



**Minutes of the Government Records Council  
November 4, 2009 Public Meeting – Open Session**

The meeting was called to order at 2:03 p.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 Acting Commissioner Charles Richman), and Kathryn Forsyth (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, Resource Manager Jyothi Pamidimukkala, and Deputy Attorney General Debra Allen.

A motion was made by Ms. Forsyth and seconded by Ms. Kovach to approve the open session minutes of the September 30, 2009 meeting. The motion passes by a unanimous vote.

A motion was made by Ms. Forsyth and seconded by Ms. Kovach to approve the closed session minutes of the September 30, 2009 meeting. The motion passes by a unanimous vote.

**Council Adjudication:**

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

1. Lorraine Miller v. NJ Department of Treasury, Division of Lottery (2008-188)
2. Marilyn Yuechka v. NJ Department of Treasury, Division of Lottery (2008-189)
3. Cynthia McBride v. City of Elizabeth (Union) (2008-226)
4. James Sage v. County of Monmouth, Board of Chosen Freeholders (2009-43)
5. Cynthia McBride v. Borough of Roseland (Essex) (2009-118)
6. Cynthia McBride v. Borough of Bay Head (Ocean) (2009-153)
7. Mary Yopez v. Bergen County Community College (2009-222)
8. John Paff v. Spring Lake Heights Fire District No. 1 (Monmouth) (2009-231)

9. Greg Byrnes v. Borough of Rockaway (Morris) (2009-271)
10. Robert Bilec v. NJ Department of Law & Public Safety, Office of the Attorney General (2009-273)
11. Richard Beeferman v. Borough of Kinnelon (Morris) (2009-276)

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. Forsyth. The motion passed unanimously.

The following complaints requiring individual adjudication were not put to a vote due to the lack of quorum:

1. James D'Andrea v. NJ Department of Community Affairs, Division of Local Government Services (2007-64)
2. William Gettler v. Wantage Regional Schools, Board of Education (Sussex) (2007-105)
3. Joyce Blay v. Jackson Board of Education (Ocean) (2007-177)
4. John Paff v. Borough of Lavallette (Ocean) (2007-209)
5. David Hinchcliffe v. NJ Department of Community Affairs, Division of Local Government Services (2007-306)
6. John Bentz v. Borough of Paramus (Bergen) (2008-89)
7. J.C. v. NJ Department of Education, Deputy Commissioner's Office (2008-91)
8. Robert Verry v. Borough of South Bound Brook (Somerset) (2008-161)
9. Ursula Cargill v. NJ Department of Education (2009-9)
10. Ursula Cargill v. State Ethics Commission (2009-10)
11. James Sage v. County of Monmouth Board of Chosen Freeholders (2009-43)

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

**Howard Kupferman v. Long Hill Township Board of Education (Morris) (2007-152)**

Mr. Stewart reviewed the GRC's analysis and issues in the case as set forth in the Supplemental 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. Because the Custodian certified he previously made all working spreadsheets used to project the 2007-2008 budget available in electronic format to the Complainant, and because the Custodian provided certified confirmation of compliance, pursuant to N.J. Court Rule 1:4-4, to the Executive Director within five (5) business days of receiving the Council's Interim Order, the Custodian has complied with the Council's September 30, 2009 Interim Order.
2. Although the Custodian failed to provide the audited financial statements for 2005-2006 in the requested electronic medium and failed to make the 2007-2008 budgetary records immediately available upon receipt of the Complainant's OPRA request, because the Custodian did disclose those records to which the Complainant was entitled, lawfully denied access to the balance of the requested records and complied with the Council's September 30, 2009 Interim Order, 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 denial of access by failing to immediately disclose budgetary records appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

3. Because no change has come about in the Custodian's actions as a result of the complaint, the Complainant is not a prevailing party as defined in Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and as such is not entitled to prevailing party attorney's fees. *See also*, Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008) and N.J.S.A. 47:1A-6.

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. Forsyth. The motion passed unanimously.

**Howard Kupferman v. Long Hill Township of Education (Morris) (2007-213)**

Ms. Starghill 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. Starghill presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. The Custodian has complied with the Council's August 11, 2009 Interim Order by providing the Council with all records set forth in said 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 simultaneously 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>1</sup>

<sup>1</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.

1	<b>Resignation Letter from Mr. Art DiBenedetto dated June 14, 2007</b>	Resignation letter from Mr. Art DiBenedetto.	The redacted portions of the resignation letter pertained to an affirmative action complaint.	<p>The first (1<sup>st</sup>) redaction is appropriate because Mr. DiBenedetto mentions the personnel matter of another individual and <u>N.J.S.A. 47:1A-10</u> exempts from disclosure all personnel records except for certain information and specific records.<sup>2</sup> The personnel information contained in this resignation letter is not of the nature that is disclosable under <u>N.J.S.A. 47:1A-10</u>.</p> <p>The second (2<sup>nd</sup>) redaction is not appropriate because that information is not specifically exempted from access under OPRA as the date and reason for separation of</p>
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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.

<sup>2</sup> OPRA provides that the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be a government record and shall not be made available for public access, except that: an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be a government record, among other records and data.

				employment of an employee is disclosable pursuant to <u>N.J.S.A. 47:1A-10</u> . <b>Therefore, the Custodian must disclose the redacted information to the Complainant.</b>
<b>2</b>	<b>Schwartz, Simon, Edelstein &amp; Kessler, LLP invoice dated March 15, 2007<sup>3</sup></b>	Schwartz, Simon, Edelstein & Kessler, LLP invoice for legal services provided to the Board of Education.	The redacted portions of the invoice dated March 15, 2007 pertained to confidential special education cases.	There were four (4) entries with redactions on these invoices. All redactions are proper because the information redacted is attorney-client privilege. Except that the amount of time (“ <b>0.75 Hrs</b> ”) is improperly redacted on the first (1 <sup>st</sup> ) 02/21/07 NC entry on page 1. <b>Because the GRC has revealed the missing information as part of these findings, no further disclosure is required.</b>
<b>3</b>	<b>Executive Session minutes dated July 11, 2007</b>	Executive Session minutes of the Board of Education.	The redacted portions of the executive session meeting minutes	There are four (4) redacted lines, multiple lines or partial lines on page 1. All four (4) redactions are appropriate because they are

<sup>3</sup> This record differs from the redacted record provided to the GRC by the Complainant as attached to the Denial of Access Complainant. Also, the Custodian provided this record along with an invoice dated April 10, 2007. The April 10, 2007 invoice was not requested for this *in camera* review pursuant to the Council’s August 11, 2009 Interim Order and as such will not be reviewed.

			<p>dated June 11, 2007 pertained to a student issue, affirmative action complaint and negotiations .</p>	<p>discussions of personnel issues and employee evaluations which are exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-10</u>.</p> <p>There are four (4) paragraphs on page 2. (There are no redactions in paragraph 2.)</p> <p><u>Paragraph 1:</u> These redactions are appropriate because the information is exempt from disclosure as information generated by or on behalf of public employers or public employees in connection with any grievance filed by or against an individual pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p> <p><u>Paragraph 3:</u> These redactions are appropriate because the discussion is exempt from disclosure as advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1</u>.</p>
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				<p><u>Paragraph 4:</u>  These redactions are appropriate because the discussion is exempt from disclosure as being in connection with collective negotiations, including documents and statements of strategy or negotiating position pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p>
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3. The Custodian unlawfully denied access to the second (2<sup>nd</sup>) redaction made to the resignation letter of Mr. DiBenedetto because that information is not specifically exempted from access under OPRA as the date and reason for separation of employment of an employee is disclosable pursuant to N.J.S.A. 47:1A-10. Therefore, the Custodian must disclose the redacted information to the Complainant. Additionally, the Custodian unlawfully denied access to the redaction of the amount of time (“0.75 Hrs”) on the first (1<sup>st</sup>) 02/21/07 NC entry on page 1 of the attorney invoices. Because the GRC has revealed the missing information as part of these findings, no further disclosure 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. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

**Carolyn James v. Holmdel Township Board of Education (Monmouth) (2007-242)**

Ms. Keys reviewed the GRC’s analysis and issues in the case as set forth in the Supplemental 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. Because the Custodian failed to simultaneously provide certified confirmation of his compliance with the Council’s August 11, 2009 Interim Order to the GRC, the Custodian has not fully complied with the Council’s August 11, 2009 Interim Order pursuant to Jung & O’Halloran v. Borough of Roselle (Union), GRC Complaint Nos. 2007-299; 2007-307 (April 2009).

2. Although the Custodian failed to fully comply with the Council's August 11, 2009 Interim Order by not providing certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4<sup>4</sup> to the Executive Director, and previously failed to disclose the requested record at the advice of legal counsel, the Custodian provided access to the records responsive to request to the Complainant within the five (5) business days after receipt of the Council's August 11, 2009 Interim Order. 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 unlawful 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. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

**Steven Brzdek v. New Jersey Parole Board (2008-81)**

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. Because the Complainant's Request Items No. 1 and No. 2 do not specify identifiable government records and would require the Custodian to conduct research to identify records responsive to the Complainant's requests, the Complainant's OPRA Request Items Nos. 1 and 2 are invalid pursuant to MAG Entertainment LLC. V. Div. of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005).
2. Because the Chief of Information Technology has certified that fulfilling the Complainant's request for copies of all official state e-mails to and from State Parole Board Executive Director Joseph M. Shields from January 1, 2008 through March 26, 2008 would substantially disrupt the agency's operations, because the Custodian attempted to reasonably accommodate the request, and because the Complainant failed to respond to the Custodian, the Custodian has not unlawfully denied the Complainant access to Request Item No. 3 pursuant to N.J.S.A. 47:1A-5.i., Vessio v. NJ Department of Community Affairs, GRC Complaint No. 2007-63 (May 2007) and Dittrich v. City of Hoboken (Hudson), GRC Complaint No. 2008-13 (May 2009).
3. Because the Custodian certified that no records responsive to Request Item No. 4 exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied access to the requested cell phone records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

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<sup>4</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."

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. Forsyth. The motion passed unanimously.

**Deborah Sandlaufer v. NJ Department of Human Services, Division of Medical Assistance & Health Services (2008-88)**

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 Complainant's request fails to identify with reasonable clarity the specific government records sought, the Complainant's request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). As such, the Custodian has not unlawfully denied the Complainant access to the records requested.
3. Although the Custodian's failure to provide a written response to the Complainant's request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian, under no legal obligation, created and disclosed records responsive to the Complainant's request, 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 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. Forsyth. The motion passed unanimously.

**Ali Morgano v. Essex County Prosecutor's Office (2008-104)**

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. Because the Complainant's description of the record requested as Item #1 fails to identify with reasonable clarity the precise record sought, and the Custodian has certified that she cannot locate a specific identifiable government record responsive to the Complainant's request, the Custodian has met the burden of proof that access to this record was not unlawfully denied pursuant to the Superior Court decisions MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
2. Because the Custodian certified that she responded to the Complainant in writing within the statutorily mandated response time indicating that there are no records responsive for Item #2 of the Complainant's request, and because the Complainant has failed to provide any evidence to contradict the Custodian's certification, the Custodian has borne her 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).

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. Forsyth. The motion passed unanimously.

**Ali Morgano v. Essex County Prosecutor's Office (2008-107)**

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 that because the Custodian certified that she responded to the Complainant in writing within the statutorily mandated response time indicating that there are no records responsive to the Complainant's request, and because the Complainant has failed to provide any evidence to contradict the Custodian's certification, the Custodian has borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-1.1., N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

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 Mr. Forsyth. The motion passed unanimously.

**Thomas Healy v. NJ Department of Labor & Workforce Development (2008-108)**

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

The Executive Director respectfully recommends the Council find:

1. The Custodian has complied with the Council's April 29, 2009 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order, as well as a legal certification within the extended time to comply with said 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 below within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director.**
3. Based on the *in camera* review of the records and examination of the law, the GRC has determined that the Custodian must disclose the following information contained in each of the records:
  - a. **Log sheets for the Forms DPF-77: Disclose only the "individual's name" and "title" columns pursuant to N.J.S.A. 47:1A-10.**
  - b. **On each of the twenty-nine (29) Forms DPF-77: Disclose only the "individual's name" (form box 4), current title (form box 6), approved salary (form box 10.c.), and specific experiential, educational or medical qualifications (form box 13) pursuant to N.J.S.A. 47:1A-10.**
  - c. **Log sheets for the Forms DPF-10: Disclose only the "individual's name" and "title" columns pursuant to N.J.S.A. 47:1A-10.**
  - d. **On each of the forty-two (42) Forms DPF-10: Disclose only the "individual's name" (form box 1), current title (form box 2), position description (form box 9), approved salary (form box 11), and specific experiential, educational or medical qualifications (form box 20) pursuant to N.J.S.A. 47:1A-10.**
4. The Custodian unlawfully denied access to the requested records because the Custodian did not disclose personnel information contained within the requested personnel records that is specifically required under N.J.S.A. 47:1A-10 to be government records open to the public. The Council finds the Custodian's argument unconvincing that disclosure of the personnel information which OPRA specifically designates as a government record open to the public would disclose otherwise exempt personnel records.
5. Since the redactions required are extensive given the number of records involved, a special service charge may be warranted. If the Custodian spends an extraordinary expenditure of time or effort making the redactions directed by the GRC, the Custodian may charge the hourly rate of the lowest level employee who is capable and available to make these redactions within the Custodian's office pursuant to N.J.S.A. 47:1A-5.c. **If the Complainant determines that he does**

**not want to pay such special service charge, the Custodian need only provide certified confirmation pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005) to the Executive Director within five (5) business days from receipt of this Order indicating same and this matter will be concluded accordingly.**

Ms. Tabakin called for a motion to accept the Executive Director's findings and recommendations with amendments. A motion was made by Ms. Forsyth and seconded by Mr. Kovach. The motion passed unanimously.

**Greg Badini v. County of Hunterdon (2008-122)**

Ms. Starghill 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. Starghill presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

1. The Custodian has complied with the Council's June 23, 2009 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order, as well as a document or redaction index, and a legal certification within the five (5) business days of receiving the Council's Order.
2. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to the supervisors' meeting minutes listed in the document index because said minutes are exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. as advisory, consultative, or deliberative material. As such, the Custodian has carried his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.**

[The table is not reproduced here since it is over one-hundred (100) pages long and is published on the GRC website.]

3. The Custodian lawfully denied access to the requested superiors' meeting minutes since those minutes are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. because the minutes are notes of discussions designed to develop pre-decisional recommendations about the operations and personnel issues of the department consistent with the court's decision in O'Shea v. West Milford Board of Education, 391 N.J. Super. 534 (App. Div. 2007).
4. Because the results of the *in camera* review determine that the Custodian lawfully denied access to the requested supervisors' meeting minutes since they are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 under OPRA, the Custodian did not knowingly and willfully violate OPRA and unreasonably deny access under the totality of the circumstances.

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 Mr. Forsyth. The motion passed unanimously.

**Alison McManus v. West Milford Township (Passaic) (2008-129)**

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

The Executive Director respectfully recommends the Council find that because the Custodian's Counsel provided the Complainant with the requested leave forms as well as provided certified confirmation of compliance to the GRC's Executive Director within the five (5) business days as ordered by the Council, the Custodian has complied with the Council's August 11, 2009 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. Forsyth and seconded by Mr. Kovach. The motion passed unanimously.

**Ali Morgano v. Essex County Prosecutor's Office (2008-146)**

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. Because the Custodian has certified that that no records responsive to Request Items Nos. 1 – 4 and 7 – 10 exist and there is no credible evidence in the record to refute the Custodian's certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to the records requested in Request Items Nos. 1 – 4 and 7 – 10.
2. Because Request Items Nos. 5 and 6 fail to identify with reasonable clarity the records sought, Request Items Nos. 5 and 6 are invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). As such, the Custodian has not unlawfully denied the Complainant access to the requested records.

Ms. 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 Ms. Kovach. The motion passed unanimously.

**Ronald Greco v. Borough of Fanwood (Union) (2008-147)**

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. Because Requests Item Nos. 1-4 and 6-7 fail to identify with reasonable clarity the specific government records sought and because Request Item No. 5 not only fails to specify identifiable government records but would require the Custodian to conduct research, the Complainant's seven (7) requests are invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). As such, the Custodian has not unlawfully denied the Complainant access to the records requested pursuant to Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
2. Because public agencies are expressly directed to adopt an official OPRA request form, and because the Borough's OPRA request form does not conform to the minimum form requirements set forth in N.J.S.A. 47:1A-5.f., the Custodian has violated N.J.S.A. 47:1A-5.f. The Custodian shall, therefore, amend the Borough of Fanwood's current OPRA request form to include all of the requirements set forth in N.J.S.A. 47:1A-5.f. Moreover, pursuant to O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (May 2008), the Custodian shall either delete the definition of a public record from the Borough's OPRA request form, or amend the form to include the definition of a "government record" as set forth in N.J.S.A. 47:1A-1.1.
3. **On the basis of the Council's determination in this matter, the Custodian shall comply with the Paragraph 2 of these Findings and Recommendations set forth above within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005)<sup>5</sup> to the Executive Director.**
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 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. Forsyth. The motion passed unanimously.

**Divya Srivastav-Seth v. NJ Department of Banking & Insurance, Small Employer Health Program (2008-152)**

Ms. Starghill 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. Starghill presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find:

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<sup>5</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."

1. The Custodian has not complied with the Council's August 11, 2009 Interim Order within five (5) business days from receipt of the Council's Interim Order. However, the Custodian did ultimately comply with the Interim Order by September 18, 2009.
2. The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to the requested record as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. As such, the Custodian has born his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.
3. The Custodian lawfully denied access to the requested record because said record is a memorandum prepared with the stated purpose "to assist with the Board's discussion" of the re-proposal of the Board's regulations. The memorandum is clearly deliberative in nature in which the author highlights changes to the existing regulations which the Board may need to consider. The deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. This memorandum fits squarely within the definition of this exemption.
4. Although the Custodian failed to comply with the Council's August 11, 2009 Interim Order within five (5) business days of receipt of the Order, the Custodian did ultimately comply with the Council's August 11, 2009 Interim Order on September 18, 2009. 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 untimely compliance with the Council's August 11, 2009 Interim Order 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. Forsyth and seconded by Ms. Kovach. The motion passed unanimously.

**Rebecca Ashton v. Maurice River Township (Cumberland) (2008-159)**

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 first 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 first June 26, 2008 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 Complainant failed to specify identifiable government records sought in either of the requests, both of the requests are invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). As such, the Custodian has not unlawfully denied the Complainant access to the records requested in either of the June 26, 2008 requests.
3. Although the Custodian's failure to provide a written response to the Complainant's first request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, 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 because the Complainant's requests were invalid, inasmuch as they failed to specify identifiable government records. However, the Custodian's unlawful "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. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

**Alfred Sallie, Sr. v. NJ Department of Banking & Insurance (2008-163)**

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 that:

1. Because the Complainant failed to identify with reasonable clarity the records sought, the Complainant's OPRA request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Morgano v. Essex County Prosecutor's Office, GRC Complaint No. 2007-156 (February 2008), and Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (March 2008). As such, the Custodian has not unlawfully denied the Complainant access to the records requested.
2. Because the Complainant's OPRA request is invalid, further analysis into the basis for the denial of access is unnecessary. However, in Sallie v. NJ Department of Banking and Insurance, GRC Complaint No. 2007-227 (April 2009), the Council considered a similar request by Mr. Sallie for exactly the same records wherein the Council held that the records contained in complaint number 200700136 were not subject to disclosure under OPRA.

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. Forsyth. The motion passed unanimously.

**Julie O'Connor v. Town of Dover (Morris) (2008-164)**

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 confidential settlement agreements entered into by private parties in civil court are subject to public access pursuant to Lederman v. Prudential Life Ins. Co., 385 N.J. Super. 307 (App. Div. 2006), certif. denied, 188 N.J. 353 (2006), Asbury Park Press v. County of Monmouth and Carol Melnick, 406 N.J. Super. 1 (App. Div. 2009), and Verni v. Lanzaro, 404 N.J. Super. 16 (App. Div. 2008), and because OPRA does not contain any provision which exempts access to records based on confidentiality clauses, the mere fact that the requested agreement contains a confidentiality clause is not a lawful basis for a denial of access under OPRA. As such, the Custodian unlawfully denied access to the requested settlement agreement and failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. However, because the requested settlement agreement was provided to the Complainant on October 15, 2009, the GRC declines to order disclosure.
3. Because the requested settlement agreement is subject to public access pursuant to Lederman v. Prudential Life Ins. Co., 385 N.J. Super. 307 (App. Div. 2006), certif. denied, 188 N.J. 353 (2006), Asbury Park Press v. County of Monmouth and Carol Melnick, 406 N.J. Super. 1 (App. Div. 2009), and Verni v. Lanzaro, 404 N.J. Super. 16 (App. Div. 2008), the Council declines to address the Custodian's other raised exemptions.
4. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated time frame resulted in a "deemed" denial and the Custodian failed to bear her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6, because the requested record was provided to the Complainant on October 15, 2009, 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 amended. A motion was made by Ms. Forsyth and seconded by Ms. Kovach. The motion passed unanimously.

**Frank Amoresano v. Rowan University (2008-168)**

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. 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 Audit Risk Assessment & Recommended Audit Plan prepared in 2006 to determine the validity of the Custodian's assertion that the record constitutes inter-agency or intra-agency advisory, consultative and deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver<sup>6</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see No. 1 above), a document or redaction index<sup>7</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>8</sup>, 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.**
3. The Custodian certified in the Statement of Information that she responded in writing to the Complainant advising that no cover letters responsive to the Complainant's request Item No. 2 existed at the time of the Complainant's request, and there is no credible evidence in the record to refute the Custodian's certification. Therefore, the Custodian has not unlawfully denied access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
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 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. Forsyth. The motion passed unanimously.

**Justice Allah v. Essex County Prosecutor's Office (2008-174)**

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<sup>6</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>7</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

<sup>8</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."

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 because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the Essex County Prosecutor's Office files to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005) and the Council's decision in Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (March 2008).

Ms. 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 Ms. Kovach. The motion passed unanimously.

**Frank Amoresano v. Rowan University (2008-186)**

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. Because the Complainant's request for the specific dates of the completed audits of Accume Partners seeks information rather than an identifiable government record, that portion of the request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005).
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 audit plans for the following eight (8) departments identified in the Complainant's request to determine the validity of the Custodian's assertion that the records constitute inter-agency or intra-agency advisory, consultative and deliberative material which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 :
  - Risk Assessment.
  - Human Resources and Payroll.
  - Rowan University gift reports.
  - Self-funded programs.
  - Purchasing and Accounts Payable.
  - Construction management.
  - Information technology network.
  - Grant Administration.

3. **The Custodian must deliver<sup>9</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (see No. 2 above), a document or redaction index<sup>10</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>11</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 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. Forsyth and seconded by Ms. Kovach. The motion passed unanimously.

**Reinaldo Aviles v. Perth Amboy Board of Education (Middlesex) (2008-191)**

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 Custodian did not provide access to the requested meeting minutes immediately, the Custodian did not violate N.J.S.A. 47:1A-5.i. because the Custodian made the requested meeting minutes available to the Complainant within the statutorily mandated seven (7) business day response time.
2. Although the Custodian granted access to the requested meeting minutes within the statutorily mandated seven (7) business day response time, the Custodian's two (2) verbal responses to the Complainant's OPRA request dated June 30, 2008 are insufficient pursuant to N.J.S.A. 47:1A-5.g. because said responses are not in writing.
3. Because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).
4. Because the Custodian certified that providing immediate access to the requested bills would substantially disrupt the operations of his agency, and because the

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<sup>9</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>10</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

<sup>11</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."

- Custodian properly requested an extension of time to respond to the Complainant's OPRA request, the Custodian's request for an extension of time to respond to the Complainant's OPRA requests is a sufficient and reasonable solution that accommodates the interests of the requestor and the agency, pursuant to N.J.S.A. 47:1A-5.g.
5. The Custodian's estimated 59.15 hour expenditure of time to fulfill the Complainant's request constitutes an extraordinary expenditure of time and warrants a special service charge pursuant to N.J.S.A. 47:1A-5.c.
  6. The Custodian's estimated special service charge of \$2,177.16 is reasonable pursuant to N.J.S.A. 47:1A-5.c. because it reflects the actual direct cost of fulfilling the Complainant's OPRA request.
  7. Because the Custodian provided the Complainant with the opportunity to review and object to the *charge* prior to it being incurred pursuant to N.J.S.A. 47:1A-5.c., and because OPRA is silent on whether such review must also include a detailed breakdown of how the charge was calculated, the Custodian has not violated said provision of OPRA.
  8. Because the Custodian has not yet made any redactions to the requested bills, the Custodian is not obligated to explain why there *might* be confidential information contained on said records pursuant to N.J.S.A. 47:1A-5.g.
  9. The Custodian has not unlawfully denied access to the Complainant's OPRA request dated August 5, 2008 because the Custodian assessed a reasonable special service charge of \$2,177.16 which reflects the actual direct cost of fulfilling the Complainant's OPRA request and because the Custodian has not yet made any redactions to the requested bills.
  10. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved "the desired result because the complaint 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 causal 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. Kovach and seconded by Ms. Forsyth. The motion passed unanimously.

**Anonymous v. Township of Long Hill Board of Education (Morris) (2008-192)**

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. The Custodian's refusal to fulfill the Complainant's OPRA request until the Complainant submitted each request on a separate OPRA request form, with the exception of the requested agenda since the Custodian disclosed said record to the Complainant on the second (2<sup>nd</sup>) business day following receipt of the Complainant's request, is an unreasonable limitation on access pursuant to N.J.S.A. 47:1A-1, Kushner v. Township of West Milford, GRC Complaint No. 2004-111 (October 2004) and Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (May 2007). The Council declines to order the Custodian to disclose the remaining request items because the Custodian certified that he provided the Complainant access to said records on August 29, 2008. However, it should be noted that the Custodian was not obligated to provide access to the June 2008 enrollment report because said report did not exist at the time of the Complainant's OPRA request. See Donato v. Borough of Emerson, GRC Complaint No. 2005-125 (March 2007).
2. Although the Custodian placed an unreasonable limitation on access to portions of the Complainant's OPRA request by refusing to fulfill said requests until the Complainant resubmitted them on separate OPRA request forms, there may be some circumstances in which a custodian may require a requestor to submit separate OPRA request forms, such as if the request is extremely voluminous as discussed in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007), Vessio v. NJ Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007), and Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-220 (September 2007). As such, 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.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Custodian disclosed the remaining records to the Complainant and abolished his policy of requiring separate OPRA request forms for multiple request items. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Specifically, all limitations on access shall be construed in favor of the public pursuant to N.J.S.A. 47:1A-1. Here, the Custodian placed an unreasonable limitation on the Complainant's right of access by requiring the Complainant to submit separate OPRA request forms for multiple request items. Therefore, the Complainant is 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). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

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. Forsyth. The motion passed unanimously.

**Michael Pierone v. County of Warren (2008-195)**

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:

1. Because N.J.S.A. 47:1A-10 specifically grants access to a public employee's salary and payroll record, and because the requested payroll check register is a payroll record that contains a public employee's salary information, as well as because the Custodian has failed to provide a lawful basis for the denial of access to the net payments contained on the payroll check register, the Custodian has failed to bear his burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6. As such, the Custodian must disclose the payroll check register from 2000 to the date of the Complainant's OPRA request to the Complainant.
2. **The Custodian shall comply with item #1 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>12</sup>, to the Executive Director.**
3. The Council defers analysis of whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees 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. Forsyth and seconded by Ms. Kovach. The motion passed unanimously.

**Tina Renna v. County of Union (2008-217)**

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:

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<sup>12</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."

1. 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 record (the written statement read by County Counsel at the July 24, 2008 freeholder meeting pertaining to employee lawsuits) to determine the validity of the Custodian's assertion that the record constitutes attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver<sup>13</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #1 above), a document or redaction index<sup>14</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>15</sup>, 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.**
3. 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.
4. The Council defers analysis of whether the Complainant is a prevailing party 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. Forsyth and seconded by Ms. Kovach. The motion passed unanimously.

**James Logue v. Borough of Fieldsboro (Burlington) (2008-223)**

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

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian verbally notified the Complainant on the sixth (6<sup>th</sup>) business day following receipt of the Complainant's OPRA request that the Custodian would require a deposit from the Complainant before fulfilling his request, the Custodian's failure to respond in writing to the Complainant's 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., DeLuca v. Town of Guttenberg, GRC

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<sup>13</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>14</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

<sup>15</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."

Complaint No. 2006-126 (February 2007) and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

2. Because the municipality has scant resources, and because of the extraordinary volume, time, and effort that will be required to fulfill the Complainant's OPRA request, the \$500.00 special service charge deposit assessed by the Custodian is valid and reasonable pursuant to N.J.S.A. 47:1A-5.c. and the Superior Court's decision in The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191 (Law Div. 2002) and the Custodian properly required payment of said special service charge deposit prior to disclosure of the requested records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
3. Because the Complainant's request for Item #1, the number of cell phones issued and to whom they are issued, constitutes a request for information and does not identify with reasonable clarity a specific identifiable government record, and because OPRA neither requires custodians to research files to discern which records may be responsive to a request nor requires custodians to create new records, the Custodian has met the burden of proof that access to these records was not unlawfully denied pursuant to the Superior Court decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
4. Because the Council has determined that the special service charge deposit assessed by the Custodian is valid and reasonable, the records responsive to request Item #2, copies of the redacted phone bills, shall not be disclosed to the Complainant until the Complainant pays the requested five hundred dollar (\$500.00) special service charge deposit.
5. Because the Custodian certified that she responded to the Complainant indicating that there are no records responsive for Item #2 of the Complainant's request, and because the Complainant failed to provide any evidence to contradict the Custodian's certification, the Custodian has borne her 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).
6. Because the Council has determined that the special service charge deposit assessed by the Custodian is valid and reasonable, the Complainant's request for Item #4, copies of council meeting minutes from January 1, 2003 to the date of request, shall not be disclosed to the Complainant until the Complainant pays the requested five hundred dollar (\$500.00) special service charge deposit.
7. **The Complainant shall comply with paragraph 4 and 6 above within five (5) business days from receipt of the Council's Interim Order by delivering to**

the Custodian (a) a special service charge deposit in the amount of five hundred dollars (\$500.00), or (b) a statement declining to purchase the records. The Complainant's failure to take any action within the five (5) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within seven (7) business days from receipt of the Council's Interim Order the Custodian shall provide to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The Custodian's statement shall be in the form of a certification in accordance with N.J. Court Rule 1:4-4.<sup>16</sup>

8. 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. Forsyth and seconded by Ms. Kovach. The motion passed unanimously.

**Chris Rogers v. Roxbury Board of Education (Morris) (2008-228)**

Ms. Starghill 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. Starghill 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 April 29, 2009 Interim Order by providing the Council with all records set forth in Paragraph 2 of the Order, as well as a document or redaction index, and a legal certification within the extended time to comply with said Order.
2. **The *In Camera* Examination set forth in the table below reveals the Custodian has lawfully denied access to the records listed in the document index because said record is exempt from disclosure under N.J.S.A. 47:1A-1.1 as advisory, consultative, or deliberative material.**

<b>Record or Redaction Number</b>	<b>Record Name/Date</b>	<b>Description of Record or Redaction</b>	<b>Custodian's Explanation/ Citation for Non-disclosure or Redactions</b>	<b>Findings of the <i>In Camera</i> Examination<sup>17</sup></b>

<sup>16</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."

<sup>17</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

1	“Assessment of the Custodial, Maintenance and Grounds Functions” prepared by Edvocate School Support Solutions	The report provides an assessment of the department’s current operations and recommendations for improvements.	The record is exempt from disclosure under OPRA as “... information generated by or on behalf of public employers or public employees in connection ... with collective negotiations, including documents and statements of strategy or negotiating position...” and as advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1</u>	The report is exempt from disclosure in its entirety as advisory, consultative or deliberative material pursuant to <u>N.J.S.A. 47:1A-1.1</u> . because the deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. <u>NLRB v. Sears, Roebuck &amp; Co.</u> , 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975).  The GRC finds no need to address the exemption for
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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.

				<p>“... information generated by or on behalf of public employers or public employees in connection ... with collective negotiations, including documents and statements of strategy or negotiating position ...” pursuant to <u>N.J.S.A. 47:1A-1.1.</u></p>
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3. The Custodian lawfully denied access to the requested report because the report is exempt from disclosure in its entirety as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. since the deliberative process privilege is a doctrine that permits government agencies to withhold documents that reflect advisory opinions, recommendations and deliberations submitted as part of a process by which governmental decisions and policies are formulated. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29, 47 (1975).
4. Because the results of the *in camera* review determine that the Custodian lawfully denied access to the requested report since it is exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 under OPRA, the Custodian did not knowingly and willfully violate OPRA and unreasonably deny access under the totality of the circumstances.

Ms. 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 Ms. Kovach. The motion passed unanimously.

**Richard Rivera v. Borough of Cliffside Police Department (Bergen) (2008-233)**

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 that:

1. Because the Custodian responded in writing to the Complainant’s OPRA request granting conditional access to the requested records upon payment of the duplication costs within the statutorily mandated seven (7) business days, the Custodian has not violated the provisions of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

2. Because the Custodian informed the Complainant in the response to the Complainant's OPRA request that the records requested as Item #1, copies of the Internal Affairs Annual Summary Reports for the years 2000 through 2007, would be disclosed forthwith following receipt by the Custodian of a copying fee payment in the amount of six dollars (\$6.00), and because the records were sent to the Complainant via the United States Postal Service on the same date the Complainant paid the copying fee, the Custodian did not unlawfully deny access to the requested records.
3. Because the Complainant withdrew his request for Item #2, Computer Aided Dispatching entries for mutual aid from other police agencies for 2006, 2007 and 2008 before he filed his Denial of Access Complaint, the Complainant's cause of action regarding this request item is moot and therefore should be dismissed.

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. Forsyth. The motion passed unanimously.

**Edwin Lopez v. NJ Department of Corrections (2008-250)**

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 because the Complainant's request seeks information rather than a specific identifiable government record, the request is invalid pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005). Additionally, the Custodian has borne her burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.

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. Forsyth. The motion passed unanimously.

**Jesse Wolosky v. Township of Frankford (Sussex) (2008-254)**

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. The Custodian's written response to the Complainant's request dated October 8, 2008 is insufficient pursuant to N.J.S.A. 47:1A-5.g. because she failed to specifically identify the records which were withheld from disclosure or do not exist.
2. Because the Custodian in this complaint certified that the records enumerated below did not exist at the time of the Complainant's OPRA request, the Custodian would have borne her burden of proving a lawful denial of access, 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 indicated that said records do not exist in her written response to the Complainant dated October 8, 2008.

- a. 2007 professional services agreement for Municipal Attorney Peter Laemers.
  - b. 2007 and 2008 health buyback for Township Administrator.
  - c. Workshop meeting minutes dated May 6, 2008, May 20, 2008, July 2008, August 2008, and September 2008.
  - d. 2008 petty cash year end report.
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 the requested e-mails between the Township Clerk and the Township Attorney regarding the recall of Robert McDowell to determine the validity of the Custodian's assertion that the records constitute attorney-client privileged information which is exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1.
4. **The Custodian must deliver<sup>18</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted documents (the requested e-mails between the Township Clerk and the Township Attorney regarding the recall of Robert McDowell), a document or redaction index<sup>19</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4<sup>20</sup>, that the documents provided are 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. Although the Custodian made the requested records enumerated below available to the Complainant, the Custodian violated OPRA at N.J.S.A. 47:1A-5.d and N.J.S.A. 47:1A-5.g by failing to provide said records to the Complainant by the Complainant's preferred method of delivery, when the Custodian had the capability to convert the records to an electronic medium for e-mail delivery or make paper copies for facsimile delivery. See O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008) and Paff v. Borough of Sussex (Sussex), GRC Complaint No. 2008-38 (July 2008). Thus, the Custodian must disclose to the Complainant the records responsive to the Complainant's OPRA request enumerated below by the method of delivery requested by the Complainant, upon the Complainant's payment of the actual cost of duplicating the records pursuant to N.J.S.A. 47:1A-5.b., if there is any.<sup>21</sup>
- a. Financial Disclosure Statements for the years 2007 and 2008 for the three (3) current Township Committee Members: Robert McDowell, Paul Sutphen and William Hahn.

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<sup>18</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>19</sup> The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

<sup>20</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."

<sup>21</sup> There is not likely any actual cost that may be justified for scanning and e-mail records.

- b. Financial Disclosure Statements for the years 2007 and 2008 for Administrator/Municipal Clerk: Luanne Cular.
- c. Financial Disclosure Statements for the years 2007 and 2008 for Township Attorney: Peter J. Laemers (2007) and Kevin Benbrook (2008).
- d. Local Government Officer Rosters for 2007 and 2008.
- e. 2008 Professional Services Agreement for Municipal Attorney Kevin Benbrook.
- f. 2007 and 2008 salary resolutions and amendments.
- g. Workshop meeting minutes dated: March 18, 2008, April 15, 2008 and June 17, 2008.
- h. 2007 petty cash register.

- 6. The Custodian shall comply with item # 5 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>22</sup>, to the Executive Director.**
7. 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 and the outcome of the Council's *in camera* review.
8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order and 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. Forsyth and seconded by Ms. Kovach. The motion passed unanimously.

**Ricardo Gonzales v. City of Gloucester (Camden) (2008-255)**

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'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 Complainant's OPRA request is overly broad inasmuch as it fails to specify identifiable government records and requires the Custodian to conduct

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<sup>22</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."

research in order to determine the records which may be responsive to the request, it is invalid under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

3. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial and the Custodian failed to provide a legal certification to the GRC, because the Complainant's OPRA request is invalid pursuant to OPRA inasmuch as it fails to specify identifiable government records, 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 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. Forsyth and seconded by Ms. Kovach. The motion passed unanimously.

#### **Barbara Kulig v. Cumberland County Board of Freeholders (2008-263)**

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 the Complainant's October 18, 2008 OPRA request within the statutorily mandated time frame pursuant to N.J.S.A. 47:1A-5.i., the Custodian's response was legally insufficient because he failed to respond to each request item contained in the request individually. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Willingboro Board of Education (Burlington), GRC Complaint No. 2007-272 (May 2008).
2. The Complainant's OPRA request is overly broad because it fails to specify identifiable government records and requires the Custodian to conduct research in order to determine the records which may be responsive to the request, and is thus invalid under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

3. Although the Custodian's failure to respond in writing to each request item individually within the statutorily mandated seven (7) business days resulted in a violation of N.J.S.A. 47:1A-5.g., because the Complainant's OPRA request is invalid pursuant to OPRA inasmuch as it fails to specify identifiable government records, 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 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. Forsyth and seconded by Ms. Kovach. The motion passed unanimously.

**Betty Greitzer v. NJ Department of Law & Public Safety, Division of Consumer Affairs (2008-279)**

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. Because N.J.S.A. 47:1A-10. does not operate to make identification credentials issued by the State of New Jersey to Kosher Enforcement Bureau representatives exempt from disclosure, the Custodian has failed to meet the burden of proving that the denial of access to Item #3 of the Complainant's request was authorized by law pursuant to N.J.S.A. 47:1A-6.
2. Because the Custodian failed to prove that the denial of access was authorized by law, the Custodian shall disclose the records listed as Item #3 of the records relevant to the complaint.
3. **The Custodian shall comply with paragraph #2 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 any redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>23</sup>, to the Executive Director.**
4. Because the Complainant's request for Item #1, Item #2 and Items #4 through Item #8 is overbroad and constitutes a request for a class of various documents rather than a request for a specific identifiable government record, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian has met the burden of proof that access to these records was not unlawfully denied pursuant to the Superior Court decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police

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<sup>23</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."

Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

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. Forsyth. The motion passed unanimously.

**Rita Watson v. Washington Township Public Schools (Gloucester) (2009-29)**

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 because the evidence of record shows that the Complainant was no longer the legal guardian of A.W. at the time of the OPRA request, the Custodian did not unlawfully deny the Complainant access to A.W.'s pupil record pursuant to *N.J.A.C.* 6A:32-1 et seq. and N.J.S.A. 47:1A-9.a.

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. Forsyth. The motion passed unanimously.

**Jesse Wolosky v. Sparta Board of Education (Sussex) (2009-56)**

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. Pursuant to Spaulding v. County of Passaic, GRC Complaint No. 2004-199 (September 2006), Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian's proposed charge of \$5.00 per audiotape recording of the requested meeting is not the actual cost and in violation of N.J.S.A. 47:1A-5.b. *See also* O'Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (December 2008). *See also* O'Shea v. Madison Public School District (Morris), GRC Complaint No. 2007-185 (December 2008). Further, the Custodian failed to bear his burden of proving that the proposed charge was reasonable pursuant to N.J.S.A. 47:1A-6.

2. Although the Board of Education's official OPRA request form does not contain a space for the maximum cost authorized and details about the actual costs of photocopying, the request form is not in violation of OPRA pursuant to N.J.S.A. 47:1A-5.f. because these two (2) items are not required to be on an official request form pursuant to OPRA. Additionally, the omission of said items does not create a barrier to public records.
3. Although the Custodian failed to bear his burden of proving that the proposed fee of \$5.00 per audiotape represented the actual cost under N.J.S.A. 47:1A-5.b., because the Custodian initially provided access to the two (2) audiotapes responsive pending payment of the proposed duplication fee and subsequently advised the Complainant in writing of the amended proposed duplication fee of \$0.68 (representing the actual cost to reproduce said records), 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 failure to bear his burden of proving that the proposed charge was reasonable under OPRA of access appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint 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 causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is 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). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

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

**Jacqueline Andrews v. Township of Irvington (Essex) (2009-111)**

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 expenses and invoices either granting access, denying access, seeking clarification or properly requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's 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). Further, the Custodian violated N.J.S.A. 47:1A-5.e. by failing to provide immediate access to the requested records or respond immediately to the Complainant's request for expenses and invoices pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007)

2. The Custodian failed to bear his burden of proving a lawful denial of access to the records requested in the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-6. **Therefore, the Custodian shall disclose the requested records with appropriate redactions, if any, and provide the Complainant 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 N.J.S.A. 47:1A-5.g. If no records responsive to the Complainant's March 11, 2009 OPRA request exist, the Custodian must provide a certification stating as such to the GRC.**
3. **The Custodian shall comply with Item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, 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>24</sup>, to the Executive Director.**
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 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. Forsyth. The motion passed unanimously.

**Nashid Sddeeq v. NJ Department of Corrections (2009-182) and Nashid Sddeeq v. NJ Department of Corrections (2009-183)**

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 to prevent the expenditure of unnecessary funds in order for the New Jersey Department of Corrections to prepare for a defense of these Denial of Access Complaints, as well as to prevent the expenditure of the administrative costs generated at the GRC to process this matter for the benefit of the parties, said complaints should be dismissed pursuant to Swindell v. New Jersey Department of Environmental Protection and Energy, Bureau of Coastal and Land Use Enforcement, OAL Docket No. ESA 5675-92 (Initial Decision 1993) because

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<sup>24</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."

the GRC cannot contact the Complainant and because the Complainant has not made attempts to contact the GRC regarding these complaints.

Ms. 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 Ms. Kovach. The motion passed unanimously.

**Complaints on Appeal:** None.

**Complaints Adjudicated on NJ Superior Court & NJ Supreme Court:** None.

**Executive Director's Report and New Business:** The Executive Director informed the Council members that the following information would be disseminated to requestors and records custodian via the GRC List Serv and over GovConnect:

1. OPRA Alert Newsletter, Volume 2, Issue 2 (November 2009) – Special Service Charges and Municipal Ordinance. The newsletter informs custodians that ordinances are prohibited for special service charges since each must be determined on a case-by-case basis and reflect actual costs that are reasonable according to the Appellate Division of the New Jersey Superior Court.
2. Custodians Handbook: Edition 3 (October 2009) – First revision of the handbook since 2003. This handbook now includes recent GRC and court decision references and accurately reflects the current state of the law.
3. Model Request Form (2009) – Revised with the assistance of the General Counsel of the New Jersey Press Association. The form includes the twenty-four (24) exemptions from disclosure under OPRA with check boxes so that custodians may respond to requests with the lawful basis for denials. The form also includes information regarding the Common Law right to access. Additionally, the form has space for a requestor's e-mail address and fax number to better enable custodians to respond to requests by the requestor's desired method of delivery.

**Public Comment:** None.

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

Meeting adjourned at 3:50 p.m.

Respectfully submitted,

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Robin Berg Tabakin, Chairwoman

Date Approved: