

MINUTES OF THE GOVERNMENT RECORDS COUNCIL
October 14, 2004

The meeting was called to order at 9:00 AM in the Department of Community Affairs, Room 235A, Trenton, New Jersey. The Open Public Meetings Act statement was read.

Ms. Luzzatto called the roll:

Present: Vice Chairman Bernard Spigner, Secretary Virginia Hook, Kimberly Ricketts (designee of Commissioner Susan Bass Levin, Department of Community Affairs)

Absent: Chairman Vincent Maltese, Diane Schonyers, (designee of Commissioner William Librera, Department of Education.)

Also present: Deputy Attorney General Karen DuMars, GRC Counsel Advisor, David Zipin, Executive Director Paul Dice and Assistant Executive Director Gloria Luzzatto, Staff Case Managers, Marion Davies, Erin Mallon, Chris Malloy and Kimberly Gardner.

Mr. Spigner 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 Ms. Ricketts. All members present unanimously approved the motion. The Council met in closed session from 9:10AM to 10:15AM. The Council reconvened in open session at 10:30AM 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.

Ms. Luzzatto called the roll:

Present: Virginia Hook, Bernard Spigner, Kimberly Ricketts (designee of Commissioner Susan Bass Levin, Department of Community Affairs)

Absent: Chairman Vincent Maltese, Diane Schonyers, (designee of Commissioner William Librera, Department of Education.)

Also Present: Executive Director Paul Dice, Assistant Executive Director Gloria Luzzatto, Deputy Attorney General Karen Dumars, GRC Attorney Advisor David Zipin, Staff Associates Marion Davies, Chris Malloy, Erin Mallon, Kimberly Gardner.

Fred Burnett v. Bergen County Clerk (2004-6)

Mr. Dice presented this case as one in which the complainant sought counsel licensed in the state of California to represent him. Counsel for Bergen County raises this issue.

It was the Executive Director's recommendation that the Council send notice to the Complainant advising him that he must either work through a licensed NJ attorney or file a motion to counsel for pro hoc vice.

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

Ayes: Ms. Hook, Ms. Ricketts, Mr. Spigner

Nays: None

Abstain: None

Toth v. Ewing Township (2004-21)

Mr. Dice recommended that this case be rescheduled to allow for the appropriate procedure to be formulated for the in-camera proceedings.

Wilcox v. Township of West Caldwell (2004-28)

Mr. Dice states that there are a number of issues under consideration in this request. The initial request was for information and not a valid OPRA request. Then a valid OPRA request was submitted and while the Complainant alleges otherwise a timely response was given to the Complainant. There was a question of the redaction of the name and address of a citizen who contacted the Township of West Caldwell to inform them of a possible zoning violation. It is this name and address being requested. After adopting the balancing test it was determined that the redactions were valid based on the fact that the release of this information may lead to confrontation. There was also no statement on the Township's adopted request form regarding the right to appeal a denial of access. It is not statutorily mandated that a form be used however they must adopt procedures that are in compliance with the Act.

It was the Executive Director's recommendation that the Council order that the Township include on its OPRA request form a statement of the requestor's right of appeal a denial of access and dismiss the remainder of the complaint on the basis that the August 15, 2002 request for information is not a valid OPRA request, the Township responded to the September 5, 2002 request on September 12, 2004, the Complainant received records responsive to his request, the Township properly redacted the name and address from the record based on a balancing test, and there is no evidence of a knowing and willful withholding of documents; the Custodian properly responded to the request.

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

Ayes: Ms. Hook, Ms. Ricketts, Mr. Spigner

Nays: None

Abstain: None

Leibel v. Manalapan Englishtown Regional Board of Education (2004-50, 2004-53)

Ms. Mallon states that this was a Supplemental Findings and Recommendations following the Council's September 9, 2004 decision to accept the Executive Director's Findings and Recommendations with amendments. The Complainant has not been given documents responsive to Item 7 on the Interim Decision, as she has not provided the proper clarification needed to fulfill her request.

It was the Executive Director's recommendation that the Council dismiss this complaint on the basis that the Custodian has complied with the Council's Interim Order of September 9, 2004 and responded to the complainant's April 12, 2004 request for items A-C at issue.

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

Ayes: Ms. Hook, Ms. Ricketts, Mr. Spigner

Nays: None

Abstain: None

Paff v. City of Perth Amboy (2004-58)

Ms. Gardner states that this was a Supplemental Findings and Recommendations following the Council's September 9, 2004 decision ordering the Custodian to contact the Complainant regarding the cost of the conversion of requested documents. The Custodian did so and the Complainant responded in writing that he was not interested in receiving the converted version of the records as he had already received a paper copy.

It was the Executive Director's recommendation that the Council dismiss this complaint on the basis that the Custodian has complied with the Council's Interim Order of September 9, 2004.

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

Ayes: Ms. Hook, Ms. Ricketts, Mr. Spigner

Nays: None

Abstain: None

Hillenbrand v. NJ Board of Social Worker Examiners (2004-63)

Mr. Malloy stated that the Complainant requested documents in writing on two occasions and received no response to his requests. The Custodian certifies that there is no record responsive to the Complainant's request for a "list of people and agencies/organizations receiving 12/1/01 'Amended Verified Complaint'". The Custodian states that the requests for records were considered informal and therefore they did not offer a specific written response to the Complainant, essentially denying access. They did give a verbal response and followed up in writing but did not give a specific basis for the denial. This denial of access is not deemed a knowing and willful violation under the totality of the circumstances, as the Custodian did not believe the requests were, in fact, OPRA requests.

It was the Executive Director's recommendation that the Council dismiss this complaint on the basis that there were no records responsive to the requests and there is not a knowing and willful violation of the law under the totality of the circumstances as the Custodian considered the requests to be informal.

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

Ayes: Ms. Hook, Ms. Ricketts, Mr. Spigner

Nays: None

Abstain: None

Sharkey v. Borough of Oceanport (2004-67)

Mr. Malloy states this is a request for information in an electronic format. The Custodian states that the requested records are not available electronically but had offered the Complainant the requested documents in the format in which they are maintained. The Chief Financial officer stated that she did not know how to transfer the files to electronic format but had in the past requested the assistance of the Borough Technician to configure the information into an Excel spreadsheet. The Borough attorney had advised that the records supplied in paper format met the requirements for OPRA. The Deputy Clerks

actions do not rise to a knowing and willful violation of the law as the records were given to the Complainant in the paper format.

It was the Executive Director's recommendation that the Council find the Custodian should disclose the records in the requested format, informing the Complainant of the cost involved in converting the document.

Mr. Spigner called for a motion to accept the Executive Director's recommendations as written with amendments stipulating the Custodian respond to the Complainant within 10-days of receipt of the final decision sending notification to the Executive Director within the same period of time. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms. Ricketts, Mr. Spigner

Nays: None

Abstain: None

Fallstick v. Haddon Township (2004-73)

Mr. Dice states that this case involves the Haddon Township Business Partnership Inc., and Haddon Township. The following is at issue: was there a valid OPRA request made, was access granted to the records or a specific reason for denial provided to the Complainant, is Haddon Township Business Partnership Inc. considered a public agency and was Haddon Township responsible for responding to OPRA requests on behalf of Haddon Township Business Partnership Inc.? There were two OPRA requests made and the Custodian certified that their office received these requests however; the records were not released because there were no records responsive to the request. This reason was conveyed to the Complainant verbally on the dates of the requests. As Township Ordinance #1082 created the Haddon Township Business Partnership Inc. it should therefore be considered a public agency operating separate from the Township itself, resulting in Haddon Township Business Partnership Inc. being responsible for its own OPRA requests.

It was the Executive Director's recommendation that the Council find that the February 13th and May 5th requests were valid OPRA requests and the township violated OPRA by not providing a written response to these two requests. The Haddon Township Business Partnership Inc. is a public agency however the requests to Haddon Township do not constitute a valid OPRA request for this agency because they were a request for a transfer of documentation to another public agency and therefore this complaint should be dismissed with an intervention held with the parties to clear up any confusion.

Mr. Spigner called for a motion to accept the Executive Director's recommendations as written with amendments stipulating that and intervention will be held with the parties in an attempt to resolve the request. A motion was made by Ms. Ricketts and seconded by Ms. Hook. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms. Ricketts, Mr. Spigner

Nays: None

Abstain: None

Bent v. Stafford Township (2004-78)

Ms. Mallon explained that this case involved a denial of access due to no response from the records custodian to a May 3, 2004 request. The Complainant argues that the Custodian withheld the records without providing any explanation. The Custodian states that there was no written OPRA request filed by the Complainant on May 3rd but rather a request for interpretations and opinions. There was an OPRA request then filed on March 23rd and a response was provided on March 30 and the complainant was given all records responsive to the request.

It was the Executive Director's recommendation that the Council find that the May 3rd correspondence to the Custodian was not an OPRA request and therefore the complaint should be dismissed.

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

Ayes: Ms. Hook, Ms. Ricketts, Mr. Spigner

Nays: None

Abstain: None

Jeffery Smith v. Department of Corrections (2004-79)

Mr. Malloy stated that this case involved a June 7, 2004 request for information on the acquisition of trigger locking devices in the NJ Department of Corrections. The complainant was then asked to clarify his request, as it was too broad. The Complainant clarified the request on July 26 seeking a paper trail of the acquisition of weapon trigger locking devices. The custodian responded to this request on August 13, 2004 stating that while there is correspondence regarding the information he is requesting which he may have the trigger locking devices were never actually acquired.

It was the Executive Director's recommendation that the Council dismiss the complaint on the basis that the Custodian has made available all records responsive to the June 7 request.

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

Ayes: Ms. Hook, Ms. Ricketts, Mr. Spigner

Nays: None

Abstain: None

Douglas Mertrud v. Byram Township (2004-80)

Ms. Luzzatto stated that this was a request for copies of complaints filed on the municipal court of the Township of Byram. The Custodian's position is that the municipal court is a judicial branch and the judicial records access is governed by court rules and not by OPRA. Pursuant to N.J.S.A. 47:1A-7(g) the Government Records Council does not have jurisdiction in this case.

It was the Executive Director's recommendation that the Council dismiss the complaint on the basis that the Government Records Council does not have jurisdiction in this case.

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

Ayes: Ms. Hook, Ms. Ricketts, Mr. Spigner

Nays: None

Abstain: None

Martin O'Shea v. Township of West Milford (2004-87)

Ms. Gardner stated that in this case the tort claim requested by the Complainant was provided to him and the memos, letters, e-mails and other records that in anyway relate to the tort claim are not disclosable pursuant to N.J.S.A. 47:1A-9. Therefore, the case should be dismissed.

It was the Executive Director's recommendation that the Council dismiss the complaint on the basis that the Complainant has received all disclosable records responsive to the request.

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

Ayes: Ms. Hook, Ms. Ricketts, Mr. Spigner

Nays: None

Abstain: None

Martin O'Shea v. West Milford Board of Education (2004-93)

Mr. Dice presented this case as involving access to a resolution and handwritten notes. The Custodian states that the resolution requested was incorporated into meeting minutes released to the Complainant. The handwritten notes, which the Custodian contends are advisory, consultative and deliberative, do not appear from their defense to be privileged information. No general nature description of the document has been offered.

It was the Executive Director's recommendation that the Council order disclosure of the handwritten notes from the June 22, 2004 closed session meeting with appropriate redactions and that there is not a knowing and willful violation of the act.

Mr. Spigner called for a motion to accept the Executive Director's recommendations as written with an amendment stipulating a response within 10 business days. A motion was made by Ms. Hook and seconded by Ms. Ricketts. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms. Ricketts

Nays: Mr. Spigner

Abstain: None

Cynthia Colella-Gallenthin v. Borough of Merchantville (2004-95)

Ms. Luzzatto presented the issue at hand in this case as being a lack of response to the Complainant regarding her OPRA request. There was some verbal communication at the time the request was made, on June 10, 2004 but there was no follow up response by the Custodian until the Denial of Access complaint was filed in July and the records were released. The documents requested should have been provided immediately under N.J.S.A. 47:1A-5(e).

The Executive Director amended the findings and recommendations after closed session to recommend that a hearing be held by the Government Records Council to determine if this is a knowing and willful violation of the OPRA.

Mr. Spigner called for a motion to accept the Executive Director's recommendations as amended stipulating that a hearing will be held by the Government Records Council to determine if there is a knowing and willful violation of the law. A motion was made by Ms. Ricketts and seconded by Ms. Hook. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms. Ricketts, Mr. Spigner

Nays: None

Abstain: None

Ms. Ricketts had to excuse herself due to prior engagements. Those cases that remained on the agenda were moved to the November meeting due to lack of a quorum

After a brief recess personnel matters were discussed.

The Executive Director, Paul Dice stated that a new case manager, Colleen McGann would be starting on Monday replacing Anthony Carrabelli. Marion Davies will remain case manager. Recruitment would be continuing in regard to independent legal counsel.

The Executive Director stated that there were 67 total cases scheduled for adjudication, 25 in November and 14 in December. 8 cases are on appeal, 8 cases at the Office of Administrative Law, and 17 cases considered work in progress. In reference to inquiries; 95 were logged for August, 76 for September and 15 for October.

There was a minor problem in posting the agenda on the website however copies were forwarded to the *Trenton Times* and the *Star-Ledger*.

During public comment Hugh Sharkey spoke and commended Chris Malloy on his work on Mr. Sharkey's OPRA complaint. He stated that he believed the 7 months that it took to resolve his case the Oceanport taxpayers suffered. He feels that the records were intentionally withheld by the Borough of Oceanport and questioned the number of cases the Council has found a knowing and willful violations. Mr. Dice explained that there were several cases at the Office of Administrative Law for a determination of a knowing and willful violations. Mr. Sharkey also questioned the use of outreach. Mr. Spigner explained that a knowing and willful violation carries a high threshold and the Government Records Council staff has employed on-going outreach to instruct Custodians in the OPRA.

Meeting was adjourned at 12:30.

Respectfully submitted,

Virginia Hook, Secretary

Dated: February 10, 2005