

[54 N.J.R. 2081\(a\)](#)

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RULE ADOPTIONS

Reporter

54 N.J.R. 2081(a)

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Agency

COMMUNITY AFFAIRS > GOVERNMENT RECORDS COUNCIL

Administrative Code Citation

Readoption with Amendments: [N.J.A.C. 5:105](#)

Adopted New Rule and Repeal: [N.J.A.C. 5:105-1.6](#)

Adopted Repeal: [N.J.A.C. 5:105-1.2](#)

Text

Complaint Adjudication and *Open Public Records Act (OPRA)* Information Inquiry Procedures

Proposed: May 16, 2022, at 54 N.J.R. 809(a).

Adopted: October 3, 2022, by the Government Records Council, Frank F. Caruso, Executive Director.

Filed: October 3, 2022, as R.2022 d.138, **with non-substantial changes** not requiring additional public notice and comment (see [N.J.A.C. 1:30-6.3](#)).

Authority: [N.J.S.A. 47:1A-7](#) and [52:14B-3](#).

Effective Dates: October 3, 2022, Readoption;

November 7, 2022, Amendments, Repeals, and New Rule.

Expiration Date: October 3, 2029.

Summary of Public Comments and Agency Responses:

Comments were received from Jean Public, an anonymous commentor, C.J. Griffin, Esq., Partner, Pashman Stein Walder Hayden, P.C.; Karen Thompson, Esq., Senior Staff Attorney, American Civil Liberties Union of New Jersey; and Walter M. Luers, Esq., Cohn Lifland Pearlman Herrmann & Knopf, LLP.

General Comments

1. COMMENT: Jean Public expressed concern that the Government Records Council (GRC) and the *Open Public Records Act (OPRA)* favor "private businesses and gov[ernment] agencies ... [and] their attorneys" without assisting "the poor NJ public."

RESPONSE: The GRC provides multiple resources to the public on its website that educate and assist individuals in understanding *OPRA*, as well as the GRC's adjudication process. The proposed amendments do not limit access to these resources, but instead provide a clearer adjudicatory road map.

[N.J.A.C. 5:105-1.6\(a\)](#)

2. COMMENT: C.J. Griffin, Esq., Partner at Pashman, Stein, P.C., and Walter M. Luers, Esq., Cohn, Lifland, LLP, supported the portion of proposed [N.J.A.C. 5:105-1.6\(a\)](#) that renders *in camera* documents and mediation communications exempt from access pursuant to *OPRA*, but opposed the portion exempting access to all other Denial of Access Complaint submissions during the pendency of an adjudication. Both commentators noted that Superior Court filings are readily available to the public through e-Courts.

Ms. Griffin argued that exempting access to these submissions during the pendency of an adjudication "runs contrary to the First Amendment right to access records of judicial and administrative records ..." Ms. Griffin noted the understanding that certain records, such as records reviewed *in camera* and others are "rendered as confidential" to balance "confidentiality interests, while promoting the First Amendment right to open court proceedings." Ms. Griffin asserted that the GRC should be no different and that it should continue to make available all other complaint documents not otherwise already exempt, as is the GRC's current practice.

Mr. Luers asserted that the GRC would exempt access to any documents simultaneously being maintained by other public agencies. Mr. Luers further contended that the GRC's decisions are not "a substitute for the actual" party submissions and that any complaints "resolved, settled, or withdrawn" would "be sealed forever without a summary being published." Mr. Luers also noted that the proposed amendment would not prevent litigants from sharing those submissions on their own.

RESPONSE: The GRC appreciates the commentators' support of the mediation communication and *in camera* documents portion of the proposed amendment. However, the GRC disagrees that exempting access to documents, as part of a pending adjudication pursuant to *OPRA*, would be injurious to the public or a violation of the First Amendment. Initially, the GRC notes that the proposed amendment does not bar access to complaint filings in perpetuity; requestors would be able to seek access to them pursuant to *OPRA*, following resolution of the complaint, including those "resolved, settled, or withdrawn." Thus, no complaint file maintained by the GRC will be permanently excluded from public access. The GRC's proposed amendment will allow complaints to be adjudicated to finality free from outside and unsolicited influence. The GRC further notes that this exemption better serves complainants by eliminating their exposure to unsolicited party involvement during an adjudication, especially where the complaints address complainants' sensitive personal matters. This exemption also ensures a smoother and more effective adjudication process beneficial to the parties engaged therein, but especially to the complainant. The GRC notes that the proposed amendment is similar to other regulations that limit the availability of documents during ongoing adjudications. See, for example, [N.J.A.C. 5:3-2.2\(a\)](#)6, 3:3-2.1, and 4A:1-2.2.

3. COMMENT: Karen Thompson, Esq., Senior Staff Attorney of the American Civil Liberties Union of New Jersey, opposed a majority of the proposed amendments at [N.J.A.C. 5:105-1.6](#), except for the confidentiality of unredacted documents submitted for *in camera* review. Ms. Thompson argued that access to both complaint submissions and mediation communications are extremely important to the public; access [page=2082] ensures transparency in the GRC's process and provides guidance on how to navigate the same. Ms. Thompson posited that such an exemption could lead to more complaint filings based on the public not being able to learn from other

requestors' mistakes. Ms. Thompson argued that the GRC's attempt to "summarily deny[] the public access to denial of access complaint submissions and mediation commissions ..." is contrary to the public's "common law" interest in accessing them. (citing [Rivera v. Union Cnty. Prosecutor's Office, 250 N.J. 124 \(2022\)](#)).

RESPONSE: The GRC respectfully disagrees with Ms. Thompson's comment substantially for the reasons identified in the Response to Comment 2, and, specifically, emphasizes that complaint records are only confidential while an adjudication is ongoing. Requiring disclosure of mediation communications, pursuant to an **OPRA** request, is a direct violation of the Uniform Mediation Act ([N.J.S.A. 2A:23C-4](#)). Moreover, requiring such disclosure would significantly chill voluntary participation in mediation and hinder the mediator's ability to settle a complaint. Additionally, the GRC maintains a wealth of resources on its website that can assist a party in navigating the Denial of Access Complaint process far better than specific filings of a pending complaint. Further, Ms. Thompson's reliance on the *Rivera* Court's common law analysis is misplaced. **OPRA** specifically provides that "nothing contained in P.L. 1963, c. 73 ([C.47:1A-1](#) et seq.), as amended and supplemented, shall be construed as affecting in any way the common law right of access to any record ..." [N.J.S.A. 47:1A-8](#). Both processes are separate methods for obtaining access to records.

[N.J.A.C. 5:105-2.1\(a\)](#)

4. COMMENT: Mr. Luers requested that the GRC delay implementation of the proposed statute of limitations at [N.J.A.C. 5:105-2.1](#) for 60 days following adoption, to allow the public time to submit complaints pursuant to the existing rules. Mr. Luers also suggested that the GRC explicitly state that the proposed amendment only applies to new complaints and not any current pending complaints. Mr. Luers further noted that the proposed amendment does not currently include a "next-business-day" rule and suggested that one should be added for the sake of clarity.

RESPONSE: The GRC appreciates Mr. Luers' suggestions regarding this provision and initially confirms, that the 60-day statute of limitations will only apply to complaints filed after the effective adoption date of this rulemaking, November 7, 2022. Thus, no complaints filed after the 60-day statute of limitations, but prior to November 7, 2022, will be affected. However, the GRC respectfully disagrees that the provision should be delayed, as the rule will apply prospectively to records requests filed after November 7, 2022. Further, potential complainants concerned by the immediate enactment of this provision will have the option of petitioning the GRC to file out-of-time. Finally, the GRC thanks Mr. Luers for his "next-business-day" rule suggestion and agrees: the GRC will change the subsection upon adoption to clarify the language, to include a "next-business-day" rule in accordance with [N.J.A.C. 1:1-1.4](#).

[N.J.A.C. 5:105-2.3\(k\)](#)

5. COMMENT: Ms. Griffin and Ms. Thompson opposed proposed [N.J.A.C. 5:105-2.3\(k\)](#), which requires anonymous requestors to meet one of four proposed requirements to proceed through the adjudication process anonymously. Both commentors stated that **OPRA** allows for anonymous requests ([N.J.S.A. 47:1A-2.2](#), 47:1A-5.f and i) and that the proposed amendment "undermines that right by requiring a requestor to prove one of four reasons" to proceed.

Ms. Griffin posited that with the amendment, an agency wishing to know the identity of an anonymous requestor can deny access and force the requestor to either "accept the unlawful denial or reveal his or her identity ..." Ms. Griffin argued that an anonymous requestor should not be forced to give their rights up to file a complaint. Ms. Griffin also argued that the "four reasons" are far too narrow and submits several examples where requestors may need to remain anonymous during the GRC's adjudication process. Ms. Griffin expressed concern that because many of the GRC's filers are *pro se* litigants, anonymous requestors "might not be capable of making submissions that meet the high bar" set forth in the proposed amendments.

Ms. Thompson argued that it would not result in better efficiency and production; rather, it would burden the GRC by requiring additional steps and tests to address anonymous complaints. Ms. Thompson also argued that the proposed amendment could present a road block to anonymous requestors who wish to file with the GRC, instead of the court: "[u]nlike a Superior Court proceeding, the GRC's decisions ... do not have the value of precedent and are not binding." Ms. Thompson finally argued that the proposed amendment could "significantly undermine[] the public safety of a requestor who may have legitimate concerns" for their safety or well-being.

RESPONSE: The GRC respectfully disagrees with both commentors that this provision will adversely affect anonymous requestors. Initially, there is no provision of *OPRA* that sets forth a process for anonymous requestors--only references to anonymous requestors in a few sections. With this lack of statutory guidance, the GRC may set standards for anonymous requestors that it believes balances the concerns of requestors with the needs of GRC. Further, in *A.A. v. Gramiccioni*, 442 N.J. Super. 276 (App. Div. 2015), the Appellate Division held that requestors may not file *OPRA* complaints anonymously in Superior Court without a showing of good cause. As part of the court's consideration of the matter, it "assume[d]" that the GRC allowed anonymous requests. *Id.* at 283. This proposed amendment confirms that anonymous complaints are allowed by the GRC and adopts a good cause standard equivalent to that set forth in *A.A.* for requestors wishing to proceed anonymously. The GRC also disagrees that the categories provided are too narrow and that a *pro se* filer may have difficulty properly arguing their position. Instead, these factors, including "[o]ther substantial reasons," allow requestors significant latitude to argue that they can proceed anonymously.

Summary of Agency-Initiated Changes:

1. At [N.J.A.C. 5:105-2.11\(a\)](#), the GRC is making a change to remove interim order and add administrative dispositions to the list of appealable GRC decisions to further clarify a party's appeal options.
2. At [N.J.A.C. 5:105-2.12\(d\)](#), the GRC is removing the cross-reference to [N.J.A.C. 5:105-2.11](#), as that cross-reference is not necessary.

Federal Standards Statement

No Federal standards analysis is required for the rules readopted with amendments, new rule, and repeals because the rules readopted with amendments, new rule, and repeals are not being adopted in order to implement, comply with, or participate in any program established pursuant to Federal law or under a State law that incorporates or refers to Federal law, standards, or requirements.

Full text of the readopted rules can be found in the New Jersey Administrative Code at [N.J.A.C. 5:105](#).

Full text of the adopted amendments and new rule follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

SUBCHAPTER 1. GENERAL PROVISIONS

5:105-1.1 Purpose, scope, conformance, and construction of rules

(a)-(b) (No change.)

(c) The rules in this chapter shall be liberally construed to permit the Council to discharge its statutory function.

(d) The rules in this chapter shall conform to the requirements of the Administrative Procedures Act, [N.J.S.A. 52:14B-1](#) et seq., and the Uniform Administrative Procedure Rules, *N.J.A.C. 1:1*, except as otherwise provided in this chapter.

5:105-1.2 (Reserved)

5:105-1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

...

"Administrative order" means an order issued by the Council requiring the records custodian or the complainant to perform a specific action in furtherance of the adjudication of a pending denial of access complaint or taking other actions deemed appropriate to adjudicate a complaint in an expedited manner.

[page=2083] . . .

"Complaint" or "denial of access complaint" means a denial of access complaint submitted to the Council on a form authorized by the Council in which a requestor claims that a custodian has unlawfully denied the requestor access to a government record.

...

"*Ex parte* communication" means a communication, either oral or written, from one party to the Government Records Council regarding the merits of a pending complaint without the knowledge of other participating parties. This definition shall not include general inquiries as to the status of a complaint or other general inquiries about **OPRA**.

...

"Inquiry" means a request from the public, including custodians, submitted to the Council, in writing, or from the toll-free helpline, for information regarding or assistance with the Act, the Council, and issues and matters regarding access to government records.

"Interim order" means an order issued by the Council during the pendency of an adjudication including, but not limited to, an order that requires the custodian or the complainant to perform some act in accordance with **OPRA**, the compliance of which must be reported back to the Council, or an order that refers a matter to the Office of Administrative Law.

"Intervenor" means a person or party who moves to intervene in an existing denial of access complaint.

...

"New evidence" means evidence that could not have been provided prior to the Council's decision because the evidence did not exist or was unknown to the party at that time.

"Party" means a complainant, custodian, intervenor, and their representatives.

"Penalty" means the civil penalty which may be imposed upon an official, officer, employee, or custodian who knowingly and willfully violates the Act and is found to have unreasonably denied access to the requested government record under the totality of the circumstances pursuant to [N.J.S.A. 47:1A-11](#).

"Person" means natural person, partnership, corporation, limited liability company, association, or society.

...

"Public agency" or "agency" means any of the principal departments in the executive branch of State government, and any division, board, bureau, office, commission, or other instrumentality within or created by such department; the legislature of the State and any office, board, bureau, or commission within or created by the legislative branch; and any independent State authority, commission, instrumentality, or agency pursuant to [N.J.S.A. 47:1A-1.1](#). The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission, or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality, or agency created by a political subdivision or combination of political subdivisions.

...

"Requestor" means a person who delivers to a public agency an *OPRA* request to copy, examine, or inspect a government record pursuant to the Act.

"Revised interim order" or "revised final decision" means a decision issued by the Council that follows an interim order or final decision correcting a non-substantive or factual error.

...

"*Sua sponte*" means the Council's ability to raise issues, legal defenses, or other matters not raised by the parties to a denial of access complaint.

...

5:105-1.4 Description of the Council

(a) (No change.)

(b) Contact information for the Council:

State of New Jersey
 Government Records Council
 101 South Broad Street
 PO Box 819
 Trenton, New Jersey 08625-0819
 Toll Free: (866) 850-0511
 Direct Phone: (609) 292-6830
 Fax: (609) 633-6337

Email: Government.Records@dca.nj.gov Website: www.nj.gov/grc

(c)-(d) (No change.)

5:105-1.5 Powers and duties of the Council

(a) The Council shall have the following powers and duties pursuant to [N.J.S.A. 47:1A-7.b](#):

1.-2. (No change.)

3. Respond to inquiries about the Act or the Council from the public and public agencies; however, neither the Council nor staff shall provide legal advice to any member of the public, public agency, party, or person;

4.-5. (No change.)

6. At the Council's discretion, issue advisory opinions on the accessibility of government records;

7.-8. (No change.)

5:105-1.6 Records designated confidential

(a) In addition to records designated as confidential pursuant to the provisions at [N.J.S.A. 47:1A-1](#) et seq., any other law, rule promulgated under the authority of any statute or Executive Order of the Governor, resolution of both houses of the Legislature, Executive Order of the Governor, Rules of Court, or any Federal law, Federal rule, or Federal order, the following records shall not be considered government records subject to public access pursuant to [N.J.S.A. 47:1A-1](#) et seq.:

1. Denial of access complaint submissions, including, but not limited to, statements of information and sur-replies during the pendency of an adjudication by the Council;
2. Mediation communications as defined at P.L. 2004, c. 157 ([N.J.S.A. 2A:23C-4](#)) pertaining to the confidential mediation process of any individual denial of access complaint, except for the "Mediation Disposition Report"; and
3. Unredacted documents provided to the Council for an *in camera* review.

SUBCHAPTER 2. COMPLAINT PROCESS

5:105-2.1 General provisions

(a) Any requestor who is denied access, in whole or in part, to a government record by a custodian, at the option of the requestor, may file a complaint with the Council pursuant to [N.J.S.A. 47:1A-6](#). Such filing shall be made within 60-calendar days ***or, if the last day of the period is a Saturday, Sunday, or legal holiday, within the next business day, pursuant to [N.J.A.C. 1:1-1.4](#),*** after the requestor receives a response from the custodian that grants or denies access or, if the custodian does not respond within seven business days of the request, within 60-calendar days following the expiration of such seven-business-day period, whichever is later, unless accompanied by a motion to file within time, showing good cause.

(b)-(c) (No change.)

(d) Upon receipt of a complaint, the Council will first determine whether any portion of the complaint is outside its jurisdiction, frivolous, or without factual basis. If the complaint falls within any of said categories, the Council shall reduce its determinations to writing and transmit a copy thereof to the complainant and to the custodian against whom the complaint was filed pursuant to [N.J.S.A. 47:1A-7.e](#).

(e)-(i) (No change.)

(j) Council votes adjudicating a complaint shall be rendered at open public meetings of the Council. Parties, their representatives, or other persons are not permitted to make oral or written presentations to the Council regarding the complaint at the meetings unless requested by the Council to do so.

5:105-2.2 Parties to a complaint

(a) The complainant and custodian shall always be parties to a complaint and, along with their legal representatives, shall be notified of all decisions or orders issued by the Council concerning a complaint. If a party secures representation following submission of a denial of access complaint, the party must notify the Council and all other parties [page=2084] immediately. The representatives of any party named in a complaint shall file with the

Council a letter of representation and a copy of same shall be served upon all parties at the same time the Council receives the notification.

(b) At the Executive Director's discretion, the Government Records Council may entertain an application for a party to intervene in a pending complaint consistent with the following:

1. Upon timely application, any person not initially a party who has a statutory right to intervene or who will be substantially, specifically, and directly affected by the outcome of a contested case may, on motion, seek leave to intervene;

2. Parties must file any objections to the movant's application within 10 business days following receipt of the application;

3. In ruling upon a motion to intervene, the Council shall take into consideration the nature and extent of the movant's interest in the outcome of the case, whether the movant's interest is sufficiently different from that of any party, so as to add measurably and constructively to the scope of the case, the prospect of confusion or undue delay arising from the movant's inclusion, and other appropriate matters;

4. The Council will notify the parties of the acceptance or rejection of movant's application through an administrative order or interim order; and

5. Persons permitted to intervene shall have all the rights and obligations of a party to the proceeding.

(c) Notwithstanding (b)3 above, persons statutorily permitted to intervene shall be granted intervention.

5:105-2.3 Complainant document submissions to the Council

(a) The complainant submitting a completed denial of access complaint on the form required pursuant to (c) below to the Council and custodian initiates the complaint process.

(b) All submissions must be in writing. The Council shall not consider *ex parte* communications from any party.

(c) Complaints shall be submitted on the Council's denial of access complaint form either through U.S. mail, facsimile, email, or through the Council's online interface. However, a courtesy copy of complaints exceeding 50 pages shall be submitted to the GRC at 101 South Broad Street, PO Box 819, Trenton, NJ 08625.

(d) Complaint forms may be obtained from the Council's staff or downloaded from the Council's website (www.nj.gov/grc).

(e) The complainant shall include in the complaint or the attachments thereto any information, issues, and arguments that the complainant wishes to bring to the Council's attention for consideration in the adjudication of the complaint. The complaint may also include any attachments, affidavits, certifications, or other documentation deemed relevant or supportive of the allegations set forth in the complaint.

(f) Upon retention, an attorney representing a complainant in a matter before the Council shall submit to the Council a letter of representation. Failure to submit this letter will result in the Council considering the complainant to be *pro se*. The Government Records Council will only communicate with the complainant until receipt of the letter of representation.

(g) A complainant may amend their complaint as a matter of right within 30 business days after the filing of the initial complaint. Such amendments must be submitted, in writing, to the Council with copies served simultaneously on all parties.

1. (No change in text.)

(h) Objections to a party's representative by another party, and a party's response thereto, to the complaint must be in writing, presented to the Council, served on all parties, and include:

1.-3. (No change.)

(i) The Council, acting through its Executive Director, may require complainants to submit, within stipulated time limits, additional information deemed necessary for the Council to adjudicate the complaint.

(j) The Council shall determine whether a complaint may proceed with the complainant remaining anonymous. To remain anonymous, the complainant must first make a clear and convincing showing that compelling circumstances exist such that:

1. There is a genuine risk of physical harm;
2. The complaint will entail revelation of highly personal and private information;
3. The very relief sought would be defeated by revealing the complainant's identity; or
4. Other substantial reasons why identification of the party would be improper.

(k) If the Council determines that the complainant has demonstrated compelling circumstances pursuant to (j) above, the Council shall then weigh the complainant's privacy interests against the public interest. If the complainant does not meet the burden of showing why they should proceed anonymously, the Council shall notify the complainant of the decision by administrative order. The Council shall dismiss the complaint unless the complainant submits a written statement expressing his or her willingness to proceed on a non-anonymous basis to the Executive Director within 30 days of receiving the Council's decision.

(l) All complaints, including authorized anonymous complaints, shall include the complainant's name, address, telephone number or fax number, and email address, if available.

5:105-2.4 Custodian document submissions to the Council

(a) Custodians shall submit a completed and signed statement of information (SOI) on the form required at (c) below to the Council and the complainant simultaneously that details the custodians' position for each complaint filed with the Council in all instances for which mediation is declined, mediation is not accepted by either party, or in which mediation is accepted but through which the parties do not fully resolve the issues presented. The custodian shall sign the completed SOI even if it is completed by their legal representative.

(b) All submissions shall be in writing. The Council will not consider *ex parte* communications from any party.

(c) SOIs shall be submitted on the Council's SOI form through either U.S. mail, facsimile, or email. A courtesy copy of SOIs exceeding 50 pages shall be submitted to the GRC at 101 South Broad Street, PO Box 819, Trenton, NJ 08625.

(d) SOI forms shall be provided by Council's staff and may be downloaded from the GRC website (www.nj.gov/grc).

(e) The custodian shall include in the SOI, or the attachments thereto, any information, defenses, and arguments that they wish to bring to the Council's attention for consideration in the adjudication of the complaint. The custodian may also include with the SOI any affidavits, certifications, or documentation deemed appropriate or supportive of the defenses set forth in the SOI.

(f) Upon retention, an attorney representing a custodian in a matter before the Council shall submit to the Council a letter of representation. Failure to submit this letter will result in the Council considering the custodian to be *pro se*. The Government Records Council will only communicate with the custodian until receipt of the letter of representation.

(g) Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than 10 business days from the date of receipt of the SOI form from the Council's staff. Custodians must sign the SOI. The Council will not accept additional submissions from the custodian, beyond what is permitted pursuant to this chapter, unless the Executive Director orders the same or offers express approval for the same. Failure to comply with this time period may result in the complaint being adjudicated based solely on the submissions of the complainant.

Recodify existing (g)-(h) as (h)-(i) (No change in text.)

(j) If a complainant amends their complaint, the custodian shall have five business days from the date of receipt of the same to submit their position regarding the complaint amendment with the Council. The Council will not accept additional submissions beyond said time period, unless the Executive Director orders the same or offers their express approval for the same. Failure to comply with this time period may result in the case being adjudicated based solely on the submissions of the complainant.

(k) Parties submitting objections to another party's representative shall adhere to the process set forth at [N.J.A.C. 5:105-2.3\(h\)](#).

Recodify existing (k)-(l) as (l)-(m) (No change in text.)

[page=2085] (n) Upon receipt of the custodian's SOI, the complainant shall have five business days to file a reply. Upon receipt of the same, the custodian shall have three business days to file a sur-reply. Except as provided at (j), (k), (l), or (m) above, no further submissions shall be filed or accepted.

5:105-2.5 Mediation

(a) (No change.)

(b) A complaint will be referred to a mediator only if the complainant and custodian agree to enter into mediation by executing the most recent version of the Council's authorized agreement to mediate.

(c)-(e) (No change.)

(f) Neither the mediator nor any party to mediation shall divulge to anyone a mediation communication, as defined in the Uniform Mediation Act, without the written consent of all participants. No party may use the statements made or documents produced during mediation proceedings against another party in any proceeding before the Council if mediation fails to resolve all issues presented in the complaint and the complaint is referred to the Council for adjudication.

(g) Representatives of the parties may participate in mediation proceedings and shall be bound by the rules with respect to mediation as set forth in this section. Such representative(s) must submit a letter of representation to the Council and must sign the agreement to mediate as provided at (b) above.

(h) A "nonparty participant," as defined at [N.J.S.A. 2A:23C-2](#), may participate in mediation proceedings and shall be bound by the rules with respect to mediation as set forth in this section. Such nonparty participant shall execute the most recent version of the Council's agreement to mediate.

(i) (No change in text.)

(j) The mediator may cease proceedings and refer the complaint back to the Council if the mediator has reason to believe a party has breached the provisions at (f) above, breached any provision of the agreement to mediate, or determines that the process is less than productive.

(k) A complaint shall remain in mediation until referred back to the Council for adjudication by the mediator's notification of such to the parties and Council staff.

(l) The Council shall not consider any mediation communications if the complaint is referred back to the Council for adjudication.

(m) The Council shall administratively dismiss any complaint upon the mediator's receipt of a written mediation agreement fully executed by the parties that stipulates that the matters presented in the complaint have been resolved and notification from the mediator that the complaint has been settled. The Council shall provide the parties notice of any dismissal by issuing an administrative complaint disposition on the complaint.

5:105-2.6 Council complaint deliberations--no hearing

(a)-(c) (No change.)

(d) The Council will issue its decision to all parties, as soon as practicable, following the adjudicatory proceedings. All decisions of the Council shall be posted online, as soon as practicable, following the adjudicatory proceedings.

5:105-2.8 *In camera* inspections

(a) The Council may, at its discretion, issue an administrative order or interim order for *in camera* inspection of the documents that are the subject of a denial of access complaint. Both parties will be notified that an *in camera* inspection has been ordered through an administrative order or interim order.

(b) Notice of inspection: The Council shall provide the custodian with advance written notice of the *in camera* inspection. The notice shall include, in addition to such other information as may be deemed relevant:

Recodify existing 2.-3. as 1.-2. (No change in text.)

(c) Presentation of documents to the Council: The custodian, or their representative, shall:

1. (No change.)

2. Deliver to the Executive Director of the Council, or such other person as the Council may designate, and to the complainant, a certification signed by the custodian stipulating that the copies of the documents delivered to the Council are true and complete copies of the documents in question with no alterations or redactions, and an *in camera* inspection index that:

i.-iv. (No change.)

3. (No change.)

(d) Upon receipt of the certification and document index at (c)2 above, complainants will be permitted to respond within five business days of receipt of said certification and index.

(e)-(i) (No change.)

(j) After inspecting the documents, the Council shall announce its decision at an open public meeting and provide written notice of its decision to all parties to the complaint, in accordance with [N.J.A.C. 5:105-2.6\(d\)](#).

(k) (No change.)

(l) Upon completion of the *in camera* inspection, the Council will seal a copy of the documents and destroy all duplicate copies. The sealed documents shall be exempt from disclosure under *OPRA*, in accordance with [N.J.A.C. 5:105-1.6](#) and the common law.

5:105-2.9 Decisions of the Council

(a) The Council shall issue the following types of decisions:

1. Administrative orders;

Recodify 1.-2. as 2.-3. (No change in text.)

4. Revised interim or final decisions; and

5. (No change.)

(b) (No change.)

(c) Enforcement. The complainant shall, pursuant to New Jersey Rules Governing the Courts, [R. 4:67-6](#), have the authority to enforce compliance with the orders and decisions issued by the Council.

5:105-2.10 Relief from Council decisions--reconsideration

(a) (No change.)

(b) Requests for reconsideration shall be filed within 10 business days following receipt of a Council decision, except that requests for reconsideration that are based on the discovery of new evidence must be submitted no later than 30 business days following receipt of a Council decision and within 10 business days of when the requestor discovered the new evidence. A request for reconsideration based on the discovery of new evidence shall be supported by an affidavit showing with particularity the materiality and necessity of the additional evidence and the reason why such evidence was not presented previously. For purposes of this subsection, "new evidence" is defined as evidence that could not have been provided prior to the Council's decision because the evidence did not exist or was unknown to the party at that time.

(c) Parties may request reconsideration based on the following reasons: change in circumstances, extraordinary circumstances, fraud, illegality, mistake, and new evidence. Mistake in this instance means a mistake by the Government Records Council.

(d) Requests shall be submitted, in writing, on the most recent version of Council's designated form, delivered to the Council, and served on all parties. Request for reconsideration forms will be provided by Council's staff or may be downloaded from the GRC website (www.nj.gov/grc). A courtesy copy of a request for reconsideration exceeding 50 pages shall be submitted to the GRC at 101 South Broad Street, PO Box 819, Trenton, NJ 08625.

(e) Parties must file any objection to the request for reconsideration within 10 business days following receipt of the request submitted, in accordance with [N.J.A.C. 5:105-2.6\(d\)](#).

(f) Sur-replies beyond a party's objections to a request for reconsideration are not permitted.

(g) (No change in text.)

5:105-2.11 Relief from Council decisions--appeals

(a) An *[interim order,]* **administrative order** or final decision of the Council may be appealed to the Appellate Division of the Superior Court within 45 calendar days from the date the decision is issued to the parties in accordance with New Jersey Rules Governing the Courts.

(b) The Council's administrative order, interim order, or final decision shall remain in full force and effect, unless, and until, a party files a request for a stay pending an appeal. Such request shall be filed with the Council prior to filing an appeal.

(c) (No change.)

[page=2086] 5:105-2.12 Stays of Council's administrative orders, interim orders, and final decisions

(a)-(c) (No change.)

(d) Requests for a stay of the effective date of a *[Council's]* **Council** administrative order or interim order must be made prior to the last day by which action was to have been taken in accordance with the Council's decision. Appeals of administrative orders and interim orders may be made to the Appellate Division of New Jersey Superior Court, in accordance with [N.J. Court Rule 2:5-6](#) *[and [N.J.A.C. 5:105-2.11](#)]*.

1. (No change.)

2. Parties must file any objection to the request for a stay from an administrative order or interim order within 10 business days following receipt of the request.

(e) The Executive Director may grant a stay of an administrative order or interim order for the period of time requested.

(f) A request for a stay of administrative orders, interim orders, or final decisions must be in writing and include a detailed analysis of the issue(s), which includes an analysis of the following factors that the Council will include in its decision-making process:

1.-4. (No change.)

5:105-2.13 Prevailing party attorney's fees

(a) Reasonable attorney's fees shall be awarded when the complainant has achieved the desired result because the complaint brought about a change, voluntary or otherwise, in the custodian's conduct and a factual causal nexus exists between the complainant's filing of a Denial of Access Complaint and the relief ultimately achieved.

(b) If the Council decides that a complainant is a prevailing party entitled to an award of reasonable attorney's fees, the parties shall be given 20 business days to confer on the award amount. The parties shall promptly notify the Council, in writing, if a fee agreement is reached. If the parties cannot agree on the amount of attorney's fees, the complainant, or their attorney, shall submit a fee application to the Council, in accordance with (c) below.

(c) The complainant, or their attorney, shall submit an application to the Council for an award of attorney's fees within 20 business days following the expiration of the conference period at (b) above, or a voluntary settlement agreement. The application must include a certification from the attorney(s) representing the complainant that includes:

1.-7. (No change.)

(d) The complainant, or their attorney, must serve all parties with the application for attorney's fees and all attachments thereto. Failure to comply with (c) above shall result in dismissal of the complaint without a fee award.

Recodify existing (d)-(f) as (e)-(g) (No change in text.)

5:105-2.14 Knowing and willful violations of the Act; penalties

(a)-(e) (No change.)

(f) Appropriate disciplinary proceedings may be initiated by the employing public agency against a public official, officer, employee, or custodian against whom a penalty has been imposed.

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