

MINUTES OF THE GOVERNMENT RECORDS COUNCIL
August 14, 2003

The meeting was called to order at 9:39 a.m. at the Department of Community Affairs, Room 235A, Trenton, New Jersey. The Open Public Meeting Act statement was read.

Mr. Pfeiffer called the roll:

Present: Chairman Vincent Maltese, Matthew U. Watkins (designee of Commissioner Susan Bass Levin, Department of Community Affairs), Virginia Hook and Bernard Spigner

Absent: 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 and Mr. Spigner seconded the motion. All members present approved the motion. The Council met in closed session from 9:39 to 10:44 a.m.

The Council reconvened in open session at 10:55 a.m. in Room 129 of the Department of Community Affairs, Trenton, New Jersey. The Open Public Meeting Act statement was read and attendees recited the Pledge of Allegiance.

Mr. Pfeiffer called the roll:

Present: Chair Vincent Maltese, Virginia Hook, Bernard Spigner and Matthew U. Watkins

Absent: Diane Schonyers

Also Present: Deputy Attorney General Barbara Conklin and Deputy Attorney General Juliet Wyne, Acting Executive Director Marc Pfeiffer, Assistant Executive Director Paul Dice and Staff Associates Marc Leavitt and Chris Malloy.

Mr. Maltese called for adoption of the minutes from the public meeting of July 10, 2003. Mr. Watkins moved to adopt the minutes as prepared with a second by Mr. Spigner. The motion was adopted by roll call:

Ayes: Ms. Hook, Mr. Spigner, Mr. Watkins and Mr. Maltese
Nays: None

Mr. Maltese called for the adoption of the closed session minutes from the July 10, 2003 meeting. Ms. Hook moved to adopt the minutes as prepared with a second from Mr. Spigner. The motion was adopted by roll call:

Ayes: Ms. Hook, Mr. Spigner, Mr. Watkins and Mr. Maltese
Nays: None

Mr. Maltese called for the Executive Director's report. Mr. Pfeiffer distributed a copy of the report to the Council and stated that copies are available for public inspection.

Mr. Maltese asked if the Council had received any new communications. Mr. Pfeiffer reported that none had been received.

Mr. Maltese then moved on to the matter of Council adjudications.

- **L.E. Fisher and Krisberg vs. the City of Paterson (2002-45 and 2002-55)**

Mr. Pfeiffer said the Council previously issued a Decision that the copying fees levied by the city for a copy of a single day's police blotter were not lawful under OPRA and that the requestors were "prevailing parties" entitled to reasonable attorney's fees under OPRA. Because the parties could not settle the amount of fees, the requestors submitted fee applications for Council adjudication. Mr. Pfeiffer recommended that the Council find that:

- Requestor's legal counsel should receive \$150 per hour for 12.13 hours of work for a total of \$1,819.50 in fees.
- The fee enhancement sought by requestor's attorney is not appropriate under OPRA.

Following a discussion, Mr. Maltese moved to accept the Executive Director's Finding and Recommendations, seconded by Ms. Hook. The motion was adopted by roll call:

Ayes: Ms. Hook, Mr. Spigner, Mr. Watkins and Mr. Maltese
Nays: None

- **Blue vs. Township of Wall (2002-47)**

Mr. Pfeiffer explained that this case involved a request by a private detective for records of a driving while intoxicated incident (DWI) and a question of redaction of personal information from certain records. The custodian claimed that the DWI documents were records of a criminal investigation and pursuant to OPRA were not disclosable.

Mr. Pfeiffer recommended that the Council:

- Find that the DWI records are not criminal investigatory records under OPRA because they concern Title 39 Motor Vehicle violations that are not punishable as crimes themselves nor are they related to allegations of criminal activity in this case.

- Find that OPRA does not afford the requestor access to information such as social security or driver's license numbers because the requestor is a licensed private investigator.
- Order the disclosure of the requested reports, including previously redacted information such as address and age of the defendant.
- Find that the custodian did not willfully and knowingly violate OPRA.

After Council discussion, Mr. Watkins moved that the Council accept the Executive Director's Finding and Recommendation. Mr. Spigner seconded the motion. The motion was adopted by roll call:

Ayes: Ms. Hook, Mr. Spigner, Mr. Watkins and Mr. Maltese
Nays: None

- **Zaccaria vs. Township of Wall (2002-70)**

Mr. Pfeiffer explained that the Township custodian initially denied a request for records stored by the Township consulting engineer in his private office because the custodian did not have access to the records. The records were provided significantly after the 7-day deadline, with no notice to the requester when the records would be made available.

Mr. Pfeiffer recommended that the Council dismiss the complaint and remind the custodian that:

- OPRA mandates access to government records even if they are in storage.
- Custodians, officials, officers and employees handling OPRA requests should know where their government records are stored.
- OPRA at N.J.S.A. 47:1A-5(i) requires custodians to, within seven business days following receipt of a request for records in storage, advise requesters of they date can expect to receive the records.
- When a custodian does not have direct access to records, the OPRA request can be delegated to someone who does have access with instructions to provide them either to the requester or the custodian.

The Council discussed the matter and raised questions concerning its ability to issue reprimands and assess fines when custodians violate OPRA. The Council directed Mr. Pfeiffer to research the matter and present recommendations at the next Council meeting.

Mr. Spigner made a motion to accept the Executive Director's Finding and Recommendations. Ms. Hook seconded the motion. The motion was adopted by roll call:

Ayes: Ms. Hook, Mr. Spigner, Mr. Watkins and Mr. Maltese
Nays: None

- **Janeczko vs. Division of Criminal Justice & N.J. State Police (2002-79 and 2002-80)**

Mr. Pfeiffer explained that the complaints involve a request for copies of a police investigation of criminal activity at Fort Dix and nearby municipalities that culminated in the shooting of the suspect. The custodian denied access because the records were part of a criminal investigation and confidential under OPRA. While the requestor had obtained access to some redacted records concerning the incident from the Department of the Army under the Federal Freedom of Information Act, the State custodians declined to provide access. The Executive Director recommended that the Council find the records sought are criminal investigatory records and are not subject to disclosure under OPRA. He also recommended that the requestor be advised to consider an application for the records under the Common Law.

Mr. Watkins made a motion was made to accept the Findings and Recommendations of the Executive Director. Mr. Maltese seconded the motion. After discussion, the Council agreed also to authorize Mr. Pfeiffer to advise the requestor that OPRA did not limit her ability to seek access to the records under the Common Law. The motion was adopted by roll call:

Ayes: Ms. Hook, Mr. Spigner, Mr. Watkins and Mr. Maltese
Nays: None

- **Jacob vs. Borough of Totowa (2002-113)**

Mr. Pfeiffer explained that the requested records included copies of licenses, “listed businesses,” and police tapes of certain incidents that were more than a month old. The custodian’s response was not timely, not written as required under OPRA and failed to provide the requestor notice of her rights of appeal under OPRA. The custodian excused the inadequate response on the basis that the records had been previously provided to the requestor and they were unable to contact the requestor by telephone. There was confusion in the record about the dates of the requests as described in the requestor’s complaint as compared to those on record with the custodian.

Mr. Pfeiffer recommended that the Council find that:

1. In light of the confusion about requests for “listed businesses” in a claimed September and submitted October 4, 2002 requests, and the December 6, 2002 request, that those portions of the Complaint be dismissed;
2. Neither the Borough's responses to previous requests from the requestor nor the Borough's attempted verbal contact to the requestor complied with OPRA requirements for responding to a records request, as OPRA requires that responses be in writing;
3. That the custodian provided untimely access to the records responsive to the December 6, 2002 request for licensing information;

4. That no records exist in response to the December 6, 2002 request for police tapes, and;
5. That under the facts of this case, OPRA was violated, but, the actions of custodian did not unreasonably deny access under the totality of the circumstances; and that the Council,
6. Dismiss the complaint because of the confusion that surrounds the request.

It was also recommended that the Council formally reprimand the custodian and the police chief for violating the OPRA seven-business days response deadline and for failing to provide the requestor the OPRA rights of appeal and provide a copy of the reprimand to the Borough Council. Finally, the complaint should be dismissed because of the confusion that surrounds the requests.

The Council discussed the matter. Mr. Maltese suggested that the proposed reprimand be discussed to the following meeting, as the Council has not yet established a reprimand policy. A discussion then ensued about reprimands.

In lieu of a reprimand, Mr. Watkins suggested that the Council send a letter to the Borough Council and the individuals regarding the Council's decision so appropriate measures could be taken to ensure adequate Borough response to other OPRA requests.

Mr. Maltese asked for a motion to accept all the Executive Director's Findings and Recommendations except the proposed reprimand and, instead, to instruct the Executive Director to advise the Borough Council and the individuals of the Council's decision. Mr. Watkins offered the motion as stated, which was seconded by Mr. Spigner. The motion was adopted by roll call:

Ayes: Ms. Hook, Mr. Spigner, Mr. Watkins and Mr. Maltese
Nays: None

Blanchard vs. Rahway Board of Education (2003-57)

Mr. Pfeiffer explained that this complaint involves a custodian, on advice of counsel, denying access to the individual employment contracts of a school superintendent and to audiotapes of a public meeting of the Board of Education.

After the initial denial, the requestor contacted the staff of the GRC for guidance on the denial. The requestor was advised that the records sought were government records subject to public access; in the case of the employment contract, access should have been provided immediately pursuant to N.J.S.A. 47:1A-5(e). The requestor provided a copy of the GRC's response to the custodian who requested that the board attorney review the matter. The attorney eventually responded that the records should be disclosed. The fact that the requestor was a candidate for the Board of Education, that the request was made prior to the election, and that the delays resulted in access after the election adds to an impression that access to the records was deliberately delayed. However, the records were made available to the requestor, and there is no evidence that the initial denial of access in this case was a knowing and willful violation of OPRA because the Board

attorney has advised the Council in writing that an error of judgment was made by a junior associate who advised the custodian in the matter.

As a result, Mr. Pfeiffer suggested that the Council dismiss the Complaint and caution the custodian to promptly discuss with the GRC any legal advice that appears inconsistent with any provision of OPRA, the Custodian Handbook, GRC Final Decisions or GRC advice to the requestor.

The Council discussed various aspects of knowing and willful violations and whether the school board attorney is an “official” subject to a fine under OPRA. Mr. Maltese asked the GRC’s legal counsel to research whether or not a school board attorney is a public official subject to fine under OPRA.

Mr. Maltese objected to Mr. Pfeiffer’s characterization of the custodian’s initial denial of access as “unreasonable.” Mr. Maltese acknowledged that while there was a violation of OPRA, the custodian’s actions were not unreasonable under the totality of the circumstances, in light of the advice provided by the Board attorney.

The Council continued to discuss the case and how the GRC should address a custodian response that does not comply with OPRA but still falls short of the OPRA “knowing and willful” standard.

Mr. Maltese asked for a motion in lieu of adopting the Recommendations the Executive Director, proposed as follows:

- There had been a violation of OPRA in so far as the requester was denied immediate access to the superintendent’s employment contract and denied access to audio tapes of an open public meeting within seven business days following receipt of the OPRA request.
- Consideration of penalties under OPRA is deferred until the next Council meeting.
- Before that meeting, Council’s attorney will provide advice whether a school board attorney is a “public official” and subject to fine under OPRA.
- The custodian’s initial denial of access was not “unreasonable” under the totality of the circumstances.
- The Executive Director is instructed to advise the custodian, the board of education, and the Board’s attorney of the GRC’s actions in this case.

Mr. Spigner made the motion, which was seconded by Ms. Hook. The motion was adopted by roll call:

Ayes: Ms. Hook, Mr. Spigner, Mr. Watkins and Mr. Maltese
Nays: None

Council considered unfinished business.

Mr. Pfeiffer reviewed **L.E. Fisher vs. Township of Fairfield (2002-34)** and **Reda vs. Township of West Milford (2002-58)** and indicated that both cases were under review and anticipated that that the matters would be ready for action at the Council's September, 2003 meeting.

Mr. Maltese asked Mr. Pfeiffer to describe the status of the proposed amendments to the Council's Inquiry and Complaint policy. Mr. Pfeiffer indicated that written comment had been received from several individuals and interest groups, that all comments had been reviewed, and that no significant substantive changes to the proposed amendments were required at this time. Mr. Pfeiffer recommended that the Council approve the amendments to the Policy as proposed with the minor changes suggested by GRC staff in response to comments received. Mr. Pfeiffer noted that the Policy is a work in progress that can be modified on an on-going basis. Mr. Watkins made a motion to accept the amendments to the proposed amendments as modified by GRC staff, which was seconded by Mr. Spigner. The motion was adopted by roll call:

Ayes: Ms. Hook, Mr. Spigner, Mr. Watkins and Mr. Maltese

Nays: None

Mr. Maltese opened the floor to public comment.

Dr. Anne Barron of Highland Park addressed the Council on several issues including responses to various OPRA requests filed with specific towns. An outline of Dr. Barron's presentation is attached hereto and made part of these minutes. Chairman Maltese advised Dr. Barron to take advantage of her right under OPRA to file a complaint in the event she believed she had been denied access to a government record. Mr. Pfeiffer suggested that Dr. Barron discuss the GRC Complaint process with Paul Dice.

Lois Lebbing of Highland Park addressed the Council. She did not provide a written outline of her presentation. Ms. Lebbing expressed frustration with custodians' delay in providing access to government records. She stated that the seven-day deadline for response to some of her requests had been missed. Further, some of the responses had been verbal rather than in writing as required by OPRA. Ms. Lebbing also stated that she has difficulty with some OPRA request procedures. Also, she said that in the past Piscataway would not provide access to pending zoning applications before they were voted upon. Now the municipality provides access to such documents. She alleged that Piscataway charged \$50.00 for copies of minutes of public meetings. Further, some of the minutes on microfilm did not include attachments referred to in the minutes. Overall, she said, it is harder now to access records than it was before OPRA was enacted. She asked that the Council send reminders to all municipalities about their responsibilities under OPRA.

Mr. Maltese stated that there appeared to be no complaints from the commenter on file with the Council and recommended that the commenter take advantage of her right under

OPRA to do so. Ms. Lebbing expressed a lack of familiarity with the OPRA appeal process. Mr. Pfeiffer stated that custodians should have posters in the public area of their offices and narratives on the OPRA request forms advising the public how to appeal a denial of an OPRA request. Ms. Lebbing said she had not seen such notices. A general discussion then ensued regarding custodian responsibilities. Mr. Maltese directed Ms. Lebbing to Mr. Dice for assistance in obtaining complaint forms.

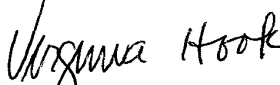
Mr. Pfeiffer indicated that GRC staff would contact Highland Park and Piscataway to determine whether the municipalities were complying with their obligations under OPRA to advise the public of procedures to appeal a denial of an OPRA request. Hearing no more public comment, Mr. Maltese called for a motion to adjourn. The motion was offered by Mr. Watkins, seconded by Ms. Hook and approved by a roll call vote:

Ayes: Ms. Hook, Mr. Spigner, Mr. Watkins and Mr. Maltese

Nays: None

The meeting was adjourned at 12:12 p.m.

Respectfully submitted,


Virginia Hook, Secretary

Dated: September 11, 2003