



**Minutes of the Government Records Council  
March 25, 2009 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.

The pledge of allegiance was recited while standing by all.

The meeting notice and fire emergency procedure was read by Ms. Tabakin.

Ms. Hairston called the roll:

Present: Robin Berg Tabakin, Chairwoman, Janice Kovach (designee of Department of Community Affairs Commissioner Joseph V. Doria) and Beth Auerswald (designee of Department of Education Commissioner Lucille Davy).

GRC Staff In Attendance: Executive Director Catherine Starghill, In-House Counsel Karyn Gordon, GRC Secretary Brigitte Hairston, Case Managers: Dara Lownie, Frank Caruso, John Stewart, Sherin Keys, Elizabeth Ziegler-Sears, IT Specialist Jyothi Pamidimukkala, Designated Outside Counsel Kelley Lake, and Deputy Attorney General Debra Allen.

Ms. Tabakin read the Resolution for Closed Session (Resolution Number 2009-03-25) to go into closed session pursuant to N.J.S.A. 10:4-12.b(7) to receive legal advice and discuss anticipated litigation in which the public body may become a party in the following matters:

1. Thomas Caggiano v. Borough of Stanhope (Sussex) (2006-211 et seq.)
2. Martin O’Shea v. Township of Wantage (Sussex) (2007-244)
3. Lewis Springer Jr. v NJ Department of Treasury, Division of Casino Control Commission  
(2008-45) (*In-Camera*)

A motion was made by Ms. Kovach and seconded by Ms. Auerswald to go into closed session. The motion was adopted by a unanimous vote. A motion was made by Ms. Kovach and seconded by Ms. Auerswald to end the closed session. The motion was adopted by a unanimous vote. The Council met in closed session from 9:46 a.m. until 10:16 a.m.

Open Session reconvened at 10:20 a.m. and Ms. Hairston called the roll.

Present: Ms. Tabakin, Ms. Kovach, and Ms. Auerswald.

There was not a quorum to approve the open and closed session minutes of February 25, 2009 (because Ms. Auerswald was not in attendance at that meeting), therefore Ms. Tabakin did not call for a motion to approve these minutes.

### **Council Adjudication:**

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

1. Joyce Blay v. Lakewood Board of Education (Ocean) (2007-175)
2. Joyce Blay v. Lakewood Board of Education (Ocean) (2007-176)
3. Ryan Brown v. Jersey City Parking Authority (Hudson) (2008-07)
4. Kenneth Grisewood v. NJ Department of Environmental Protection (2008-15)
5. Louanne Cular v. Township of Montague (Sussex) (2008-63)
6. Melissa Kossup v. Borough of Branchville (Sussex) (2008-94)
7. Melissa Kossup v. Branchville Hose Company No. 1 (Sussex) (2008-95)
8. Daniel Newman v. Brick Township Municipal Utilities Authority (Ocean) (2008-121)
9. Frank Amoresano v. Rowan University, Administration & Finance (2008-130)
10. Dean Phinney v. Trenton Board of Education (Mercer) (2008-176)
11. Tucker Kelley v. Township of Rockaway (Morris) (2008-204)
12. David Weiner v. County of Essex (2008-269)
13. Cynthia McBride v. Township of Hainesport (Burlington) (2009-18)
14. John Nessel v. Borough of Newfield (Gloucester) (2009-37)
15. Carolanne Schlosser v. City of Union Parking Authority (Hudson) (2009-44)
16. John Brian King v. County of Camden (2009-48)
17. Jay Thomas v. County of Bergen (2009-67)
18. Jay Thomas v. NJ Department of Public Advocate (2009-81)
19. Robert Verry v. Borough of South Bound Brook (Somerset) (2009-84)
20. Robert Verry v. Borough of South Bound Brook (Somerset) (2009-85)
21. Robert Verry v. Borough of South Bound Brook (Somerset) (2009-86)
22. Robert Verry v. Borough of South Bound Brook (Somerset) (2009-87)
23. Robert Verry v. Borough of South Bound Brook (Somerset) (2009-88)
24. Robert Verry v. Borough of South Bound Brook (Somerset) (2009-89)
25. Robert Verry v. Borough of South Bound Brook (Somerset) (2009-90)
26. Robert Verry v. Borough of South Bound Brook (Somerset) (2009-91)
27. Robert Verry v. Borough of South Bound Brook (Somerset) (2009-92)

Ms. Tabakin 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. Kovach and seconded by Ms. Auerswald. The motion passed unanimously.

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

**Thomas Caggiano v. Borough of Stanhope (Sussex) (2006-211, -219, 2007-24, -25, -26, -40, -43, -44, -45, -46, -47,-183, -184, -228, -229, -285, -289, and 2008-105 )**

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 the following cases should be dismissed based on Judge Dana's December 3, 2008 Judgment: Thomas Caggiano v. Borough of Stanhope, GRC Complaint Nos. 2006-211, -219; 2007-24, -25, -26, -40, -43, -44, -45, -46, -47, -183, -184, -228, -229, -285, -289, 2008-105.

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

**James D'Andrea v. NJ Department of Community Affairs, Div. of Local Government Services (2007-64)**

This matter was not put to a vote due to the lack of a quorum.

**George Burdick v. Franklin Township Board of Education (Hunterdon) (2007-74)**

Ms. Lownie reviewed the GRC's analysis and issues in the case as set forth in the 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 because the Complainant voluntarily withdrew his complaint from the Office of Administrative Law via letter to the GRC dated March 6, 2009. Therefore, no further adjudication is required.

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations as written. A motion was made by Ms. Auerswald and seconded by Ms. Spera (on behalf of the Commissioner of the NJ Department of Community Affairs). The motion passed unanimously.

**William Gettler v. Wantage Regional Schools, Board of Education (Sussex) (2007-105)**

This matter was not put to a vote due to the lack of a quorum.

**Steve Hyman v. Jersey City (Hudson) (2007-118)**

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:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7)

business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

2. Because the Custodian failed to immediately grant or deny access to the requested bills and vouchers, request additional time to respond or request clarification of the request, the Custodian has also violated N.J.S.A. 47:1A-5.e.
3. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of all records contained within the privilege logs dated March 5, 2007 and March 19, 2007 to determine the validity of the Custodian’s assertion that the record constitutes attorney-client privileged or advisory, consultative or deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
4. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see No. 3 above), a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the document provided is the document requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Auerswald. The motion passed unanimously.

#### **Martin O’Shea v. Township of Wantage (Sussex) (2007-244)**

Ms. Lownie reviewed the GRC’s analysis and issues in the case as set forth in the 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 because the Complainant failed to use the official OPRA request form adopted by Wantage Township, and with which the Complainant was provided a copy by the Custodian, the Complainant’s October 3, 2007 OPRA request is invalid pursuant to N.J.S.A. 47:1A-5.f and N.J.S.A. 47:1A-5.g and the GRC’s Advisory Opinion No. 2006-01.

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<sup>1</sup> 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 office by the deadline.

<sup>2</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

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

**Judd Shanker v. Cliffside Park Borough (Bergen) (2007-245)**

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:

1. Counsel's response was insufficient because he failed to specifically state that the requested record did not exist at the time of the Complainant's September 11, 2007 OPRA request pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Township of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008).
2. The Custodian certified in the Statement of Information that no report which was responsive existed at the time of the Complainant's September 11, 2007 OPRA request because the report was not provided to the Borough until October 16, 2007 and there is no credible evidence in the record to refute the Custodian's certification. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., there was no unlawful denial of access pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although Counsel's response denying access to the requested report on the first (1<sup>st</sup>) business day following receipt of the OPRA request was insufficient pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Township of Berkeley Heights (Union), GRC Complaint No. 2007-271 (November 2008), Counsel did later certify that no record responsive existed at the time of the Complainant's request or subsequent filing of this complaint. Therefore, it is concluded that Counsel'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. However, Counsel's insufficient response appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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

**Sharon Zappia v. City of Atlantic City (Atlantic) (2007-260)**

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

The Executive Director respectfully recommends the Council find:

1. The Custodian's failure to respond in writing to the Complainant's June 28, 2006 OPRA request and the Custodian's failure to respond in writing within the statutorily mandated seven (7) business days to the Complainant's June 14, 2007 OPRA request resulted in "deemed" denials of the Complainant's OPRA requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian certified that no additional records responsive to the Complainant's June 14, 2007 OPRA request exist, and there is no credible evidence in the record to refute the Custodian's certification, therefore, while the Custodian violated N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i., there was no unlawful denial of access pursuant to Pusterhofer v. NJ Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. The GRC does not have jurisdiction over the accuracy of records disclosed pursuant to N.J.S.A. 47:1A-7.b. and Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005).
4. Although the Custodian's failure to provide a written response to the Complainant's June 28, 2006 OPRA request and the Custodian's failure to provide a written response within the statutorily mandated seven (7) business days to the Complainant's June 14, 2007 OPRA request resulted in "deemed" denials, because the Custodian provided the Complainant with the records requested in the June 28, 2006 OPRA request and provided the only records which could be found in response to the June 14, 2007 OPRA request nineteen (19) days following the date of the Complainant's request, and the Custodian provided a memorandum which explained why records could not be found, it is concluded that 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. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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

#### **Vesselin Dittrich v. City of Hoboken (Hudson) (2008-04)**

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

The Executive Director respectfully recommends the Council find:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA

request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

2. Because the Custodian in this complaint certified that there are no records responsive to the Complainant's request, the Custodian would have borne his burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), had the Custodian responded in writing in a timely manner.
3. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., by not providing the Complainant with a written response to the Complainant's request pursuant to N.J.S.A. 47:1A-5.i. within seven (7) business days, the record requested did not exist. The evidence of record does not support a finding that the Custodian's actions were knowing and willful. Therefore, it is concluded that 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. However, the Custodian's "deemed" denial of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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

**Lewis Springer, Jr. v NJ Department of Treasury, Casino Control Commission (2008-45)**

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

The Executive Director respectfully recommends the Council find:

1. The Custodian has complied with the Council's December 18, 2008 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order within five (5) business days of receiving the Council's Order.
2. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the table below within five (5) business days from receipt of this Order and provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**

Record or Redaction Number	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination <sup>3</sup>
1	E-mail from Lewis Springer to Barbara Cranmer dated March 25, 2006 at 3:59 a.m.	Communication relating to an alleged power surge at the Showboat Hotel Casino and its impact on gaming voucher systems and advice regarding how to prevent such future problems.	Exempt as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> .  Information regarding internal controls is confidential pursuant to <u>N.J.S.A. 5:12-74</u> and <u>N.J.S.A. 47:1A-9</u> .	Redact everything in the third full paragraph in the body of the e-mail after the word "hour" in the first sentence through the end of the paragraph. Also, redact the fourth, fifth, and sixth paragraphs. This material contains confidential information obtained relative to internal controls specified in <u>N.J.S.A. 5:12-99a</u> , applicable to OPRA through <u>N.J.S.A. 47:1A-9.a</u> . Paragraph six is also exempt as ACD material pursuant to <u>N.J.S.A. 47:1A-1.1</u> .  Disclose balance

<sup>3</sup> **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

				of record.
2	E-mail from Lewis Springer to Barbara Cranmer dated March 25, 2006 at 8:26 a.m.	Same as #1	Same as #1	Redact everything in the first full paragraph in the body of the e-mail after "10:46 pm" in the first sentence through the end of the paragraph. Also, redact everything in the second paragraph after "10:46 pm" in the first sentence through the end of the paragraph. This material contains confidential information obtained relative to internal controls specified in <u>N.J.S.A. 5:12-99a</u> , applicable to OPRA through <u>N.J.S.A. 47:1A-9.a</u> .  Disclose balance of record.
3	E-mail from Lewis Springer to James Fehon dated June 13, 2007 at 2:10 a.m.	Same as #1	Same as #1	Redact everything in the first sentence of the first full paragraph in the body of the e-mail after "3:00 pm" to the end of the sentence because it contains confidential information obtained relative to internal

				<p>controls specified in <u>N.J.S.A. 5:12-99a</u>, applicable to OPRA through <u>N.J.S.A. 47:1A-9.a</u>.</p> <p>The attachment referred to in the second sentence was not provided to the GRC, therefore it is not within the scope of the <i>in camera</i> examination; however, if it is either record #1 or #2 listed above in this table, then those previously identified redactions apply.</p> <p>Redact the third and fourth sentences because they make reference to a redacted segment in the first sentence.</p> <p>Redact the fifth sentence as ACD material exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p>Disclose balance of record.</p>
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Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Auerswald. The motion passed unanimously.

**Robert Verry v. Borough of South Bound Brook (Somerset) (2008-48)**

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:

1. Although the Custodian responded in writing to Item No. 1 in a timely manner pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response is insufficient because he failed to provide a definitive response as to whether the record requested in Item No. 1 existed. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g.
2. Because the Custodian failed to provide within the statutorily mandated seven (7) business days a specific date on which the record responsive to request Item No. 2 would be provided, the Custodian's response to the Complainant requesting an extension of time is insufficient under N.J.S.A. 47:1A-5.i. See Hardwick v. New Jersey Department of Transportation, GRC Complaint No. 2007-164 (February 2008).
3. Pursuant to N.J.S.A. 47:1A-6, the Custodian has failed to bear his burden of proving a lawful denial of access to all records requested in the Complainant's December 19, 2006 OPRA request. **The Custodian shall disclose all requested records with appropriate redactions, if any, and a redaction index detailing the general nature of the information redacted and the lawful basis for such redactions as required by N.J.S.A. 47:1A-6 and 47:1A-5.g. If no record responsive to request Item No. 1 exists, the Custodian must certify to this fact.**
4. **The Custodian shall comply with Item No. 3 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
5. The Custodian's assertion that the Complainant is in possession of the record responsive to request Item No. 2 does not relieve the Custodian of his burden to prove a lawful denial of access under OPRA pursuant to N.J.S.A. 47:1A-6.
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

**Edward Osky v. NJ State Parole Board (2008-53)**

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

The Executive Director respectfully recommends the Council find:

1. Because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days, and because the Custodian provided an anticipated deadline date and adhered to said deadline, the Custodian has properly responded to the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
2. Because the Complainant's request sought specific identifiable government records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), and because the Custodian is obligated to search his files for said records pursuant to Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), the Custodian's failure to ask the named individuals if they maintained any records responsive results in an insufficient search pursuant to Schneble v. NJ Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008) and as such, the Custodian has failed to bear his burden of proving a lawful denial of access to the e-mail subsequently located by Joseph Shields pursuant to N.J.S.A. 47:1A-6.
3. Although the Custodian failed to conduct an adequate search for the requested records, the Custodian's actions were not intentional and deliberate because he conducted a subsequent search and located a record responsive which he certified he will provide to the Complainant upon payment of the copying fee. Therefore, it is concluded that 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. However, the Custodian's insufficient search appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

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

#### **Tina Renna v. Union County Improvement Authority (Union) (2008-86)**

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

The Executive Director respectfully recommends the Council find:

1. Although the Recording Secretary granted access to the requested attorney bills within the statutorily mandated seven (7) business days, the Secretary failed to provide the Complainant with the specific legal basis for the

redactions. As such, the Secretary's response to the Complainant's request is insufficient pursuant to N.J.S.A. 47:1A-5.g.

2. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the requested bills to determine the validity of the Custodian's assertion that the redactions constitute attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1, litigation and personnel matters pursuant to N.J.S.A. 10:4-12 as well as discussions pertaining to an ongoing investigation pursuant to N.J.S.A. 47:1A-3.a.
3. **The Custodian must deliver<sup>4</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see #2 above), a document or redaction index<sup>5</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>6</sup>, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the outcome of the Council's *in camera* review.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the outcome of the Council's *in camera* review.

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

### **Tina Renna v. County of Union (2008-110)**

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

The Executive Director respectfully recommends the Council find:

1. Because a completed version of the requested record did not exist in the medium requested at the time of the Complainant's OPRA request and required medium conversion pursuant to N.J.S.A. 47:1A-5.d., and because the Custodian provided the Complainant access to the requested record in the medium requested immediately after the medium conversion was completed, the Custodian did not violate N.J.S.A. 47:1A-5.e.

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<sup>4</sup> 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 office by the deadline.

<sup>5</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

<sup>6</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

2. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved “the desired result” because the complaint has not brought about a change (voluntary or otherwise) in the custodian’s conduct. *Id.* at 432. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual casual nexus does not exist between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney’s fee pursuant to N.J.S.A. 47:1A-6, 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 (2008).

Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. A motion was made by Ms. Auerswald and seconded by Ms. Kovach. The motion passed unanimously.

### **Eric Taylor v. Trenton Board of Education (Mercer) (2008-240)**

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:

1. The Custodian’s failure to respond in writing to the Complainant’s OPRA request for meeting minutes either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian failed to immediately respond in writing to the Complainant stating that no receipts, invoices and contracts exist or request additional time to respond to the Complainant’s request, the Custodian has violated N.J.S.A. 47:1A-5.e.
3. Although the Custodian failed to respond in writing to the Complainant’s OPRA request within the statutorily mandated time frame, the Custodian did respond to the Complainant on October 31, 2008, stating that no records responsive had been located, and subsequently certified in the Statement of Information that no records exist which are responsive to the request relevant to this complaint. Therefore, while the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., there was no unlawful denial of access pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request for meeting minutes within the statutorily

mandated seven (7) business days results in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. and the Custodian’s failure to respond immediately to the Complainant’s request for receipts, invoices and contracts violates N.J.S.A. 47:1A-5.e., because the Custodian responded in writing stating that no records responsive exist approximately twenty-one (21) business days following the date of the Complainant’s request, and subsequently certified in the Statement of Information that no records responsive exist, it is concluded that 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. However, the Custodian’s unlawful “deemed” denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Ms. Tabakin called for a motion to accept the Executive Director’s findings and recommendations as written. A motion was made by Ms. Kovach and seconded by Ms. Auerswald. The motion passed unanimously.

### **Jacqueline Andrews v. Township of Irvington (Essex) (2008-243)**

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

The Executive Director respectfully recommends the Council find:

1. The Custodian’s failure to respond in writing to Item #1 and Item #2 of the Complainant’s September 19, 2008 OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian failed to indicate the specific basis for the denial of access to the records relevant to the complaint, the Custodian has failed to prove that the denial of access was authorized by law in violation of N.J.S.A. 47:1A-6.
3. Because the Custodian failed to prove that the denial of access was authorized by law, and because Custodian’s Counsel informed the GRC that all of the records the Complainant requested have been disclosed or will be disclosed, the Custodian shall disclose the requested records with appropriate redactions, if any. If any portions of the record are redacted, the Custodian must provide a redaction index detailing the nature of the information redacted and the lawful basis for the redaction(s).
4. **The Custodian shall comply with item #3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, if any, including a detailed document index explaining the**

**lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>7</sup>, to the Executive Director.**

5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

**Ursula Cargill v. NJ Department of Education (2009-09) BA recusal**

This matter was not put to a vote due to the lack of quorum.

**Complaints Adjudicated on NJ Superior Court & NJ Supreme Court:**

None.

**Executive Director's Report and New Business:**

Ms. Starghill discussed

**Public Comment:**

None.

A motion to end the Council's meeting was made by Ms. Kovach and seconded by Ms. Auerswald. The motion passed unanimously.

Meeting adjourned at 11:01 a.m.

Respectfully submitted,

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Robin Berg Tabakin, Chairwoman

Date Approved:

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<sup>7</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."