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## COMMUNITY AFFAIRS

### (a)

#### GOVERNMENT RECORDS COUNCIL

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

#### Proposed Readoption with Amendments: N.J.A.C. 5:105

#### Proposed New Rule and Repeal: N.J.A.C. 5:105-1.6 Proposed Repeal: N.J.A.C. 5:105-1.2

Authorized By: Government Records Council, Frank F. Caruso,  
 Executive Director.

Authority: N.J.S.A. 47:1A-7 and 52:14B-3.

Calendar Reference: See Summary below for explanation of  
 exception to calendar requirement.

Proposal Number: PRN 2022-065.

Submit written comments by July 15, 2022, to:

Geraldine Callahan  
 Department of Community Affairs  
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The agency proposal follows:

#### Summary

The Government Records Council's ("Council" or "GRC") rules set forth the process by which denial of access complaints are adjudicated. The Council proposes to readopt the rules with amendments, a new rule, and repeals. Pursuant to N.J.S.A. 52:14B-1.5.c, the chapter was scheduled to expire on April 5, 2022. As the Council filed this notice of readoption with the Office of Administrative Law on that date, the expiration date is extended 180 days to October 2, 2022, pursuant to N.J.S.A. 52:14B-5.1.c(1). A summary of the rules proposed for readoption follows:

#### Subchapter 1 sets forth the general provisions of the chapter.

N.J.A.C. 5:105-1.1 sets forth the purpose and scope of the new chapter, that is, the implementation of those rules articulating the Council's complaint adjudication and OPRA information inquiry procedures.

N.J.A.C. 5:105-1.2 provides for the liberal construction of these rules to permit the Council to discharge its statutory mandate.

N.J.A.C. 5:105-1.3 contains the definitions that are necessary for the implementation of the chapter.

N.J.A.C. 5:105-1.4 provides the description of the Council organization and contact information of the Council.

N.J.A.C. 5:105-1.5 provides the statutorily mandated powers and duties of the Council.

N.J.A.C. 5:105-1.6 provides that this chapter shall conform to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1, except as provided in this chapter.

#### Subchapter 2 establishes the process for filing a complaint with the Council pursuant to the Act.

N.J.A.C. 5:105-2.1 provides the statutory authorization for filing a denial of access complaint with the Council and jurisdictional qualifications for a complaint being adjudicated by the Council.

N.J.A.C. 5:105-2.2 provides that the complainant and custodian are the parties to a complaint.

N.J.A.C. 5:105-2.3 provides the requirements of denial of access complaints, amendments to complaints, and any other submissions for consideration in the adjudicatory process from the complainant.

N.J.A.C. 5:105-2.4 provides the requirements of the statement of information and any other submissions for consideration in the adjudicatory process from the custodian.

N.J.A.C. 5:105-2.5 provides the process for mediation of a complaint.

N.J.A.C. 5:105-2.6 provides the procedures for the Council's adjudicatory process when no hearing is held.

N.J.A.C. 5:105-2.7 provides the procedures for the Council's adjudicatory process when a hearing is held.

N.J.A.C. 5:105-2.8 provides the procedures for the Council's *in camera* inspection of documents.

N.J.A.C. 5:105-2.9 describes the Council's decisions.

N.J.A.C. 5:105-2.10 describes the Council's procedures for reconsideration of its decisions.

N.J.A.C. 5:105-2.11 provides the procedure for appeals from the Council's final decisions to the Appellate Division of the Superior Court of New Jersey.

N.J.A.C. 5:105-2.12 provides the requirements for a party's request for a stay of the Council's decision.

N.J.A.C. 5:105-2.13 provides the procedures for a party's application for prevailing party attorney's fees.

N.J.A.C. 5:105-2.14 provides the procedures for the Council's determination and imposition of a penalty for the knowing and willful violation of the Act.

#### Subchapter 3 concerns inquiries.

N.J.A.C. 5:105-3.1 describes the information and resources available to the public and public agencies through the inquiry process established by the Council.

#### Subchapter 4 concerns advisory opinions.

N.J.A.C. 5:105-4.1 provides the Council's discretion to issue advisory opinions.

This rulemaking includes a series of proposed amendments, a new rule, and repeals; while specific substantive amendments are listed below, together with the rationale for each, any technical, non-substantive amendments that are proposed are not discussed in detail. The changes to the existing rules are intended to assist any affected parties in using the rules.

The proposed amendments at N.J.A.C. 5:105-1.1 relocate N.J.A.C. 5:105-1.2 and 1.6 as proposed new N.J.A.C. 5:105-1.1(c) and (d).

N.J.A.C. 5:105-1.2 is proposed for repeal, as the section is being merged into N.J.A.C. 5:105-1.1.

The proposed amendments at N.J.A.C. 5:105-1.3 add the definition of "ex parte communication," change the term "complaint" or "OPRA Complaint" to "complaint" or "denial of access complaint," revise the definition of "interim order" (to specify that it is an order issued during the pendency of an adjudication), add a definition for "intervenor" (which is also proposed to be added to the existing definition of "party"), add a definition for an "administrative order," add a definition of "new evidence," and add a definition of "revised interim order" or "revised final decision." The proposed amendments also delete the definition for "supplemental decision," because the Council does not issue such a decision.

The proposed amendments at N.J.A.C. 5:105-1.4 update the Council's general email address to reflect recent changes made by the Office of Information Technology to the State government's email domain. The old email address is no longer active.

The proposed amendments at N.J.A.C. 5:105-1.5 clarify that the Council is not legislatively empowered to give legal advice and make N.J.A.C. 5:105-1.5 consistent with N.J.S.A. 47:1A-7, with respect to advisory opinions. The clarification will aid affected parties by preventing possible confusion.

Existing N.J.A.C. 5:105-1.6 is relocated to N.J.A.C. 5:105-1.1. Proposed new N.J.A.C. 5:105-1.6 will address regulatory Open Public Records Act (OPRA) exemptions pursuant to N.J.S.A. 47:1A-9.a for complaint documents during an adjudication (N.J.S.A. 47:1A-3.a); individual complaint mediation records except for the "Mediation

Disposition Report” (N.J.S.A. 2A:23C-2); and unredacted *in camera* documents.

The proposed amendments at N.J.A.C. 5:105-2.1 will codify a 60-calendar day statute of limitation for complaint filings and clarifies meeting procedures to assist affected parties. Such a statute of limitation is larger than the Superior Court’s 45-calendar day limitation. See *Mason v. City of Hoboken*, 196 N.J. 51 (2008). A proposed amendment clarifies that no parties to a complaint may provide oral or written presentations at a Council meeting without the Council’s request.

The proposed amendments at N.J.A.C. 5:105-2.2 will add an intervenor provision. The GRC currently allows for intervenors in appropriate circumstances pursuant to *Gill v. N.J. Dep’t of Banking & Ins.*, 404 N.J. Super. 1 (App. Div. 2009), and the amendments will provide better clarification on the proper procedures. The proposed amendment also includes a process by which the parties shall be notified of the Council’s acceptance or rejection of their application.

The proposed amendments at N.J.A.C. 5:105-2.3 will add clarification to several aspects of the section, address *ex parte* communications, letters of attorney representation, confidentiality of submissions, and anonymous complaints. The proposed amendments will increase agency efficiency and enhance production. The changes will result in a more expeditious adjudication process.

The proposed amendments at N.J.A.C. 5:105-2.4 amend the section to address *ex parte* communications, letters of representation, statements of information, and a limitation on sur-replies. The amendments will increase the agency’s efficiency and enhance production, thus resulting in a more expeditious adjudication process.

The proposed amendments at N.J.A.C. 5:105-2.5 improve clarity in the mediation process and addresses improper disclosure of mediation communications. The revisions will provide affected parties with better clarity.

The proposed amendments at N.J.A.C. 5:105-2.6 will reinforce that every Council decision is posted online. This change is consistent with P.L. 2013, c. 259.

The proposed amendments at N.J.A.C. 5:105-2.8 will change the *in camera* procedures by allowing the Council to issue an administrative order to obtain records for *in camera* review. Such an action is intended to expedite the adjudication process by avoiding the issuance of an interim order, which has been the Council’s long-standing practice. The revisions will also assist affected parties by providing clarification of current *in camera* procedures.

The proposed amendments at N.J.A.C. 5:105-2.9 delete the term “supplemental decisions” for consistency with the change proposed at N.J.A.C. 5:105-1.3. The GRC also proposes adding an “administrative order” to the Council’s repertoire for purposes of drastically diminishing or otherwise eliminating the need for interim orders.

The proposed amendments at N.J.A.C. 5:105-2.10 will reflect the GRC’s consideration of a petition for rulemaking that was submitted by a member of the public. See 48 N.J.R. 599(a); 1319(c). The proposed revisions also prohibit sur-replies beyond objections to the request for reconsideration.

The proposed amendments at N.J.A.C. 5:105-2.11 revise the section to include administrative orders and interim orders.

The proposed amendment at N.J.A.C. 5:105-2.12 includes administrative orders (and the appropriate cross-references) pertaining to stays of an effective date. By removing an unnecessary limitation, affected parties will be better served.

The proposed amendments at N.J.A.C. 5:105-2.13 will make the section consistent with current case law at *Teeters v. DYFS*, 387 N.J. Super. 423 (App. Div. 2006) and *Mason v. City of Hoboken and City Clerk of the City of Hoboken*, 196 N.J. 51, 71 (2008). The current section can cause confusion, and the revisions will provide better clarification. Additionally, the proposed amendments codify the Council’s current process of allowing the parties 20 business days to settle the fee issue before requiring submission of a fee application. Also, the proposed revision adds that a failure to comply with subsection (c) shall result in a complaint dismissal without a fee award.

The proposed amendments at N.J.A.C. 5:105-2.14 clarify who may initiate appropriate disciplinary proceedings when a public employee is

found to have knowingly and willfully violated the Open Public Records Act (OPRA).

As the Council has provided a 60-day comment period on this notice of proposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

#### **Social Impact**

The Council anticipates that the rules proposed for readoption with amendments, new rule, and repeals will have a positive social impact. As described in the Summary above, the rules proposed for readoption with amendments, new rule, and repeals attempt to reimagine the GRC’s process for the purposes of making adjudications more expeditious. The vast majority of the proposed amendments, new rule, and repeals support the goal of a more efficient process for all affected parties. The proposed amendments, new rule, and repeals also include voluminous technical corrections and clarifications. The rules proposed for readoption with amendments, new rule, and repeals promote the stated purposes and intent of OPRA by providing more streamlined procedures. The rules proposed for readoption with amendments, new rule, and repeals are consistent with the underlying philosophy and purposes of the spirit of OPRA, which is to provide transparency in government.

#### **Economic Impact**

The GRC anticipates that the rules proposed for readoption with amendments, new rule, and repeals will have no significant economic impact, except that speedier adjudications will result in less administrative cost to the taxpayers.

#### **Federal Standards Statement**

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

#### **Jobs Impact**

The rules proposed for readoption with amendments, new rule, and repeals are not expected to have an impact on the creation or loss of jobs in New Jersey.

#### **Agriculture Industry Impact**

The GRC does not anticipate that the rules proposed for readoption with amendments, new rule, and repeals will impact the agriculture industry in New Jersey.

#### **Regulatory Flexibility Statement**

The rules proposed for readoption with amendments, new rule, and repeals are not expected to introduce any new recordkeeping, reporting, or compliance requirements on small businesses as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., nor are they expected to cause small businesses to need to employ professional services not already required in order to comply with the Act.

#### **Housing Affordability Impact Analysis**

The GRC does not anticipate that the rules proposed for readoption with amendments, new rule, and repeals will cause any increase or decrease in the average cost of housing or have any impact on the affordability of housing as the rules promote the stated purposes and intent of OPRA by providing more streamlined procedures making adjudications more expeditious.

#### **Smart Growth Development Impact Analysis**

The GRC does not anticipate that the rules proposed for readoption with amendments, new rule, and repeals will have any impact on the availability of affordable housing within Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan.

#### **Racial and Ethnic Community Criminal Justice and Public Safety Impact**

The rules proposed for readoption with amendments, new rule, and repeals will not have an impact on pretrial detention, sentencing,

probation, or parole policies concerning adults and juveniles in the State. Accordingly, no further analysis is required.

**Full text** of the rules proposed for re-adoption may be found in the New Jersey Administrative Code at N.J.A.C. 5:105.

**Full text** of the proposed amendments, new rule, and repeals follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

SUBCHAPTER 1. GENERAL PROVISIONS

5:105-1.1 Purpose [and], 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 [Construction of the rules] **(Reserved)**

[The rules in this chapter shall be liberally construed to permit the Council to discharge its statutory function.]

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.**

...  
**“Complaint” or “[OPRA Complaint] 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 [or a], **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 [requiring] **during the pendency of an adjudication including, but not limited to, an order that requires** the [records] 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 [or], 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.

[“Supplemental decision” or “revised final decision” means a decision issued by the Council that follows a final decision.]

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

[P.O.] PO Box 819

Trenton, New Jersey 08625-0819

Toll Free: (866) 850-0511

Direct Phone: (609) 292-6830

Fax: (609) 633-6337

Email: [grc@dca.state.nj.us](mailto:grc@dca.state.nj.us) [Government.Records@dca.nj.gov](mailto:Government.Records@dca.nj.gov)

Website: [www.nj.gov/grc](http://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. [Issue] **At the Council’s discretion, issue** advisory opinions on the accessibility of government records;

7.-8. (No change.)

5:105-1.6 [Conformance] **Records designated confidential**

[These rules shall conform to the requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1, except as provided in these rules.]

**(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 [of the Act]. **Such filing shall be made either within 60-calendar days 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-[7e]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 immediately. The representatives of any party named in a complaint shall file with the Council [written notification] **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 [should] **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](http://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. [(f)] The complaint may also include any attachments, affidavits, certifications, or other documentation deemed relevant or supportive of the allegations set forth in the complaint.

[(g)] The Council shall provide a copy of all complaints to the custodian if the complainant fails to do so.

(h) The following concern complaint amendments:]

**(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.**

[1.] (g) A complainant may amend [his or her] **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.

[2.] 1. (No change in text.)

[3. The Council shall provide custodians with copies of complaint amendments if the complainant fails to do so.]

[(i)] (h) [Objections to representation:] 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.)

[(j)] A party may respond to any challenge to its representative within five business days of receipt of the challenge.]

[(k)] (i) The Council, acting through its Executive Director, may require complainants to submit, within [prescribed] **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 [his or her] **their** legal representative. [SOI forms will be provided by Council's staff or may also be downloaded from the GRC website ([www.nj.gov/grc](http://www.nj.gov/grc)).]

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

(c) [(Reserved)] **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](http://www.nj.gov/grc)).**

[(d)] (e) The custodian shall include in the SOI, or the attachments thereto, any information, defenses, and arguments that [the custodian] they wish[es] to bring to the Council's attention for consideration in the adjudication of the complaint. [(e)] The custodian may also include with the SOI any [attachments,] 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.**

[(f)] (g) Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than [five] 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.)

[(i)] (j) If a complainant amends [his or her] **their** complaint, the custodian shall have five business days from the date of receipt of the same to submit [his or her] **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 [his or her] **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.

[(j)] Objections to representation: 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. The Council's case reference name and number;
2. Clear identification of the representative in question; and
3. A detailed explanation of the reasons for the objections, or conversely the response to such objections.]

(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.)

(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 [the content of any mediation session or share any document produced in the course of or resulting from mediation] **a mediation communication, as defined in the Uniform Mediation Act**, without the written consent of [the party who made the statement or produced the document] **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 [attend] **participate in** mediation proceedings and shall be bound by the [regulations] **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.**

[(h)] (i) (No change in text.)

[(i)] (j) The mediator may cease proceedings and refer the complaint back to the Council if [he or she] **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 [not] 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.**

[(j)] (l) The Council shall not consider any [statement made or document submitted to the mediator during the] mediation [proceedings] **communications** if the complaint is referred back to the Council for adjudication.

[(k)] (m) The Council shall administratively [adjudicate] **dismiss** any complaint upon **the mediator's** receipt of a written mediation agreement fully executed by the parties [which] **that** [indicates] **stipulates** that the matters presented in the complaint have [either] been resolved [or voluntarily dismissed by all parties. Such mediation agreements shall be deemed confidential] **and notification from the mediator that the complaint has been settled.** [(l)] The Council shall provide the parties notice of any dismissal by issuing an administrative complaint disposition [in the matter] **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, [in] **at its discretion**, [order an] **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 [interim order of the Council] **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: [1. A statement of the time, place and nature of the document inspection;]

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

(c) Presentation of documents to the Council: The custodian, or [his or her] **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) [Complainants] **Upon receipt of the certification and document index at (c)2 above, complainants** will be permitted to respond [to the certification and the document index in (c)2 above] 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 [return them to the custodian] **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.)

[3. Supplemental decisions;]

4. Revised **interim or** final decisions; and

5. (No change.)

(b) (No change.)

(c) Enforcement. The [Council] **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 [must] **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.**

[(c)] (d) Requests [must] **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](http://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.**

[(d)] (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.**

[(e)] (g) (No change in text.)

5:105-2.11 Relief from Council decisions—appeals

(a) [A] **An interim 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. [(See N.J.S.A. 47:1A-7.e).]**

(b) [Prior] **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,** the appealing party shall request a stay of the Council’s final decision which orders disclosure of government records].

(c) (No change.)

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 **administrative order or** interim order[s] 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 [but in no event for a period of time longer than the date of the next regularly scheduled meeting of the Council].

(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 [requestor is successful (or partially successful) in obtaining access to government records after a denial of access complaint filed with the Council, access was improperly denied, and the requested records are disclosed pursuant to a determination of the Council or voluntary settlement agreement between the parties.] **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.**

[(b)] (c) The complainant, or [his or her] **their** attorney, shall submit an application to the Council for an award of attorney’s fees within 20 business days following the [effective date of a decision by the Council] **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.)

[(c)] (d) The complainant, or [his or her] **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 [a] **the employing public agency** against a public official, officer, employee, or custodian against whom a penalty has been imposed.