

**MINUTES OF THE GOVERNMENT RECORDS COUNCIL**  
**April 26, 2004**

The meeting was called to order at 9:10 AM. at the Department of Community Affairs, Room 235A, Trenton, New Jersey. The Open Public Meetings Act statement was read.

Mr. Dice called the roll:

Present: Chairman Vincent Maltese, Virginia Hook, Bernard Spigner, Dale Caldwell (designee of Commissioner Susan Bass Levin, Department of Community Affairs) Diane Schonyers, (designee of Commissioner William Librera, Department of Education.)

Mr. Maltese read a resolution to convene in closed session to receive legal advice concerning the complaints to be adjudicated that day. Ms. Hook moved to adopt the resolution that was seconded by Mr. Caldwell. All members present unanimously approved the motion. The Council met in closed session from 9:15AM to 10:35AM.

The Council reconvened in open session at 10:45 AM in room 129 of the Department of Community Affairs, Trenton, New Jersey. The Open Public Meetings Act statement was read and attendees recited the Pledge of Allegiance.

Ms. Luzzatto called the roll:

Present: Chairman Vincent Maltese, Virginia Hook, Bernard Spigner, Dale Caldwell (designee of Commissioner Susan Bass Levin, Department of Community Affairs, Diane Schonyers, (designee of Commissioner William Librera, Department of Education)

Also Present: Deputy Attorney General Andrea Grundfest, Executive Director Paul Dice, Assistant Executive Director Gloria Luzzatto, GRC Attorney Advisor David Zipin, Staff Associates Chris Malloy, Anthony Carbabelli, Erin Mallon, Kimberly Gardner.

Mr. Maltese called for a motion to accept the Open Public Meeting Minutes from the March 11, 2004 meeting as prepared and amended. A motion was made by Mr. Spigner and seconded by Ms. Schonyers. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms. Schonyers, Mr. Spigner, Mr. Maltese

Nays: None

Abstain: Mr. Caldwell

Mr. Dice stated that the Draft Minutes were available for review only until the amended changes are completed.

Mr. Maltese called for a motion to accept the Closed Session Meeting Minutes as proposed for the March 11, 2004. A motion was made by Mr. Spigner and seconded by Ms. Schonyers.

Ayes: Ms. Hook, Ms. Schonyers, Mr. Spigner, Mr. Maltese

Nays: None

Abstain: Mr. Caldwell

Executive Director, Mr. Paul Dice, gave his report as follows:

1. The current break down of cases: Two cases on appeal; six cases with the Office of Administrative Law; sixteen cases in mediation; fifteen cases scheduled for (April 26, 2004) meeting; twenty-one cases scheduled for the May 13, 2004 meeting; two cases schedule for the June 10, 2004; five cases are work in progress, making a grand total of sixty seven open cases, of which thirty five are scheduled for a GRC agenda.

2. Mr. Dice announced that the Government Records Council has planned several out reach programs starting in May and continuing through November. The presentations involve the Department of Education, the League of Municipalities, Municipal Clerks Association of New Jersey and AM/PM Services.

At Mr. Maltese's request, Mr. Carabelli reported on the findings concerning the public comment from Ms. Ann Baron at the April 8, 2004 meeting. Mr. Carabelli stated that, an issue was raised at the public meeting regarding OPRA forms at three public agencies, the Borough of Highland Park, Piscataway Township and Middlesex County. He explained that he contacted all three of these agencies and reviewed their OPRA forms with them to ensure their OPRA forms complied with Sections 5 (f) and 5 (g) of the OPRA. In addition, the agencies were also notified that the GRC appeal process must follow the provisions of 5 (j) and be properly displayed at the offices of each Custodian.

**Calogero v. Borough of Emerson (2003-119)**

Ms. Luzzatto stated this case was initially heard at the February 27, 2004 meeting when the Council ordered access to all documents in existence at the time of the request, which the Borough had custody of and was subject to OPRA. On April 8, 2004 the Council determined that there were two items still outstanding from the request that involved e-mails and council meetings minutes. The Council ordered the Custodian to provide same to the requestor and to inform the Executive Director when it was completed. On April 15, 2004 the GRC received a letter from the Custodian advising that it had complied with the Council's order.

The Executive Director recommended that the Council find that all items with respect to this complaint and request have been satisfied and that the complaint should be dismissed.

Mr. Maltese called for a motion to accept the Executive Director's recommendation as written. A motion was made by Ms. Hook and seconded by Mr. Caldwell. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms. Schonyers, Mr. Spigner, Mr. Maltese, Mr. Caldwell

Nays: None

Abstain: None

**Jann Giacaoboni v. Camden County Office of the Sheriff (2003-122)**

Mr. Dice indicated that the case was heard at the April 8, 2004 public meeting and the Council voted unanimously to adopt the entirety of the Findings and Recommendations at the time. At issue was a copy of a Writ of Possession with the State seal; the requestor received a Writ of Possession without the state seal. Additionally, the Custodian sent the information to the GRC staff as opposed to the Requestor. Mr. Dice indicated that the information should have gone from the Custodian to the Requestor so there would be no intervening issues.

Subsequent to the Council's April 8, 2004 Interim Decision, all documents available and responsive to the request was provided to the requestor.

The Executive Director respectfully recommended that the Council dismiss the case as the custodian has complied with the Council's Interim Decision and all the requests.

Mr. Maltese called for a motion to accept the Executive Director's recommendation as written. A motion was made by Ms. Hook and seconded by Mr. Spigner. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms. Schonyers, Mr. Spigner, Mr. Maltese, Mr. Caldwell

Nays: None

Abstain: None

**Richard Gober v. City of Burlington (2003-139)**

Ms. Luzzatto stated that this case was on follow-up from the March 11, 2004 public meeting, and involved a series of requests dealing with a townhouse development by the Pennington properties in the City of Burlington. The Council in their March 11, 2004 decision ordered the requestor to supply specific details regarding the information still being sought to the Executive Director, Paul Dice within 10 business days and the custodian was to reply within 10 business days to the requestor's response with the documents still sought. Additionally, the Custodian was to provide a certification explaining the delay in responding to the request and why it should not be considered a knowing and willful violation. Subsequent to the interim decision the GRC received a response from the custodian and the complainant. Because the complainant was out of the country, there was a delay in receiving his reply. On April 7, 2004 the requestor did respond to both the custodian and the GRC indicating that the custodian was now providing him with the information that he was seeking and that his request was completely satisfied. The Custodian's certification explained the reasons for the delay in responding to the request listing the following factors:

1. The city moved from its prior location disrupting operations.
2. The Custodian was assigned as Project Manager for the construction of a building during 2003
3. The Custodian went on vacation for two weeks in August.

Based on the reasons given by the Custodian, the Custodian's actions in this case did not rise to a knowing and willful violation under OPRA.

The Executive Director respectfully recommended that the Council dismiss the case on the basis of:

1. The custodian has fulfilled the complainant's request.
2. There has been no knowing and willful violation of N.J.S.A. 47:1A-11 under the totality of the circumstances

Mr. Maltese suggested that the custodian should be informed that when situations arise that would require the custodian to not be available there should be an alternative plan that would give an assistant the clearance to make the necessary decisions regarding OPRA requests. Ms. Hook and Ms. Schonyers reiterated with similar statements.

Mr. Maltese called for a motion to accept the Executive Director's recommendation as written. A motion was made by Mr. Caldwell and seconded by Mr. Spigner. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms. Schonyers, Mr. Spigner, Mr. Maltese, Mr. Caldwell

Nays: None

Abstain: None

**Richard Wilcox v. Township of West Caldwell (2003-142)**

Mr. Dice stated that this case is on follow-up from the March 11, 2004 public meeting, when the Council ordered:

1. The Custodian to provide a certification to fully explain why the Council should consider the exempted documents as “attorney-client privileged.”
2. The Custodian to provide a certification that fully explains the delay in responding to the Open Public Records Act (“OPRA”) request.

Mr. Dice stated that following the March 11, 2004 the Government Records Council received two Vaughn indexes from the Custodian’s Counsel and found that the rationale asserting the documents are attorney-client privilege was acceptable. However, the custodian needed to clarify it’s statements regarding “any records” / “all public” records.

The Executive Director respectfully recommended the following:

1. The Custodian has met the burden of explaining that the records requested are subject to “attorney-client privilege” and exempt under OPRA (N.J.S.A. 47:1A-1.1) as demonstrated by means of a Vaughn Index, required by the Council’s Interim Order of March 11, 2004, therefore, no further action is needed.
2. Pursuant to N.J.S.A. 47:1A-5(i), the Custodian certifies and provides documentation that she had complied by responding to an OPRA request within the statutory seven (7) business day time frame and no further action is needed.
3. There are no provisions in OPRA that allows a municipal ordinance to abrogate a statutory exemption.
4. The Council should order the custodian’s counsel to comply with the GRC Staff’s request of April 19, 2004 and provide a re-certification of Ms. Edwards clarifying the records in West Caldwell’s file that were disclosed to the requestor and if needed, an explanation and Vaughn Index for any documents that were withheld. The Council should order that the custodian’s counsel comply with this request within five (5) business days after receipt of the Interim Order.

Mr. Maltese called for a motion to accept the Executive Director’s recommendation as written. A motion was made by Ms. Hook and seconded by Ms. Schonyers. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms. Schonyers, Mr. Spigner, Mr. Maltese, Mr. Caldwell

Nays: None

Abstain: None

**Trish Fanders v. Easthampton Board of Education (2004-16)**

Mr. Dice stated that in the April 8, 2004 Interim Decision, the Council ordered that:

1. The Complainant shall provide Executive Director Paul Dice with a response within five (5) business days of receipt of this Interim Decision on Access indicating whether any of the information requested in Complainant’s January 8, 2004 Open Public Records Act request has not been disclosed.
2. Failure of Complainant to respond in accordance with “1” above will result in the case being dismissed.

Mr. Dice stated further that in a March 26, 2004 letter to the GRC, the Complainant submitted a response regarding point #1 of the April 8, 2004 Interim Decision. In this response, the Complainant highlighted two resumes that were not disclosed and two resumes that were partially disclosed. Pursuant to the Open Public Records Act (OPRA), the Custodian should provide all requested documents from the date of the original request in January 2004.

The Executive Director recommended that the Council find that:

1. Pursuant to the Open Public Records Act (OPRA), the Custodian should provide all requested documents from the date of the original request in January 2004.
2. The Custodian should disclose to the Complainant any outstanding requested documents within 5 business days of receipt of this decision.

Mr. Maltese called for a motion to accept the Executive Director’s recommendation amending the Findings and Recommendations to reflect that the custodian anticipated a response was needed and provided same on March 26, 2004 before the interim decision was adopted. A motion was made by Ms. Hook and seconded by Ms. Schonyers. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms. Schonyers, Mr. Spigner, Mr. Maltese, Mr. Caldwell  
Nays: None  
Abstain: None

**Martin O’Shea v. Township of West Milford (2004-17)**

Ms. Mallon stated that this complaint alleges a violation of OPRA regarding two requests to the Township of West Milford. She explained that the request dated January 12, 2004; sought all records, including emails, pertaining to the appointment of William De Marco as West Milford Township Attorney. The second request dated January 29, 2004, sought any records, including emails, not already released, pertaining to the process of selecting

the Township Council for 2004, including, but not limited to, applications, resumes, interviews and discussions and comments regarding the candidates.

She noted that the custodian responded to the January 12, 2004 request on January 26, 2004, however, they did not meet the statutory seven (7) day time period allotted by OPRA. Further, on January 26, 2004, a written response and copy of the actual contract was provided to the requestor, which in Section 5(e) in OPRA should have been disclosed immediately.

The custodian asserts that he did not officially respond to the requestor's January 29, 2004 OPRA request because he felt that his response to the January 26, 2004 request involved the same topic and was sufficient.

The Executive Director recommended that the Council find that:

1. OPRA provides that immediate access is ordinarily granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information [N.J.S.A. 47:1A-5 (e)]. The custodian should provide an explanation for their failure to comply with the statutory seven (7) business day time period in responding to the requestor's January 12, 2004 OPRA request for any and all records regarding the employment of Mr. DeMarco as the Township Attorney, specifically why the contract was not immediately provided to the requestor.
2. According to OPRA, a custodian's failure to provide a response to a request shall be deemed a denial of access [N.J.S.A. 47:1A-5 (i)]. Although the custodian considered the January 26<sup>th</sup> and the January 29<sup>th</sup> requests to be similar, and felt that his response to the January 26, 2004 request satisfied as a response to the January 29, 2004 request, he should have provided a specific response to the January 29, 2004 request. Pursuant to OPRA, the Council should order the custodian to disclose all documents responsive to the January 29, 2004 request within five (5) business days of the Council's decision and inform the Executive Director when this had been completed.
3. N.J.S.A. 47:1A-11 provides that a "custodian who knowingly and willfully violates OPRA, as amended and supplemented, and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty." The Council should order the custodian to provide an explanation for their failure to comply with the statutory seven (7) business day time period in responding to the requestor's January 29, 2004 OPRA request.

Mr. Maltese called for a motion to accept the Executive Director's recommendations with amendments to recommendations #'1" and "3" to read "provide a certification". A motion was made by Mr. Caldwell and seconded by Mr. Spigner. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms. Schonyers, Mr. Spigner, Mr. Maltese, Mr. Caldwell

Nays: None

Abstain: None

**Michael D'Angio v. Berkeley Heights (2004-23)**

Mr. Dice stated that the complainant advised the Government Records Council Staff on April 12, 2004 that he was withdrawing the subject complaint based on the fact he received most of the requested documents, and was confident he would receive the remaining requested records.

The Executive Director respectfully recommended that the Council dismiss the complaint based on the complainant's voluntary withdrawal of his complaint.

Mr. Maltese called for a motion to accept the Executive Director's recommendation as written. A motion was made by Mr. Spigner and seconded by Ms. Schonyers. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms. Schonyers, Mr. Spigner, Mr. Maltese, Mr. Caldwell

Nays: None

Abstain: None

**David Nystrand v. Netcong Police Department (2004-32)**

Ms. Luzzatto stated that this case involved a request to the Netcong Borough Police Department for a copy of a police photo. She indicated that the requestor presented the request to the Netcong Borough Police Department and did not receive a response to his request. The Police Department certified in their Statement of Information that the photograph did not exist and that the Complainant was aware of this from his court proceedings. However, the Custodian erred by in sending their response to the requestor's attorney without first confirming with the requestor that he had legal representation.

The Executive Director recommended that the Council find that:

1. The requested photograph was never "made, maintained or kept on file".
2. The Custodian violated N.J.S.A. 47:1A-5 when the response to the request was made to the requestor's attorney rather than the requestor on the presumption that he was represented by legal counsel. The Custodian should be made aware that absent a letter of legal representation, a response is to be made to the requestor.
3. The Custodian has satisfied her duties pursuant N.J.S.A. 47:1A-1 et seq.
4. The complaint should be dismissed.

Mr. Maltese called for a motion to accept the Executive Director's recommendation as written. A motion was made by Ms. Hook and seconded by Ms. Schonyers. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms. Schonyers, Mr. Spigner, Mr. Maltese, Mr. Caldwell

Nays: None

Abstain: None

**Ronald Miles v. Borough of Barnegat (2004-36)**

Mr. Dice stated that the case involved three separate requests to Barnegat Township's Custodian of Records for:

1. The names of Township engineers from 1976-2003.
2. The year Catherine Street was excavated.
3. A copy of the old maps showing the vacated streets of Elm, Maple and First Ave. with Cloverdale Rd.

Mr. Dice stated further that the record reflects there was frequent dialogue between the complainant and the custodian but it is not clear to the GRC what is outstanding and what is not.

The Executive Director, therefore, recommended that the Council find that:

1. In its February 19, 2004 to the Complainant, the Custodian provided a list of Township Engineers from 1976 to 2004 in response to the Complainant's requests "1".
2. The Custodian affirmed in a February 19, 2004 letter to the Complainant and later certified in the Statement of Information that Catherine Street was a paper street and had not been excavated and there were no maps in the Township's possession in response to request "2" and "3".
3. The requestor should provide specific details of the information still being sought, which has not already been provided by the Custodian. Said response is to be provided to the Custodian and Executive Director, Paul Dice within 10 business days from receipt of the Council's decision. A lack of a response will result in the case being dismissed.

Mr. Spigner suggested that the Council order the Custodian to provide a certification to the Executive Director within five (5) business days of receipt of the Council's Interim Decision with an explanation for the delay in responding to the request and why the Council should not consider their actions to be a "knowing and willful" violation under N.J.S.A. 47:1A-11.

Mr. Maltese called for a motion to accept the Executive Director's recommendations as amended. A motion was made by Mr. Caldwell and seconded by Ms. Schonyers. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms. Schonyers, Mr. Spigner, Mr. Maltese, Mr. Caldwell

Nays: None

Abstain: None

**Gerard Lanosga v. Borough of Princeton (2004-37)**

Mr. Dice stated that this is a request for any and all incident or arrest reports that involved the complainant from 1967 through 1971 while he attended Princeton University.

Pursuant to an April 20, 2004 facsimile transmittal confirmation, unspecified records were sent to the complainant. Via e-mail, carbon copied to the Government Records Staff on April 20, 2004, the complainant acknowledged receipt of unspecified records via facsimile. In the same e-mail, the complainant requested additional answers or documents in regard to his request.

The Executive Director recommends that the Council order the custodian to provide Executive Director Dice and the complainant with a certified statement that addresses the following:

- In whole or in part, what information and/or documentation was released in accordance with the September 16, 2003 Open Public Records Act request.
- What information, if any was not released and why.

Said statement shall be provided to Executive Director Dice and the complainant within five (5) business days of receipt of the Council's order.

Mr. Maltese called for a motion to accept the Executive Director's recommendation as written. A motion was made by Ms. Hook and seconded by Mr. Spigner. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms. Schonyers, Mr. Spigner, Mr. Maltese, Mr. Caldwell

Nays: None

Abstain: None

**Pat Moran v. Department of Environmental Protection (2004-39)**

Mr. Dice reviewed the case stating that the Complainant indicated in his Denial of Access Complaint that he verbally contacted Daren Shaffer at the Department of Environmental Protection on February 11, 2004 requesting “who the inspecting engineer was who signed off on the 6’-12’ stone used on the Lake Swannanoa Dam in 1997” and received a verbal response that the documents did not exist.

Mr. Dice stated further that the Custodian contends that the complainant did not submit a written request for the documents at issue in the complaint. The GRC requested from the complainant confirmation that a written request was made; the complainant produced no written request.

The Executive Director recommended that the Council:

1. Find that a written OPRA request was not made by the requestor as required in N.J.S.A. 47:1A-5(g).
2. Find that the Government Records Council lacks the jurisdiction to adjudicate the complaint.
3. Find that the complaint should be dismissed.

Mr. Maltese called for a motion to accept the Executive Director’s recommendation as written. A motion was made by Ms. Hook and seconded by Ms. Schonyers. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms. Schonyers, Mr. Spigner, Mr. Maltese, Mr. Caldwell

Nays: None

Abstain: None

**Timothy Michael Seabrook v. Cherry Hill Police Department (2004-40)**

Ms. Luzzatto stated that this case involved a request for any Investigation Work (minus the police report) about an accident on 3/31/03 involving a car accident between the Complainant and another driver in the Coastline parking lot. The requestor presented a written request to the Cherry Hill Police Department although not dated it specifically asked for an investigation report (work minus a police report). The Central Records department responded with a copy of the police report; there was no further direction given to the requestor.

The Custodian indicated in there Statement of Information that they did not treat this complaint as an OPRA request because the Township processes hundreds of requests for police reports in any given month. The Custodian also indicated the information sought

was not available through their department and needed to be directed to the Department of Internal Affairs.

The Executive Director recommended that the Council find that:

1. Although the Complainant submitted an undated request, the request constitutes a valid OPRA request pursuant to N.J.S.A. 47:1A-5(g).
2. The Custodian violated N.J.S.A.47:1A-5(g) and 5(h) by not providing the requestor with an explanation of why it was unable to comply with the request and by not directing the requestor to the appropriate records custodian.
3. The Custodian's Counsel has explained that no disclosable records exist, other than those given to the Complainant.
4. The Custodian's violation in "2" does not constitute a knowing and willful violation under the totality of the circumstances because Central Records believed this was a request for a police report rather than an OPRA request.
5. This complaint should be dismissed.

Mr. Maltese called for a motion to accept the Executive Director's recommendation as written. A motion was made by Mr. Spigner and seconded by Ms. Hook. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms. Schonyers, Mr. Spigner, Mr. Maltese, Mr. Caldwell

Nays: None

Abstain: None

#### **Larry Kohn v. Township of Livingston (2004-43)**

Mr. Dice stated that the complainant and the custodian voluntarily signed Agreements to Mediate on March 31, and April 5, 2004. Based on same, the Executive Director respectfully recommends that the Council and GRC staff forego adjudicatory action pending the outcome of mediation.

Mr. Maltese called for a motion to accept the Executive Director's recommendation as written. A motion was made by Ms. Schonyers and seconded by Ms. Hook. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms. Schonyers, Mr. Spigner, Mr. Maltese, Mr. Caldwell

Nays: None

Abstain: None

Mr. Maltese recused himself from this part of the meeting for the following cases:

Margaret Wolenski v. Bayonne Police Department (2004-31)

Carmine Venezia v. Jersey City Incinerator Authority (2004-44)

**Carmine Venezia v. Jersey City Incinerator Authority (2004-44)**

Mr. Dice stated that the requestor received a copy of the documents that he requested on April 2, 2004. In a letter to the Government Records Staff on April 14, 2004, he withdrew his Denial of Access Complaint.

The Executive Director recommended that the Council dismiss the complaint since Mr. Venezia received a copy of the requested documents and on April 14, 2004 he withdrew his complaint.

Mr. Spigner called for a motion to accept the Executive Director's recommendation as written. A motion was made by Ms. Hook and seconded by Mr. Caldwell. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms. Schonyers, Mr. Spigner, Mr. Maltese, Mr. Caldwell

Nays: None

Abstain: None

Recused: Mr. Maltese

**Margaret Wolenski v. Bayonne Police Department (2004-31)**

Mr. Dice stated that this case involved a request for a given report from the Bayonne Police Department. A request made on April 1, 2004 for the custodian's statement of information was unanswered and no additional information has been provided from the custodian in response to the complaint. Thus, the custodian offered no defense in this case.

The Executive Director recommended that the Council:

1. Determine that the Custodian's lack of response be considered a denial of access pursuant to N.J.S.A.47: 1A-5(i).
2. Order the Custodian to disclose all requested information pursuant to N.J.S.A. 47:1A-1 et seq.
3. Order the custodian to disclose the requested documents to the Complainant within five business days of the Custodian's receipt of the Council's order.

Mr. Spigner called for a motion to accept the Executive Director's recommendation as written. A motion was made by Ms. Hook and seconded by Ms. Schonyers. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms. Schonyers, Mr. Spigner, Mr. Maltese, Mr. Caldwell

Nays: None  
Abstain: None  
Recused: Mr. Maltese

Mr. Dice announced that the Government Records Council is seeking Requests for Qualifications (RFQ) for independent council representation. The RFQ is being publicized in the Law Journal and the GRC website with a (30) thirty-day period to respond.

Mr. Dice suggested that the Council forego any further action on the Baranoski Case & the Cundiff Case pending the assignment of Independent Council. The Council agreed by a consensus.

There were no comments from the public at this time.

Meeting adjourned at 12:45PM.

Respectfully submitted,

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/s/Virginia S. Hook, Secretary

Dated \_\_\_\_\_



