure under the “advisory, consultative, or deliberative” exemption. N.J.S.A. 47:1A-1.1. The Court reasoned that, among other things, the trial court erred in attempting to distinguish the record from decisions made based on the record.

It should be noted that the Court also addressed disclosure of outside activity questionnaires (“OAQ”) under common law. The Court noted that the trial court had already determined that OAQs were not disclosable under OPRA.

VII. Public Comment: None

X. Adjournment:

Ms. Tabakin called for a motion to end the Council meeting. Mr. Martucci made a motion, which was seconded by Mr. Ritardi. The motion passed unanimously.

The meeting adjourned at 2:33 p.m.

Respectfully submitted,

Robin Berg Tabakin, Esq., Chair

Date Approved: September 29, 2016