



Minutes of the Government Records Council April 25, 2007 Public Meeting – Open Session

The meeting was called to order at 9:45 a.m. at the Department of Community Affairs, Conference Room 126, Trenton, New Jersey. The Open Public Meetings Act statement was read.

Ms. Hairston called the roll:

Present: Vincent Maltese, Chairman, Robin Berg Tabakin and David Fleisher. (Kathryn Forsyth (designee of Department of Education Commissioner Lucille Davy) arrived during the first closed session).

GRC Staff: Executive Director Catherine Starghill, Brigitte Hairston, Karyn Gordon, Jyothi Pamidimukkala, Dara Lownie, Frank Caruso, John Stewart, Designated Outside Counsel Meagan Tuohey-Kay, and Deputy Attorney General Debra Allen.

Mr. Maltese read the Resolution for Closed Session (Resolution Number 2007-04-25) to go into closed session pursuant to N.J.S.A. 10:4-12.b(7) to receive legal advice regarding the scheduled hearing in the matter of John Paff v. Borough of South Bound Brook (2006-158) and conduct *in camera* inspections and for the following matter:

1. Norman Berger v. Kean University (2006-56)
2. Edmund Haemmerle, III v. Washington Township (2006-106)
3. Daniel Meaders v. William Paterson University (2005-131)

A motion was made by Ms. Robin Berg Tabakin and seconded by Mr. Fleisher to go into closed session. The motion was adopted by a unanimous vote. A motion was made by Ms. Robin Berg Tabakin and seconded by Mr. Fleisher to end the closed session. The motion was adopted by a unanimous vote. The Council met in closed session from 9:50 a.m. until 10:24 a.m.

Open Session reconvened at 10:25 a.m. and Ms. Hairston called the roll.

In attendance:

Mr. Maltese, Ms. Berg Tabakin, Mr. Fleisher and Ms. Forsyth.

The pledge of allegiance was recited.

There was not a quorum to approve the open and closed session minutes of January 31, 2007 (because Ms. Berg Tabakin and Mr. Fleisher were not in attendance at that meeting), therefore Mr. Maltese did not call for a motion to approve these minutes. (The minutes for the February and March meetings were unavailable for approval.)

Statement from the Chairman:

On Monday of this week New Jersey lost one of her most ardent cheerleaders, Bernard Spigner. Bernard was appointed to this Council by Governor McGreevey in 2002 and served on this panel with pride and distinction until he recently assumed the role of Director of Communications for the New Jersey Sports and Exposition Authority. Bernard was 51 years old and leaves his wife Debbie and his two year old son, Robert.

Bernard had an extremely deep commitment to his family and he cared deeply for his friends and this State. He was a compassionate and considerate gentleman and brought a special passion to his work on this Council. We will miss him greatly. Please join me in a moment of silence in his memory.

Council Summary Administrative Adjudication:

The following complaints were presented to the Council for summary administrative adjudication:

GRC Complaint Case and Number	Disposition
1. Kenneth J. Austin v. Ocean County Soil Conservation District (2006-217)	Settled in mediation
2. Paula J. DeBona v. City of Newark (2007-8)	Settled in mediation
3. Rashaun Barkley v. Essex County Prosecutors Office (2007-16)	Not a Valid OPRA Request
4. Thomas Caggiano v. Borough of Stanhope (Sussex) (2007-27)	Not a Valid OPRA Request
5. Thomas Caggiano v. Borough of Stanhope (Sussex) (2007-28)	Not a Valid OPRA Request
6. Thomas Caggiano v. Borough of Stanhope (Sussex) (2007-29)	Not a Valid OPRA Request
7. Thomas Caggiano v. Borough of Stanhope (Sussex) (2007-30)	Not a Valid OPRA Request
8. Thomas Caggiano v. Borough of Stanhope (Sussex) (2007-31)	Not a Valid OPRA Request
9. Thomas Caggiano v. Borough of Stanhope (Sussex) (2007-32)	Not a Valid OPRA Request
10. Thomas Caggiano v. Borough of Stanhope (Sussex) (2007-33)	Not a Valid OPRA Request
11. Thomas Caggiano v. Borough of Stanhope (Sussex) (2007-34)	Not a Valid OPRA Request
12. Thomas Caggiano v. Borough of Stanhope (Sussex) (2007-35)	Not a Valid OPRA Request
13. Thomas Caggiano v. Borough of Stanhope (Sussex) (2007-36)	Not a Valid OPRA Request
14. Thomas Caggiano v. Borough of Stanhope (Sussex) (2007-37)	Not a Valid OPRA Request
15. Thomas Caggiano v. Borough of	Not a Valid OPRA Request

Stanhope (Sussex) (2007-38)	
16. Thomas Caggiano v. Borough of Stanhope (Sussex) (2007-39)	Not a Valid OPRA Request
17. Tyrone Jamison v. The Somerset Community Action Program (2007-42)	Not a Valid OPRA Request
18. Thomas Caggiano v. Borough of Stanhope (Sussex) (2007-48)	Not a Valid OPRA Request
19. Michael A. Cerone, Jr. v. Belleville Township (2007-50)	Settled in Mediation
20. Julian Grauer v. NJ Department of Education (2007-60)	Complaint withdrawn
21. Stephen Biss v. Township of Hillside (2007-66)	Settled in Mediation
22. Emory Muhammad Ghana v. NJ Department of Environmental Protection (2007-82)	No Records Responsive to Request
23. David Herron v. Montclair Board of Education (2007-195)	No Records Responsive Exist

Mr. Maltese called for a motion to accept the Executive Director's recommendations as written in all of the above Administrative Complaint Dispositions. A motion was made by Ms. Richardson and seconded by Mr. Fleisher. The motion passed by an unanimous vote except for one matter for which Ms. Forsyth recused herself (Julian Grauer v. NJ Department of Education (2007-60)) which passed by a majority vote.

The Council conducted a hearing to determine whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances in the following matter:

John Paff v. Borough of South Bound Brook (2006-158)

After the hearing was concluded, a motion was made by Ms. Forsyth and seconded by Mr. Fleisher to go into closed session. The motion was adopted by a unanimous vote. A motion was made by Ms. Robin Berg Tabakin and seconded by Mr. Fleisher to end the closed session. The motion was adopted by a unanimous vote. The Council met in closed session from 11:20 a.m. until 12:10 p.m.

Open Session reconvened at 12:15 p.m. and Ms. Hairston called the roll.

In attendance:

Mr. Maltese, Ms. Berg Tabakin, Mr. Fleisher and Ms. Forsyth.

Council Adjudication of Individual Complaints:

The following complaints were presented to the Council for individual adjudication:

Jeffrey Smith v. NJ Department of Corrections (2005-84)

Ms. Lownie reviewed the GRC's analysis and issues in the case as set forth in the Supplemental Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that this complaint should be dismissed as the Complainant has voluntarily withdrawn his complaint in a letter to the GRC dated March 27, 2007.

Mr. Maltese called for a motion to accept the Executive Director's supplemental findings and recommendations as written. A motion was made by Mr. Fleisher and seconded by Ms. Berg Tabakin. The motion passed unanimously.

Daniel Meaders v. William Paterson University (2005-131)

Ms. Gordon reviewed the GRC's analysis and issues in the case as set forth in the *In Camera* Findings and Recommendations of the Executive Director. Ms. Gordon presented the recommendations to the Council as amended:

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council's March 28, 2007 Interim Decision in supplying the Council with the requested Audit Report for the Office of Continuing Education and Distance Learning and the Performance Evaluation for Stephen Bolyai, Vice President of Administration and Finance within five (5) business days of receiving the Council's decision.
2. The Custodian shall not disclose the November 13, 2001 memorandum on personnel issues entitled "Audit Report" from William Patterson University Internal Auditor Richard Felton because it contains advisory, consultative and deliberative material exempt from disclosure under N.J.S.A. 47:1A-1.1 and the Council's decision in Toth v. Ewing Township, GRC Complaint No. 2004-21 (November 2004) and personnel records which are not considered government records pursuant to N.J.S.A. 47:1A-10 and the Council's decision in Hewitt v. Longport Police Department, GRC Complaint No. 2004-148 (March 2005).
3. The Custodian shall disclose the September 11, 2003 Performance Evaluation of Stephen Bolyai, Vice President of Administration and Finance with redactions as follows:

Page 1:	Heading	Disclosable.
	Part I	Disclosable.
	Part II	Disclosable.
Page 2:	Part III	Redact, exempt from disclosure as "personnel record" pursuant to <u>N.J.S.A. 47:1A-10</u> .
	Part IV	Disclosable.
Page 4:	Part V(a)	Redact, exempt from disclosure as "personnel record" pursuant to <u>N.J.S.A. 47:1A-10</u> . Contains self-critical analysis which incumbents would not disclose if they knew such information were to be made public.
	Part V(b)	Redact, exempt from disclosure as "personnel record"

Page 5:	Part VI	pursuant to <u>N.J.S.A. 47:1A-10</u> . Contains self-critical analysis which incumbents would not disclose if they knew such information were to be made public.
	Part VII	Redact, exempt from disclosure as “personnel record” pursuant to <u>N.J.S.A. 47:1A-10</u> . Contains advisory, consultative and deliberative material and analysis which authors would not disclose if they knew such information were to be made public. The last sentence beginning “Comments:” should be disclosed. Additionally, the signature line, title line and date should also be disclosed.
	Part VIII	Disclosable. Additionally, the signature line, title line and date should also be disclosed.
	Part IX	Disclosable.

- 4. The Custodian shall comply with #3 above within five (5) business days from receipt of this decision on the basis of the Council’s above determination and provide certified confirmation of compliance pursuant to N.J. Court Rules, R. 1:4-4 to the Executive Director.**

Mr. Maltese called for a motion to accept the Executive Director’s *in camera* findings and recommendations as amended. A motion was made by Ms. Forsyth and seconded by Ms. Berg Tabakin. The motion passed unanimously.

Janet Hascup v. Waldwick Board of Education (2005-192)

Ms. Gordon reviewed the GRC’s analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Gordon presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that:

1. The Custodian violated N.J.S.A. 47:1A-5.e, N.J.S.A. 47:1A-5.g, and N.J.S.A. 47:1A-6 by failing to provide immediate access or an immediate response providing a lawful basis for denial of access to the requested budget, bills, vouchers and contracts pursuant to OPRA.
2. Pursuant to N.J.S.A. 47:1A-5.a., the Custodian did not violate OPRA when he refused to accommodate Complainant’s request to review the requested documents after regular business hours.
3. Consistent with the New Jersey Supreme Court’s holding in Moore v. The Board of Chosen Freeholders of the County of Mercer, 39 N.J. 26 (1962) and its progeny, the Custodian did not violate OPRA when he refused to accommodate Complainant’s request to use her personal copier to photocopy the requested records.

4. Pursuant to N.J.S.A. 47:1A-7.b., the GRC does not have the authority to regulate how a Custodian utilizes its legal representative in its response to a Denial of Access Complaint.
5. The Complainant is not entitled to a refund of the copying charges she paid to obtain the records pursuant to her OPRA request. The statutory copying fees stated in N.J.S.A. 47:1A-5.b apply.
6. Based on the Custodian's delay in providing an immediate response or immediate access to the requested bills, budget, vouchers and contracts, it is clear that the Custodian does not fully understand the legal requirements of OPRA to which he is statutorily mandated to adhere. Therefore, the Custodian's actions appear to be negligent and do not meet the legal standard of a knowing and willful violation of OPRA and unreasonable denial of access pursuant to N.J.S.A. 47:1A-11.a.

Ms. Berg Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Mr. Fleisher and seconded by Ms. Forsyth. The motion passed by a majority vote. Mr. Maltese recused himself from a vote in this matter.

James Donato v. Jersey City Police Department (2005-251)

Ms. Gordon reviewed the GRC's analysis and issues in the case as set forth in the Supplemental Findings and Recommendations of the Executive Director. Ms. Gordon presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian submitted certified answers to the fourteen (14) point criteria established by the GRC for evaluating special service charges within the time period allotted, the Custodian complied with the Council's December 19, 2006 Interim Order.
2. Because the facts of record do not support a conclusion that the Custodian's response to the Complainant's OPRA request required an extraordinary expenditure of time and effort, the Custodian unlawfully imposed a charge of \$5.00 for the first page and \$1.00 for each page thereafter for the auto accident reports requested by the Complainant.
3. The Custodian may only charge the enumerated copying rates listed in OPRA when responding to an OPRA records request made in person for copies of auto accident reports consistent with N.J.S.A. 47:1A-5.b. If the records request is not made in person, the Custodian may charge the additional fee of up to \$5.00 for the first three pages and \$1.00 per page

thereafter to cover the administrative costs of mailing the reports pursuant to N.J.S.A. 39:4-131.

Ms. Berg Tabakin called for a motion to accept the Executive Director's supplemental findings and recommendations as written. A motion was made by Mr. Fleisher and seconded by Ms. Forsyth. The motion passed by a majority vote. Mr. Maltese recused himself from a vote in this matter.

Thomas Caggiano v. Borough of Stanhope (2006-2)

Ms. Lownie reviewed the GRC's analysis and issues in the case as set forth in the Supplemental Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that

1. Based on the Custodian's certification dated March 1, 2007, the Custodian has provided the Complainant with all the requested records that exist, or certified that the requested records do not exist, with the exception of "any correspondence or record of telephone conversation between any employee of the Borough of Stanhope and the Sussex County Prosecutor's Office regarding the Oak Drive development" as the Custodian certifies that to date, she has not received a response from the Borough Administrator regarding the record. As such, the Custodian has complied with the Council's December 14, 2006 Interim Order except that such compliance was not completed within the required time frame. It should be noted, however, that on February 9, 2007, after the Custodian's compliance due date, the Complainant requested to meet with the Custodian regarding the records subject of this complaint.
2. As it has been more than twenty four (24) business days following the Custodian's compliance due date, and the Custodian certifies that she has responded to all of the Complainant's requests with the exception of the request in which the Borough Administrator agreed she would respond and the Custodian also certifies that to date, she has not received a response from the Borough Administrator regarding said request, it is possible that the Borough Administrator's actions were intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless, or unintentional. As such, this complaint should be referred to the Office of Administrative Law for determination of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Mr. Maltese called for a motion to accept the Executive Director's supplemental findings and recommendations as written. A motion was made by Ms. Berg Tabakin and seconded by Ms. Forsyth. The motion passed unanimously.

Norman Berger v. Kean University (2006-56)

Ms. Gordon reviewed the GRC's analysis and issues in the case as set forth in the *In Camera* Findings and Recommendations of the Executive Director. Ms. Gordon presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council's September 21, 2006 Interim Decision in supplying the Council with the requested Preliminary Draft Science Building Report and the 2005 New Jersey Educational Facilities Authority Bond Fund Project Estimates within the required time period.
2. The Custodian bore her burden of proving that the denial of access to the Preliminary Draft Science Building Report was lawful under N.J.S.A. 47:1A-6 because it contains advisory, consultative and deliberative material exempt from disclosure under N.J.S.A. 47:1A-1.1 and the Council's decision in Toth v. Ewing Township, GRC Complaint No. 2004-21 (November 2004).
3. The Custodian bore her burden of proving that the denial of access to the 2005 New Jersey Educational Facilities Authority Bond Fund Project Estimates was lawful under N.J.S.A. 47:1A-6 because it contains advisory, consultative and deliberative material exempt from disclosure under N.J.S.A. 47:1A-1.1 and the Council's decision in Toth v. Ewing Township, GRC Complaint No. 2004-21 (November 2004).

Mr. Maltese called for a motion to accept the Executive Director's *in camera* findings and recommendations as written. A motion was made by Mr. Fleisher and seconded by Ms. Forsyth. The motion passed unanimously.

Linda Seiler v. Old Bridge Economic Development Corp. (2006-69)

Ms. Gordon reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Gordon presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that:

1. The OBEDC is a public agency subject to OPRA pursuant to N.J.S.A. 47:1A-1.1.
2. Because the Custodian failed to respond to Complainant within seven (7) business days of receiving Complainant's OPRA request, the request is deemed denied and the Custodian has violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
3. Because there is insufficient evidence in the record to ascertain to what extent the executive session minutes requested by the Complainant contain privileged and confidential information, the GRC should conduct an *in camera* review of the completed executive session minutes to determine to

what extent N.J.S.A. 47:1A-10 or any other exemption applies to these documents.

4. The Custodian's actions, most notably the thirteen (13) business days it took for her to respond to the Complainant's OPRA request, appear to be negligent and heedless, but the evidence of record does not support a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.
5. **The Custodian must deliver¹ to the Council in a sealed envelope six copies of the requested unredacted documents (see #3 above), a documents or redactions index detailing the lawful basis for denial of each document and/or each redaction asserted and the Custodian's legal certification, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection within five (5) business days from receipt of the Council's Interim Order.**

Mr. Maltese called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Berg Tabadin and seconded by Ms. Forsyth. The motion passed unanimously.

Robert Vessio v. Township of Barnegat (2006-70)

Ms. Gordon reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Gordon presented the recommendations to the Council as amended:

The Executive Director respectfully recommends the Council find that:

1. Based on the broad scope of records requested by Complainant, the Custodian did not unlawfully deny access pursuant to N.J.S.A. 47:1A-11.a with regard to the Complainant's March 16, 2006 OPRA request for the following information: Township of Barnegat Inspector Rules, Regulations and Ordinances from 1985 to 2006, Township conformity with New Jersey Housing Codes in relation to commercial property from 1985 to 2006, Township Building Inspector Duties from 1985 to 2006, commercial zoning information from 1985 to 2006, and Township requirements to renovate businesses that have a Certificate of Occupancy for office space from 1985 to 2006;
2. Because the Custodian failed to indicate in her March 21, 2006 letter whether the list of commercial office use properties from 1985 to 2006 requested by Complainant was archived or in storage, and failed to provide any time period when the records would be made available, the request for these records is deemed denied and the Custodian has violated N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i.

¹ The *in camera* documents may be sent overnight mail, regular mail or be hand-delivered, at the discretion of the custodian, as long as they arrive at the GRC by the deadline.

3. Because the evidence of record shows that the Custodian would be required to expend an extraordinary amount of time and effort to retrieve for Complainant's examination the commercial certificates of occupancy from 1985 to 2006 from all of the building and permitting records filed by block and lot number, the \$400.00 special service charge proposed by Custodian appears to be reasonable and permitted by N.J.S.A. 47:1A-5.c;
4. Custodian's actions do not meet the legal standard for a knowing and willful violation pursuant to OPRA and unreasonable denial of access under the totality of the circumstances in this case. However, the Custodian's actions do appear to be at least negligent regarding her knowledge of OPRA.

Mr. Maltese called for a motion to accept the Executive Director's findings and recommendations as amended. A motion was made by Mr. Fleisher and seconded by Ms. Forsyth. The motion passed unanimously.

Anne Barron v. Essex County Superintendent of Registration (2006-95)

Ms. Gordon reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Gordon presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian has certified that the agency does have on file the Essex County's OPRA request form, but holds the right to not utilize such form, the Custodian's staff member violated OPRA pursuant to N.J.S.A. 47:1A-5.f. by not providing the Complainant with the form upon request.
2. The evidence of record does not support a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.

Mr. Maltese called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Berg Tabakin and seconded by Ms. Forsyth. The motion passed unanimously.

Carlton Levine v. Bergen County Improvement Authority (2006-96)

Ms. Gordon reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Gordon presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to properly notify the Complainant of the reasons for denial pursuant to OPRA. Therefore, based on the GRC decision in DeLuca v. Town of Guttenburg, GRC Complaint No. 2006-25 (May 2006), the Custodian has violated N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. by failing to properly inform the Complainant of the reasons for the denial of

access in writing within the statutorily mandated seven (7) business days, resulting in a deemed denial of access pursuant to N.J.S.A. 47:1A-5.i.

2. In the current matter, the requested records were prepared by an outside third-party consultant hired to provide expertise and opinions on formulating new policy. However, pursuant to the GRC's decision in Rademacher v. Borough of Eatontown, GRC Complaint No. 2004-18 (November 2005), the GRC should perform an *in camera* inspection of the following requested records to determine whether they meet the "inter-agency or intra-agency advisory, consultative, or deliberative" exemption under OPRA:
 - a. Analysis and Recommendations Regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated February 28, 2006, 5 pages;
 - b. Recommendations regarding the creation of a Clinical Quality Performance Reporting Scorecard for the Behavioral Health Division, BRMC, dated March 14, 2006, 31 pages;
 - c. E-mail dated 4/10/2006 - Analysis and Recommendations regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated March 14, 2006, 33 pages;
 - d. E-mail dated April 17, 2006 - Analysis and Recommendations regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated March 14, 2006, 33 pages;
 - e. E-mail dated April 21, 2006
 - * Analysis and Recommendations regarding Staffing Ratios of the Behavioral Health Division, BRMC, dated April 21, 2006, 33 pages,
 - * Memo regarding 65% Rule, dated April 21, 2006, 2 pages,
 - * Memo re: Management and Clinical Research Stakeholder Input, dated April 21, 2006, 25 pages,
 - * Analysis and Recommendations regarding the creation of a clinical quality performance scorecard for Behavioral Health Division, BRMC, dated April 21, 2006, 19 pages, and
 - * Analysis and Recommendations regarding quality data and outcome measurements of the Behavioral Health Division, BRMC, dated April 21, 2006, 60 pages.
3. **The Custodian must deliver² to the Council in a sealed envelope six copies of the requested unredacted documents (see #2 above), a documents or redactions index detailing the lawful basis for denial of each document and/or each redaction asserted and the Custodian's legal certification, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection within five (5) business days from receipt of the Council's Interim Order.**

Ms. Berg Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Mr. Fleisher and seconded by Ms.

² The *in camera* documents may be sent overnight mail, regular mail or be hand-delivered, at the discretion of the custodian, as long as they arrive at the GRC by the deadline.

Forsyth. The motion passed by a majority vote. Mr. Maltese recused himself from a vote in this matter.

Edmund Haemmerle, III v. Washington Township (2006-106)

Ms. Lownie reviewed the GRC's analysis and issues in the case as set forth in the *In Camera* Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council's February 28, 2007 Interim Order in supplying the Council with the requested e-mail from Mary Caffery to Mayor Fried dated Friday, January 27, 2006 within five (5) business days of receiving the Council's *in camera* request.
2. The Custodian unlawfully denied access to page one (1) of the requested e-mail as it contains the sender, receiver and date information which does not fall within OPRA's advisory, consultative or deliberative exemption. Thus, the Custodian should release said page to the Complainant.
3. The Custodian was proper in withholding pages two (2) and three (3) of the requested e-mail which contains Mayor David Fried's draft letter beginning with "Dear Residents," which the Custodian certifies was never finalized nor sent out to the residents of the Township, because the requested e-mail is considered pre-decisional and deliberative and is therefore not considered a government record subject to public access as it constitutes advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. Thus, pages two (2) and three (3) of the requested e-mail should not be released to the Complainant.
4. **The Custodian shall comply with # 2 of these Conclusions and Recommendations within five (5) business days from receipt of this decision on the basis of the Council's above determination and shall provide certified confirmation of compliance pursuant to *N.J. Court Rules, 1969 R. 1:4-4 (2005)* to the Executive Director.**

Mr. Maltese called for a motion to accept the Executive Director's *in camera* findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Berg Tabakin. The motion passed unanimously.

Vesselin Dittrich v. City of Hoboken (2006-145)

Ms. Starghill reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Starghill presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that:

- 1) The Custodian shall provide access to the requested records, or give a lawful basis for denial. N.J.S.A. 14:1A-5.g.
- 2) The Custodian shall comply with #1 above within five (5) business days from receipt of the Council's Interim Order, and simultaneously provide confirmation of compliance, pursuant to N.J. Court Rules, R. 1:4-4, to the Executive Director.

- 3) The Custodian's actions, most notably requiring the Complainant to deliver the OPRA request to another department, at which time the Complainant was required to complete additional request forms, appears to be negligent and heedless, but the evidence of record does not support a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.

Ms. Berg Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Mr. Fleisher. The motion passed by a majority vote. Mr. Maltese recused himself from a vote in this matter.

Donald Baldwin v. Township of Readington (2006-165)

Ms. Starghill reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Starghill presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that:

- 1) The Custodian violated N.J.S.A. 47:1A-5.i. by not granting or denying the Complainant access to the records responsive within the statutorily mandated seven (7) business days. The Custodian also failed to obtain a written agreement from the Complainant extending the time in which the Custodian had to fulfill the Complainant's OPRA request. Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006).
- 2) Regardless of the vagueness of an OPRA request, the Custodian is statutorily mandated to seek clarification for any requests deemed broad or unclear within seven (7) business days. Tucker Kelley v. Rockaway Township, GRC Complaint No. 2006-176 (March 2007).
- 3) It cannot be determined whether the Custodian has met the burden of proving that the requested documents are exempt from disclosure without actually reviewing the documents to confirm the Custodian's legal conclusion. Therefore, it is recommended that the Council conduct an *in camera* inspection of all 175 e-mails to determine whether the documents are exempt from disclosure in whole or in part because of "advisory, consultative or deliberative material" pursuant to N.J.S.A. 47:1a-1.1.
- 4) The Custodian must deliver³ to the Council in a sealed envelope six copies of the requested unredacted documents (see #3 above), a documents or redactions index detailing the lawful basis for denial of each document and/or each redaction asserted and the Custodian's legal certification, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection within five (5) business days from receipt of the Council's Interim Order.
- 5) The matter of prevailing parties attorney's fees will be determined after the Council conducts the *in camera* inspection.

³ The *in camera* documents may be sent overnight mail, regular mail or be hand-delivered, at the discretion of the custodian, as long as they arrive at the GRC by the deadline.

Mr. Maltese called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Berg Tabakin and seconded by Mr. Fleisher. The motion passed unanimously.

Z.T. v. Bernards Township School District (2006-168)

Ms. Gordon reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Gordon presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that:

1. Since the three (3) employees (Ms. Rudolph, Mr. Heineman and Mr. Thompson) did not direct the Complainant to the proper records custodian, or forward the Complainant's OPRA request, the employees (Ms. Rudolph, Mr. Heineman and Mr. Thompson) are in violation of OPRA pursuant to N.J.S.A. 47:1A-5.h.
2. While the Complainant in this complaint states that he sent the OPRA request to the Custodian, the Custodian has certified that he never received the OPRA request. Therefore, the Custodian has not unlawfully denied access to the requested records.
3. Although the three (3) employees (Ms. Rudolph, Mr. Heineman and Mr. Thompson) did not direct the Complainant to the proper records custodian, or forward the Complainant's OPRA request, the three (3) employees' actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the three (3) employees' actions appear to be at least negligent and ignorant regarding their knowledge of OPRA.

Ms. Berg Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Mr. Fleisher. The motion passed by a majority vote. Mr. Maltese recused himself from a vote in this matter.

Femaarta Momo v. NJ Department of the State, Office of Faith Based Initiatives (2006-206)

Ms. Starghill reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Starghill presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that:

1. The Custodian violated N.J.S.A. 47:1A-5.i and N.J.S.A. 47:1A-5.g by failing to provide the Complainant with a written response stating that the record requested does not exist within the statutorily mandated seven (7) business days therefore creating a "deemed" denial.
2. The Custodian's actions, most notably the Custodian's failure to respond to the Complainant's OPRA request, appear to be negligent and heedless, but the evidence of record does not support a knowing and willful violation of OPRA

and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.

Mr. Maltese called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Berg Tabakin and seconded by Ms. Forsyth. The motion passed unanimously.

Richard Rivera v. Town of Guttenberg (2007-5)

Mr. Caruso reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Caruso presented the recommendations to the Council as amended:

The Executive Director respectfully recommends the Council find that:

1. Pursuant to N.J.S.A. 47:1A-5.i, the Custodian, though responding within the statutorily mandated seven (7) business days, failed to grant access, deny access, seek clarification or request an extension of the statutorily mandated response time resulting in a deemed denial.
2. Pursuant to N.J.S.A. 47:1A-6, the Custodian has not borne her burden of proving a lawful denial of access to the police department tape recordings.
3. The Custodian must grant the Complainant access to the requested records or indicate the specific basis on which access to said records is denied.
4. The Custodian shall comply with (3) above within five (5) business days from receipt of the Council's Order and simultaneously provide certified confirmation of compliance pursuant to *N.J. Court Rules, R. 1:4-4* to the Executive Director.

Mr. Maltese called for a motion to accept the Executive Director's findings and recommendations as amended. A motion was made by Ms. Berg Tabakin and seconded by Ms. Forsyth. The motion passed unanimously.

Robert Ahlers v. Township of Hardwick (2007-57)

Mr. Caruso reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Mr. Caruso presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to fulfill the Complainant's request for records within seven (7) business days after being informed of the request's submission to the township CPA, thus resulting in an unlawful denial of access pursuant to N.J.S.A. 47:1A-5.h and N.J.S.A. 47:1A-5.i.
2. The Custodian did not bear her burden of proving that this denial was within the statutorily mandated limits of OPRA pursuant to N.J.S.A. 47:1A-6.
3. Based on the facts that the Custodian did release the records relevant to this request after the Complainant resubmitted the request, the Custodian's actions appear merely negligent, heedless, or unintentional. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Mr. Maltese called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Ms. Berg Tabakin. The motion passed unanimously.

Darryl Conquest v. NJ Department of Corrections (2007-75)

Ms. Starghill reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Starghill presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that the Custodian did not unlawfully deny the Complainant access to the record requested because the evidence shows that the requested record is not made, maintained or kept on file by the New Jersey Department of Corrections. N.J.S.A. 47:1A-1.1.

Mr. Maltese called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Berg Tabakin and seconded by Mr. Fleisher. The motion passed unanimously.

Barbara Skinner v. City of Cape May (2007-85)

Ms. Starghill reviewed the GRC's analysis and issues in the case as set forth in the Findings and Recommendations of the Executive Director. Ms. Starghill presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that:

1. The Custodian violated N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-5.g. by failing to provide the Complainant with a written response stating that the record requested does not exist within the statutorily mandated seven (7) business days therefore creating a "deemed" denial.
2. The Custodian's actions, most notably the eighteen (18) business days it took for her to respond to the Complainant's OPRA request, appear to be negligent and heedless, but the evidence of record does not support a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.a.

Mr. Maltese called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Forsyth and seconded by Mr. Fleisher. The motion passed unanimously.

Complaints Adjudicated on Appeal in Superior Court:

1. Martin O'Shea v. West Milford Board of Education (2004-93) – AFFIRMED
2. John Paff v. Township of Plainsboro (2005-29) - AFFIRMED

Motion for Reconsideration:

None

Executive Director's Report:

Ms. Starghill introduced the newest addition to the GRC staff, Mr. John Stewart who will serve as the Case Manager/*In Camera* Attorney. Additionally, Ms. Starghill discussed the re-proposed regulations which will be published in the May 7, 2007 edition of the New Jersey Register. The public comment period for these re-proposed regulations ends July 6, 2007. The earliest the regulations may be promulgated is August 6, 2007.

Public Comment:

(1) Thomas Caggiano, resident of Stanhope, NJ

A motion to end the Council's meeting was made by Ms. Forsyth and seconded by Mr. Fleisher. The motion passed unanimously.

Meeting adjourned at 1:05 p.m.

Respectfully submitted,

David Fleisher, Secretary

Date Approved: