



**Minutes of the Government Records Council
February 23, 2010 Public Meeting – Open Session**

The meeting was called to order at 9:52 a.m. at the Department of Community Affairs, Conference Room 126, Trenton, New Jersey. The Open Public Meetings Act statement was read.

The pledge of allegiance was recited while standing by all.

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

Ms. Hairston called the roll:

Present: Robin Berg Tabakin, Chairwoman, Harlynn Lack (designee of Department of Community Affairs Acting Commissioner Lori Grifa), and Kathryn Forsyth (designee of Department of Education Commissioner Bret Schundler).

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, and Deputy Attorney General Debra Allen.

Ms. Tabakin read the Resolution for Closed Session (Resolution Number A 2010-01-26) to go into closed session pursuant to N.J.S.A. 10:4-12.b(7) to receive legal advice and discuss anticipated litigation in which the public body may become a party in the following matters:

1. Nancy Lewen v. Robbinsville Public School District (Mercer) (2008-211) ***In-Camera Review***
2. Joseph Elcavage v. West Milford Township (Passaic) (2009-07)
3. Joseph Elcavage v. West Milford Township (Passaic) (2009-08)
4. John Paff v. Borough of Wildwood Crest (Cape May) (2009-54)

A motion was made to go into closed session by Ms. Lack and seconded by Ms. Forsyth to go into closed session. The motion was adopted by a unanimous vote. A motion was made by Ms. Lack and seconded by Ms. Forsyth to end the closed session. The motion was adopted by a unanimous vote. The Council met in closed session from 9:54 a.m. until 11:00 a.m.

Open Session reconvened at 11:10 a.m. and Ms. Hairston called roll.

Present: Ms. Tabakin, Ms. Lack, and Ms. Forsyth.

A motion was made by Ms. Lack and seconded by Ms. Forsyth to approve the closed session minutes of the January 26, 2010 meeting. The motion passes by an unanimous vote.

A motion was made by Ms. Lack and seconded by Ms. Forsyth to approve the open session minutes of the January 26, 2010 meeting. The motion passes by an unanimous vote.

Council Adjudication:

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

1. Teasha Griffin v. Salem County Prosecutor's Office (2009-139)
2. B. Connor Hamilton v. Springfield Board of Education (Union) (2009-147)
3. Susan Moeller v. Borough of East Rutherford (Bergen) (2009-224)
4. John Paff v. City of Beverly (Burlington) (2009-279)
5. Harry B. Scheeler, Jr. v. NJ Department of Community Affairs, Division of Codes and Standards (2009-284)
6. Gregory Byrnes v. Township of Randolph (Morris) (2009-294)
7. Daniel Gatson v. Morris County Prosecutor's Office (2009-321)
8. George Vasquez v. Passaic County Prosecutor's Office (2009-326)
9. Eric Taylor v. Jersey City Board of Education (Hudson) (2009-329)
10. Jay Thomas v. Ramapo College of New Jersey (2009-330)
11. David Weiner v. City of Newark (Essex) (2009-335)
12. Drew Martin v. TEAM Academy Charter School (Essex) (2010-01)
13. Frank D'Amore, Sr. v. Borough of North Plainfield (Somerset) (2010-08)
14. James J. Devine v. Middlesex County Board of Chosen Freeholders (2010-16)

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. Lack 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. Gertrude Casselle v. NJ Department of Community Affairs, Division of Community Resources (2008-248)
10. Ursula Cargill v. NJ Department of Education (2009-9)
11. Ursula Cargill v. State Ethics Commission (2009-10)

12. James Sage v. County of Monmouth Board of Chosen Freeholders (2009-43)

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

Kreszentia Morris v. Borough of Victory Gardens (Morris) (2008-137)

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

The Executive Director respectfully recommends the Council find that:

1. Because Item No. 1 of the June 17, 2008 request and Item No. 4 of the June 18, 2008 OPRA request (except the request for the resume) fails to specify identifiable government records or dates within which the Custodian could focus her search and would require the Custodian to conduct research to identify and locate government records which may be responsive to the requests, these two (2) requests are overly broad and are therefore invalid under OPRA. 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 New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007). The Custodian has not therefore unlawfully denied access to the requested records. Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
2. Because the Custodian has certified that no resume responsive to request Item No. 4 of the Complainant's June 18, 2008 request exists, and because the Complainant has provided no credible evidence to refute the Custodian's certification in this regard, the Custodian has not unlawfully denied access to the requested records. *See* Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005). Moreover, the Custodian's initial response was insufficient pursuant to N.J.S.A. 47:1A-5.i. because the Custodian failed to state that no resume responsive existed in her initial written response.
3. Because the Custodian was not obligated under OPRA to create records that do not otherwise exist, the Custodian went above and beyond her responsibilities under OPRA to create a handwritten record that was responsive to Item No. 2 of the Complainant's June 17, 2008 OPRA request and obtain additional drivers' abstracts responsive to request Item No. 2 of the Complainant's June 18, 2008 OPRA request, the Custodian has not unlawfully denied access to the requested records under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).
4. Because the Complainant's June 20, 2008 OPRA request fails to identify a specific time period within which the Custodian could focus her search and would require the Custodian to conduct research to identify and locate government records which may be responsive to the request, this request is overly broad and is therefore invalid under OPRA. 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 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). The Custodian has not therefore unlawfully denied access to the requested records. *See also* Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007).

5. Because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when Mr. Wood would respond to Item No. 3 of the Complainant's June 18, 2008 OPRA request, the Custodian's written response is inadequate under OPRA pursuant to Ghana v. New Jersey Department of Correction, GRC Complaint No. 2008-154 (June 2009), and the Complainant's request item is "deemed" denied 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). Additionally, although Mr. Wood did respond to the Complainant on June 29, 2008, his verbal response was insufficient and therefore in violation to N.J.S.A. 47:1A-5.g., because he failed to respond in writing, as required under OPRA, on behalf of the Custodian.
6. Because Mr. Wood certified that the 1099s responsive to request Item No. 3 of the Complainant's June 18, 2008 OPRA request were missing or not yet completed, Mr. Wood has not unlawfully denied access (except for failing to provide a response to the Complainant in writing pursuant to N.J.S.A. 47:1A-5.i.) to the requested 1099s and is under no obligation to provide the requested records after responding that no records were available at the time of the Complainant's request pursuant to Driscoll v. School District of the Chathams (Morris), GRC Complaint No. 207-303 (June 2008).
7. Because the Custodian failed to immediately respond in writing to Item No. 1 of the Complainant's June 18, 2008 OPRA request granting or denying access to the requested invoices or requesting an extension of time to respond, the Custodian has violated N.J.S.A. 47:1A-5.e. pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 28, 2007). Moreover, the Custodian unlawfully denied access to the requested records. The Custodian shall disclose the requested invoices and legally certify to the search undertaken.
8. **The Custodian shall comply with Item No. 7 above within five (5) business days from receipt of the Council's Interim Order and provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4¹, to the Executive Director.**
9. 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.
10. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

¹ "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. Forsyth and seconded by Ms. Lack. The motion passed unanimously.

Cecilia Bogart v. Borough of Lebanon (Hunterdon) (2008-172)

Cecilia Bogart v. Borough of Lebanon (Hunterdon) (2008-173)

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

The Executive Director respectfully recommends the Council find that:

1. Although the evidence of record indicates that the Custodian timely sought, in writing, an extension of time to provide a response to the request within the statutorily-mandated seven (7) business day response period, the Custodian's response to the Complainant's June 26, 2008 request occurred one (1) day beyond the extension date of July 17, 2008 stated by the Custodian in her letter to the Complainant dated July 1, 2008. Therefore, 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 extension of 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 evidence of record indicates that the Custodian's response to the Complainant's July 9, 2008 OPRA request was timely and in writing, and because the Custodian provided records responsive within the statutorily mandated response period and provided a legal basis for the non-disclosure of the remainder of the records, the Custodian provided a timely and sufficient response to the Complainant's July 9, 2008 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).
3. Because request Items No. 1 and No. 2 of the Complainant's June 26, 2008 OPRA request would require the Custodian to conduct research to ascertain the records responsive to the request, said request Items are invalid under OPRA pursuant to MAG Entertainment LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 549 (App. Div. 2005), and N.J. Builders Ass'n v. NJ Council on Affordable Housing, 390 N.J. Super. 166, 176 (App Div.), *certif. denied* 190 N.J. 394 (2007). *See also* Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
4. Because the Custodian certified in the Statement of Information that no records which were responsive to the Complainant's June 26, 2008 request Item No. 3 and July 9, 2008 OPRA request Item Nos. 1, 2, 3 and 5 existed at the time of the Complainant's two (2) requests, 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 records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

5. Because the Custodian certified in the Statement of Information that at the time of the Complainant's July 9, 2008 request for executive council meeting minutes dated December 13, 2007, said meeting minutes had not yet been approved by the governing body, such minutes constitute inter-agency, intra-agency advisory, consultative, or deliberative material and at the time of the request were exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. Therefore, the Custodian did not unlawfully deny access to the requested executive council meeting minutes dated December 13, 2007. N.J.S.A. 47:1A-1.1; Parave-Fogg v. Lower Alloways Creek Twp, GRC Complaint No. 2006-51 (August 2006).
6. Based on the Appellate Division's decision in Windish v. Mount Arlington Board of Education, N.J. Super. Unpub. Lexis 228 (App. Div. 2007), it appears from the evidence of record that the Custodian in the matter before the Council properly charged the Complainant the enumerated copying rates set forth at N.J.S.A. 47:1A-5.b. for the production of records in response to the Complainant's June 26, 2008 OPRA request.
7. Because the Custodian in the matter before the Council charged the Complainant the actual postage costs associated with delivery by mail of the requested records in connection with the Complainant's June 26, 2008 OPRA request, the Custodian has not violated OPRA.
8. The Custodian must refund to the Complainant \$2.55, representing the postage fees inappropriately charged for the July 9, 2008 OPRA request.
9. **The Custodian shall comply with item #8 above and simultaneously provide certified confirmation of compliance, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director, within five (5) business days of receipt of the Council's Interim Order.**
10. The Council defers its analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the requested records pending compliance with this 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. Lack 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 Supplemental Findings and Recommendations of the Executive Director. Ms. Lownie presented the following recommendations to the Council:

The Executive Director respectfully recommends the Council find that:

1. Because the current Custodian provided the Complainant with the records identified in the Council's December 22, 2009 Interim Order with appropriate redactions, and provided the GRC with certified confirmation of compliance, all within the five (5)

business days as ordered by the Council, the current Custodian has complied with the Council's December 22, 2009 Interim Order.

2. Although the original Custodian provided the Complainant with an insufficient response to his OPRA request, unlawfully denied access to e-mails in whole or in part, and violated N.J.S.A. 47:1A-5.d. and N.J.S.A. 47:1A-5.g. by failing to provide records by the Complainant's preferred method of delivery, there is no evidence in the record that suggests said violations of OPRA were intentional and deliberate, with knowledge of their wrongfulness. There is also no evidence in the record to contradict the original Custodian's certification that the records requested were available on October 8, 2008. Therefore, it is concluded that the original 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. Although the current Custodian did not timely comply with Paragraphs 4 or 6 of the Council's November 4, 2009 Interim Order by providing the Council with all records set forth in Paragraphs 4 and 6 of the Order within five (5) business days of receiving the Council's Order or by November 16, 2009, because the current Custodian provided the Complainant with the records identified in the Council's December 22, 2009 Interim Order with appropriate redactions, and provided the GRC with certified confirmation of compliance, all within the five (5) business days as ordered by the Council, the Custodian has complied with the Council's December 22, 2009 Interim Order. Therefore, it is concluded that the current 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.
4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's November 4, 2009 and December 22, 2009 Interim Orders, 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. Specifically, because of the filing of this Denial of Access Complaint, the Custodian disclosed records that were initially denied and disclosed records by the Complainant's preferred method of delivery. Further, the relief ultimately achieved had a basis in law. The original Custodian unlawfully denied access to all or portions of the requested e-mails, and failed to provide other records via the Complainant's preferred method of delivery when she had the capability to do so. 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. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Jesse Wolosky v. Township of Frankford (Sussex) (2008-278)

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

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian provided access to the Complainant to the requested executive session meeting minutes dated August 28, 2008, with redactions, on December 29, 2009 and provided certified confirmation of compliance with the Council's December 22, 2009 Interim Order on December 29, 2009, four (4) business days after the Interim Order was issued, the Custodian has complied with the Council's December 22, 2009 Interim Order.
2. Although the Custodian violated N.J.S.A. 47:1A-5.g. in her response to the Complainant's OPRA request by unlawfully denying access to the entire record when only a portion of the record was exempt from disclosure pursuant to the Open Public Meetings Act and failed to bear her burden of proving that the proposed \$25 per audio tape copying fee was permissible under OPRA, the Custodian complied with the Council's December 22, 2009 Interim Order and provided the Complainant with the requested records with redactions in compliance with the Council's December 22, 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.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's December 22, 2009 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." 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 written. A motion was made by Ms. Forsyth and seconded by Ms. Lack. The motion passed unanimously.

Jesse Wolosky v. Township of Montague (Sussex) (2009-14)

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

The Executive Director respectfully recommends the Council find that:

1. 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 charge of \$5.00 per CD for the requested audio recording of the public meeting dated February 4, 2008 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. Further, the Custodian failed to bear her burden of proving that the charge was the actual cost pursuant to N.J.S.A. 47:1A-6.
2. Pursuant to O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (May 2008), the Custodian must either remove from its form the section entitled "exceptions to public access to government records" or amend the form to include the remainder of the applicable legal authorities governing the various exemptions listed in said section. Alternatively, the Custodian may adopt the GRC model request form in its entirety.
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)² 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.
5. **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. Lack. The motion passed unanimously.

Jesse Wolosky v. Township of Green (Sussex) (2009-15)

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

The Executive Director respectfully recommends the Council find:

1. The Custodian has complied with the intent of the Council's December 22, 2009 Interim Order by providing the Complainant access to the check registries that are maintained in the format requested, making the remaining check registries available

² "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."

to the Complainant by asking if he wished to receive them in PDF format, providing access by one (1) of the Complainant's preferred methods of delivery (e-mail), and providing access at the actual cost of duplication which is zero. However, because the Custodian failed to provide her completed legal certification to the GRC within the five (5) business days as ordered by the Council, the Custodian has not timely complied with the Council's December 22, 2009 Interim Order.

2. The Custodian violated N.J.S.A. 47:1A-5.d. and N.J.S.A. 47:1A-5.g. by failing to provide the requested executive session minutes by the Complainant's preferred method of delivery. However, the Custodian did ultimately grant the Complainant access to the executive session minutes by one of his preferred methods of delivery (facsimile). Additionally, while the Custodian improperly charged the Complainant \$25.00 for a CD-ROM of the requested check registry data pursuant to N.J.S.A. 47:1A-5.b., the Custodian ultimately complied with the intent of the Council's December 22, 2009 Interim Order by providing the Complainant access to the check registries that are maintained in the format requested, making the remaining check registries available to the Complainant by asking if he wished to receive them in PDF format, providing access by one (1) of the Complainant's preferred methods of delivery (e-mail), and providing access at the actual cost of duplication which is zero. However, because the Custodian failed to provide her completed legal certification to the GRC within the five (5) business days as ordered by the Council, the Custodian has not timely complied with the Council's December 22, 2009 Interim Order. Further, although the Township's OPRA request form initially violated OPRA because it contained misinformation regarding access to police investigation reports, the Custodian ultimately adopted the GRC's Model Request Form. Moreover, there is no evidence in the record suggesting that the Custodian's actions which amounted to her various violations of OPRA were intentional and deliberate, with knowledge of their wrongfulness and not merely negligent, heedless or unintentional. 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.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's December 22, 2009 Interim Order, 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 to the Complainant the requested executive session minutes by the Complainant's preferred method of delivery, the Custodian provided the Complainant access to the requested check registry data in the medium requested at the actual cost, and the Custodian adopted the GRC's Model Request Form. 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. The Custodian did not provide the Complainant access to the requested records in the medium requested or by the preferred method of delivery until after the filing of this Denial of Access Complaint. Further, the relief ultimately achieved had a basis in law. Specifically, N.J.S.A. 47:1A-5.d. provides that custodians must provide access to the requested records in the medium requested. 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. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Jesse Wolosky v. Township of Vernon (Sussex) (2009-16)

Ms. Starghill reviewed the GRC's analysis and issues in the case as amended in the Supplemental 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 provided the GRC with a legal certification, the unredacted record requested for the *in camera* inspection and a redaction index on December 29, 2009. Therefore, the Custodian timely complied with the Council's December 22, 2009 Interim Order.
2. The GRC declines to conduct an *in camera* review of the Township Council's executive session minutes dated August 14, 2008 requested by the Complainant. Pursuant to the Court orders provided to the GRC by the Custodian's Counsel subsequent to the Council's December 22, 2009 Interim Order, the redactions of these minutes have previously been mediated among the Custodian's Counsel and Complainant's Counsel as of May 2009³. In Bart v. City of Paterson Housing Authority, 403 N.J. Super. 609 (App. Div. 2008), in which the Court upheld Plaintiff's denial of access to a requested record he already had in his possession at the time of the OPRA request, the Appellate Division noted that requiring a custodian to duplicate another copy of the requested record and send it to the complainant does not advance the purpose of OPRA, which is to ensure an informed citizenry. Therefore, the GRC views the Complainant's persistence with this Denial of Access Complaint after the exact record was previously provided to the Complainant with redactions specifically mediated between the parties' attorneys (as ordered by the Superior Court of New Jersey) an egregious waste of State resources for duplicative prosecution of this matter.
3. Although the Custodian failed to provide the Complainant with a detailed and lawful basis for each redaction in the Township Council's executive session minutes dated August 14, 2008, resulting in a legally insufficient response pursuant to N.J.S.A. 47:1A-5.g., the Custodian did provide the requested record with redactions as previously mediated among the Custodian's Counsel and Complainant's Counsel in May 2009 pursuant to Wolosky v. Township of Vernon and Robin Kline, Records

³ The GRC assumes that the records with the mediated redactions were provided to the Complainant by May 2009 because the Court order directing such mediation was issued in March 2009 while the Court order directing the parties agree to reasonable attorney's fees for the Complainant was issued in May 2009 – presumably after all records were provided with the mediated redactions.

Custodian, Docket No.:SSX-L-079-09, Superior Court of New Jersey, Sussex County (March 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.

4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved "the desired result because the complaint did not bring 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. This is especially true given that the relief ultimately achieved was the result of a previously decided Court action⁴ for which reasonable attorney's fees have already been awarded to the Complainant. Therefore, the Complainant is not a prevailing party entitled to a second 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) for a duplicative resolution of this matter.

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 Mr. Lack. The motion passed unanimously.

Stephen Biss v. New Providence Police Department (Union) (2009-21)

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

The Executive Director respectfully recommends the Council find that under the state of the law at the time of the Complainant's request dated December 11, 2008, the Complainant's request was not a valid OPRA request because the Complainant failed to submit said request on the Borough's official OPRA request form. N.J.S.A. 47:1A-5.g.; MAG Entertainment LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Twp. of Stafford Police Dept., 381 N.J. Super. 30, 33 (App. Div. 2005); and Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J. Super. 205, 213 (App. Div. 2005). Therefore, the Custodian did not unlawfully deny the Complainant access to the records requested.

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. Lack. The motion passed unanimously.

Jesse Wolosky v. Township of Stillwater (Sussex) (2009-22)

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

⁴ Wolosky v. Township of Vernon and Robin Kline, Records Custodian, Docket No.:SSX-L-079-09, Superior Court of New Jersey, Sussex County (March 2009).

The Executive Director respectfully recommends the Council find that:

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 November 10, 2008 executive session minutes to determine the validity of the Custodian's assertion that the redactions made to the requested closed session minutes were for confidential contract negotiations exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and N.J.S.A. 10:4-12.7., as well as the Complainant's contention that additional redactions were made to the requested minutes without explanation.
2. **The Custodian must deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted document (see #1 above), a document or redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4⁷, 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. Pursuant to N.J.S.A. 47:1A-5.b., 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 must charge the actual cost of duplicating the requested record. As such, the Custodian's charge of \$5.00 for a copy of the December 2, 2008 Stillwater public meeting is unreasonable and violates N.J.S.A. 47:1A-5.b. Because there is no evidence that the Complainant actually paid the proposed \$5.00 copying fee, the Council declines to order any refund to the Complainant.
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.
5. 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. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Jesse Wolosky v. County of Sussex (2009-26)

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

⁵ 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.

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

⁷ "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 Executive Director respectfully recommends the Council find that:

1. Because the Board of Chosen Freeholders approved the November 25, 2008 executive session minutes on December 17, 2008, said minutes no longer constituted advisory, consultative or deliberative (ACD) material at the time of the Complainant's request and were therefore disclosable pursuant to N.J.S.A. 47:1A-1.1. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Accordingly, the Custodian has failed to bear her burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6.
2. Pursuant to O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (May 2008), the Custodian shall amend the Board of Freeholder's official OPRA request form to include the remainder of the applicable provisions of OPRA.
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)⁸ 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.**
5. **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. Lack. The motion passed unanimously.

Russell Miller v. Westwood Regional School District (Bergen) (2009-49)

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

The Executive Director respectfully recommends the Council find that:

1. Because a recording of an agency's public meeting that is used to draft the agency's official meeting minutes is not deliberative in nature, such recording is not exempt from disclosure under OPRA as advisory, consultative or deliberative (ACD) material pursuant to In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000), Education Law Center v. NJ Department of Education, 198 N.J. 274 (2009), and Burlett v. Monmouth County Board of Freeholders, GRC Complaint No. 2004-75 (August 2004). Therefore, the Custodian has failed to bear his burden of proving that

⁸ "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."

he lawfully denied the Complainant access to the recording of the Board's January 29, 2009 meeting. N.J.S.A. 47:1A-6.

2. Because the Custodian certified that he provided the Complainant with a copy of the audio tape of the Board's January 29, 2009 meeting on March 13, 2009, the Council declines to order disclosure of the requested record.
3. Pursuant to N.J.S.A. 47:1A-5.b. and Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Custodian must charge the actual cost of duplicating the requested record. As such, the Custodian's charge of \$5.00 for an audio recording of the requested public meeting is unreasonable and in violation of N.J.S.A. 47:1A-5.b. The Custodian must therefore charge the actual cost of the audio tape and shall not include the cost of labor or other overhead expenses associated with making the copy. To the extent that the actual cost of duplication of such audio tape is less than the \$5.00 per tape charged by the Custodian, the Custodian must refund the difference.
4. **The Custodian shall provide to the Council a certification of the actual costs associated with duplication of an audio tape, excluding labor or other overhead expenses associated with making the copy, and simultaneously provide certified confirmation of compliance with item #3 above, pursuant to N.J. Court Rules, 1969 R. 1:4-4 (2005), to the Executive Director, within five (5) business days of receipt of the Council's Interim Order.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

John Paff v. Township of Blairstown (Warren) (2009-53)

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

The Executive Director respectfully recommends the Council find:

1. For the purposes of OPRA, a settlement agreement constitutes a contract, access to which shall ordinarily be granted immediately pursuant to N.J.S.A. 47:1A-5.e.
2. The Custodian's search for the requested settlement agreement which included her own files, the Police Department, the Township Attorney and the Risk Management Consultant, was reasonable. Without any knowledge that any settlement agreement existed, and a specific request in place for the Township Attorney to be notified of any settlement discussions, it would be unreasonable for the Custodian to conduct an open-ended search for the requested settlement agreement. As such, the Custodian has not unlawfully denied access to the requested settlement agreement because she certified that said record did not exist within the Borough's files at the time of the

Complainant's OPRA request. Additionally, because the Custodian provided the Complainant with a written response to his request on the first (1st) business day following receipt of said request, the Custodian has not violated N.J.S.A. 47:1A-5.e.

3. Because the Custodian's search for the requested settlement agreement which included her own files, the Police Department, the Township Attorney and the Risk Management Consultant, was reasonable, as well as because the Custodian has not unlawfully denied access to the requested settlement agreement because she certified that said record did not exist within the Borough's files at the time of the Complainant's OPRA 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.
4. 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) because the complaint has not brought about a change in the Custodian's conduct, which had a basis in 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. Lack. The motion passed unanimously.

John Paff v. Barrington School District (Camden) (2009-55)

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. The original Custodian's failure to respond to the Complainant's first (1st) OPRA request dated December 31, 2008 in writing 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. The current Custodian's failure to respond to the Complainant's second OPRA request dated January 21, 2009 in writing 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).
3. The current Custodian unlawfully denied access to the requested settlement agreement because she had knowledge of the litigation and was obligated to obtain the settlement agreement from the insurance fund. However, the Custodian did provide the requested settlement agreements to the Complainant on April 1, 2009 after obtaining said agreements from outside counsel.

4. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), this Denial of Access Complaint did bring about a change in the Custodian's conduct. Specifically, the Custodian obtained the requested settlement agreement from the outside counsel and provided such to the Complainant. Thus, the relief ultimately achieved did have a basis in law because the Custodian was obligated to contact the outside counsel in an attempt to locate the requested settlement agreement. 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. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Jesse Wolosky v. Vernon Township Board of Education (Sussex) (2009-57)

Mr. Caruso reviewed the GRC's analysis and issues in the case as set forth in the Supplemental 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 Custodian amended the Vernon Township Board of Education's official OPRA request form to meet the requirements of N.J.S.A. 47:1A-5.f., 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 December 22, 2009 Interim Order.
2. Although the Custodian failed to bear his burden of proving a lawful denial of access to the requested executive session meeting minutes pursuant to N.J.S.A. 47:1A-6, because the Custodian provided access to the requested meeting minutes on February 26, 2009 and complied with the Council's December 22, 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.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's December 22, 2009 Interim Order, 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 written. A motion was made by Ms. Forsyth and seconded by Ms. Lack. The motion passed unanimously.

Veronica Silkes v. Town of Dover (Morris) (2009-60)

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. The Custodian did not unlawfully fail to respond to the Complainant's OPRA request dated January 14, 2009 in a timely manner because there is no proof the Custodian actually received the facsimile request on January 15, 2009, and when the Custodian certified that she did receive the request, on January 28, 2009, she responded that same day in compliance with N.J.S.A. 47:1A-5.e. and N.J.S.A. 47:1A-5.i.
2. The Custodian's response is insufficient because she failed to specifically address the Complainant's preference for receipt of records. Therefore, the Custodian has violated OPRA pursuant to N.J.S.A. 47:1A-5.g., O'Shea v. Township of Fredon (Sussex), GRC Complaint No. 2007-251 (February 2008) and Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008).
3. Because the Custodian had the proper means to deliver the requested paper record via facsimile, the Custodian has violated N.J.S.A. 47:1A-5.d. by failing to deliver the record to the Complainant via that means.
4. The Custodian shall disclose all records responsive to the Complainant's January 14, 2009 OPRA request via the Complainant's preferred delivery method.
5. **The Custodian shall comply with paragraph 4 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 1:4-4⁹, to the Executive Director.**
6. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
7. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

⁹ "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. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Gary DeMarzo v. City of Wildwood (Cape May) (2009-61)

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. 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 Emergency Software Products inspection report for 439 Tacony Road to determine the validity of the assertion by the Custodian that the record was not disclosed because it constitutes intra-agency advisory, consultative or deliberative material.
2. **The Custodian must deliver¹⁰ to the Council in a sealed envelope nine (9) copies of the requested unredacted Emergency Software Products inspection report for 439 Tacony Road, a document or redaction index¹¹, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹² 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.**

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

Laura Cole v. Newton Memorial Hospital (Sussex) (2009-68)

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

The Executive Director respectfully recommends the Council find because the Hospital is a charitable nonprofit corporation that does not perform a governmental function affecting the rights of others and has no collective authority to spend public funds, it is not a public agency as defined by OPRA and therefore not subject to the provisions of OPRA. N.J.S.A. 47:1A-1.1., The Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 368 N.J. Super. 425 (App. Div. 2004), and Nash v. Children's Hospital of New Jersey, GRC Complaint No. 2006-13 (May 2006).

¹⁰ 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.

¹¹ The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹² "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. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Willie Williams v. NJ Department of Corrections (2009-78)

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. The Custodian unlawfully denied access to the records responsive to item no. 1 of the Complainant's OPRA request dated 1977-1990 because the Custodian inadvertently failed to include the correct date parameters into the OPRA tracking system. However, the Custodian realized said error after the filing of this Denial of Access Complaint and made said records available to the Complainant on March 10, 2009.
2. Because item nos. 2-3 of the Complainant's OPRA request do not identify with reasonable clarity the records sought, and because the Custodian is not required to conduct an open-ended search of the agency's files, said request items are invalid and the Custodian has not unlawfully denied access to the requested records 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), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Further, the Custodian certified that after receiving additional information regarding said request items in the Complainant's Denial of Access Complaint, the Custodian determined that there are no records responsive to said request items.

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

Mary Campbell v. NJ Department of Labor & Workforce, Division of Unemployment Insurance (2009-82)

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 Christina Zarejko failed in a timely manner to forward the Complainant's December 26, 2008 OPRA request to the Custodian or direct the Complainant to the Custodian, she violated N.J.S.A. 47:1A-5.h. *See also* Mourning v. Department of Corrections, GRC Complaint No. 2006-75 (August 2006), Vessio v. New Jersey Department of Community Affairs, Division of Fire Safety, GRC Complaint No. 2007-63 (May 2007) and Morgano v. NJ Office of the Public Defender, Essex County, GRC Complaint No. 2008-79 (July 2008).

2. 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).
3. Because the Custodian subsequently certified in the Statement of Information that no records which are responsive to the request exist and there is no credible evidence in the record to refute the Custodian's certification, the Complainant was 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. Although Christina Zarejko violated OPRA by failing to forward the OPRA request to the Custodian or direct the Complainant to the Custodian and thereby prevented the Custodian from responding to the Complainant in a timely manner which consequently resulted in a "deemed denial," because Ms. Zarejko certified that she never before saw an OPRA request and did not know who the Custodian was for the NJ Department of Labor and Workforce Development, Division of Unemployment Insurance, her failure to promptly forward the OPRA request to the Custodian does not appear to have been purposeful or deliberate. Therefore, it is concluded that Christina Zarejko'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.

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

Robert Tesoroni, Jr. v. Millville Public Library (Cumberland) (2009-97)

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

The Executive Director respectfully recommends the Council find:

1. The Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian has certified that no records responsive to Request Item No. 3 exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the records responsive to Request Item No. 3 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
3. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond in writing to the Complainant's OPRA request within the statutorily

mandated seven (7) business days, because the Custodian certified that she disclosed the records responsive to Request Items Nos. 1 and 2 to the Complainant and further certified that no records responsive to Request Item No. 3 exist, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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

Calvin Riggins v. Borough of Jamesburg (Middlesex) (2009-105)

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

The Executive Director respectfully recommends the Council find:

1. Because the Custodian has certified that that no records responsive to Request Item No. 1. exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied the Complainant access to the records responsive to Request Item No. 1 pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
2. Because the records responsive to Request Items No. 2 and 3 are disciplinary records that are classified as personnel records, said records are exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-10, Rick Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004), and Allen v. County of Warren, GRC Complaint No. 2003-155 (March 2004). Therefore, the Custodian has not unlawfully denied the Complainant access to said records. 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. Lack and seconded by Ms. Forsyth. The motion passed unanimously.

Robert Verry v. Borough of South Bound Brook (Somerset) (2009-107)

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 because the Complainant's OPRA request does not specify identifiable government records, the 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).

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

Anthony Parisi v. City of Gloucester (Camden) (2009-112)

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

The Executive Director respectfully recommends the Council find:

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, N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Custodian failed to provide the Council with evidence in support of his contention that the lawful copy fee for a copy of the master plan of the City of Gloucester is \$150.00, the City of Gloucester¹³ must provide a certification to the Council as to the number of pages involved in making the requested copy and any evidence supporting the proposed copy fee.
3. Because the Complainant also requested a copy of recordings for the City of Gloucester Council meetings for August 2008, September 2008, and October 2008, and because the Custodian failed to provide to the Council any evidence that would require non-disclosure of such records, the City of Gloucester must disclose such records to the Complainant if they exist; if said records do not exist or are otherwise not disclosable, the City of Gloucester must provide a certification in support of said facts.
4. **The Custodian shall comply with items #2 and #3 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 1:4-4¹⁴, to the Executive Director.¹⁵**
5. Because the Complainant's request Items No. 2 and 4 do not specify an identifiable government record and would require the Custodian to conduct research and create a

¹³ It has come to the attention of the GRC that Paul Kain, the Custodian for the City of Gloucester in this matter, is no longer employed by the City of Gloucester. The City of Gloucester is therefore required to comply with this Interim Order.

¹⁴ "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."

¹⁵ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

new record, the Complainant's OPRA request for Items No. 2 and 4 is 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).

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

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

John Schmidt v. Gloucester City (Camden) (2009-119)

John Schmidt v. Gloucester City (Camden) (2009-120)

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 original 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 requests pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the Complainant's request No. 1 would require the research of the original Custodian's e-mail accounts over a two (2) year period to determine which e-mails pertain to business relating to Washington Township, and because a custodian is not required to conduct research in response to a request pursuant to Donato v. Township of Union, GRC Complaint No. 2005-182 (February 2007), and further, because request No. 2 seeks information rather than identifiable government records, the Complainant's two (2) requests are invalid under OPRA and the original Custodian has not unlawfully denied access to the requested records 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, 180 (App. Div. 2007), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (March 2008). *See also* Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2008-70 and 2008-71 (February 2009).
3. Although the original 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 and the Custodian failed to respond to the GRC's request for the Statement of Information, because the Complainant's two (2) OPRA requests are invalid under OPRA, it is concluded that the original 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.

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. Lack. The motion passed unanimously.

Donna Antonucci v. City of Hoboken (Hudson) (2009-125)

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

The Executive Director respectfully recommends the Council find:

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, e.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 evidence of record indicates that the record requested by the Complainant contains Councilman Russo's "suggested" budget cuts, which were proposed at the November 5, 2008 Council meeting prior to the adoption of the City's Fiscal Year 2009 budget on or about March 25, 2009, the requested record is therefore both pre-decisional and deliberative and is exempt from disclosure under OPRA as advisory, consultative or deliberative (ACD) material. N.J.S.A. 47:1A-1.1; In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000).
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, because the requested record is both pre-decisional and deliberative and is exempt from disclosure under OPRA as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1, 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.

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

Steven Kossup v. City of Newark (Essex) (2009-135)

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

The Executive Director respectfully recommends the Council find:

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 second (2nd) and third (3rd) portions of the Complainant’s request seek access to information and fail to identify a specific government record sought, these elements of the request are 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), Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009), and Fenichel v. Cape May County Prosecutor’s Office, GRC Complaint No. 2009-72 (November 2009).
3. Although the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. by failing to respond to the Complainant’s OPRA request, because no records responsive to either portion of the Complainant’s request exist, and because the second (2nd) and third (3rd) portions of the request fail to identify a specific government record sought and are therefore invalid under OPRA, 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.

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. Lack. The motion passed unanimously.

Complaints on Appeal: None.

Complaints Adjudicated on NJ Superior Court & NJ Supreme Court:

Dean Smith, on behalf of himself and all others similarly situated v. Hudson County Register and Willie J. Flood, in his capacity as the Hudson County Register and Hudson County, through the Hudson County Board of Chosen Freeholders, Docket No. A-1762-08T2 (Appellate Division of New Jersey Superior Court),

James Gensch, on behalf of himself and all others similarly situated v. Hunterdon County Clerk’s Office and Mary H. Melfi, in her capacity as the Hunterdon County Clerk, and Hunterdon County, through the Hunterdon County Board of Chosen Freeholders, Docket No. A-2507-08T3 (Appellate Division of New Jersey Superior Court), and

Martin O’Shea, on behalf of himself and all others similarly situated v. Sussex County Clerk’s Office and Erma Gormley, in her capacity as the Sussex County Clerk, Sussex County, and the Sussex County Board of Chosen Freeholders, Docket No. A-2518-08T3 (Appellate Division of New Jersey Superior Court).

In these three (3) consolidated appeals arising from instances of Counties charging more than actual cost for self-service copy machines, the Appellate Division of New Jersey Superior Court establishes the rule of copy fees. The Court held that as of July 1, 2010, public agencies may not charge requestors more than the “actual costs” of photocopying government records. If charges imposed are equal to or less than those stated in the second sentence of Section 1A-5(b) [the enumerated rates], a challenger would have the burden of demonstrating that

the agency's actual costs were indeed lower. If the challenger fails to sustain that burden, the agency will prevail and may continue to charge its existing rates. On the other hand, if the agency's charges exceed the rates stated in the second sentence, then the burden will be placed on the agency to demonstrate that its actual costs are indeed higher than those enumerated rates and are therefore justified.

If the proofs are inconclusive or in equipoise, then the outcome shall be in favor of the party who does not have the burden of persuasion. The conventional preponderance-of-the-evidence standard for civil cases shall apply. These burden-shifting principles shall be observed, whether a dispute over the propriety of copying rates is litigated in a court or is presented administratively to the Government Records Council.

As to administrative feasibility, the Court held that it did not believe the Legislature intended in OPRA to require a public agency to continually re-calculate its actual costs and establish a "new" copying rate every time a citizen makes copies of a government record. The Court found that such an obligation would be unwieldy and absurd. Instead, the Court interpreted OPRA to require simply that the public agency re-calibrate its copying charge schedule with reasonable periodic frequency. The Court stated that it believed that it would be reasonably sufficient for a public agency to perform such recalibrations on at least an annual basis.

(Please note that the Court omitted the exact formula for which public agencies must use in determining its annual actual cost for paper copies of records requested under OPRA.)

Executive Director's Report and New Business: Ms. Starghill announced that Ms. Sherin Keys was no longer employed by the GRC.

Public Comment: None.

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

Meeting adjourned at 12:13 a.m.

Respectfully submitted,

Harlynn Lack, Secretary

Date Approved: