

38 N.J.R. 1265(A)

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RULE PROPOSALS

COMMUNITY AFFAIRS

NEW JERSEY GOVERNMENT RECORDS COUNCIL

38 N.J.R. 1265(a)

Proposed New Rules: N.J.A.C. 5:105

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

Authorized By: New Jersey Government Records Council, Paul Dice,  
Executive Director.

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

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

Proposal Number: PRN 2006-81.

Submit written comments by May 5, 2006 to:

Catherine Starghill, Esq.  
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Government Records Council  
PO Box 819  
Trenton, NJ 08625-0819  
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The agency proposal follows:

Summary

These rules are proposed in response to the enactment of N.J.S.A. 47:1A-1 et seq. (Open Public Records Act) which makes government records readily accessible for inspection, copying, or examination by the citizens of New Jersey, with certain exemptions for the

protection of the public interest, and with any limitation on the right of access accorded under the Act being construed in favor of the public's right of access. The New Jersey Government Records Council (Council) was established in the Department of Community Affairs by the Open Public Records Act (Act) to adjudicate denial of access to government records complaints by requestors at no cost to citizens, and the answer inquires about the Council and the Act.

Nothing in these proposed rules affects or alters a citizen's right to pursue a denial of access complaint in New Jersey Superior Court under the Act or common law.

A summary of each section of the proposed rules follows:

Subchapter 1 sets forth the chapter's general provisions.

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

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

Proposed N.J.A.C. 5:105-1.3 contains the definitions which are necessary for the implementation of the new rules.

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

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

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

Subchapter 2 establishes the process for filing a complaint with the Council under the Act.

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

Proposed N.J.A.C. 5:105-2.2 provides the six-month deadline from the date of an OPRA request for filing a denial of access compliant with the Council.

Proposed N.J.A.C. 5:105-2.3 provides that the complainant and custodian are the parties to a complaint.

Proposed N.J.A.C. 5:105-2.4 provides the requirements of representatives of parties to a complaint before the Council.

Proposed N.J.A.C. 5:105-2.5 provides the requirements of denial of access complaints, amendments to complaints, and any other submissions for consideration in the adjudicatory process from the complainant.

Proposed N.J.A.C. 5:105-2.6 provides the requirements of the statement of information and any other submissions for consideration in the adjudicatory process from the custodian.

Proposed N.J.A.C. 5:105-2.7 provides the process for mediation of a complaint.

Proposed N.J.A.C. 5:105-2.8 provides the procedures for the Council's adjudicatory process when no hearing is held.

Proposed N.J.A.C. 5:105-2.9 provides the procedures for the Council's adjudicatory process when a hearing is held.

Proposed N.J.A.C. 5:105-2.10 provides the procedures for the Council's in camera inspection of documents.

Proposed N.J.A.C. 5:105-2.11 describes the Council's decisions.

Proposed N.J.A.C. 5:105-2.12 describes the Council's procedures for reconsideration of its decisions.

Proposed N.J.A.C. 5:105-2.13 provides the procedure for appeals from the Council's final decisions to the Superior Court of New Jersey - Appellate Division.

Proposed N.J.A.C. 5:105-2.14 provides the requirements for a party's request for a stay of the Council's decision.

Proposed N.J.A.C. 5:105-2.15 provides the procedures for a party's application for prevailing party attorney's fees.

Proposed N.J.A.C. 5:105-2.16 provides the procedures for the Council's determination and imposition of a penalty for the knowing and willful violation of the Act.

Subchapter 3 concerns inquiries.

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

Subchapter 4 concerns advisory opinions.

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

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

#### Social Impact

The proposed new rules will have a positive social impact upon New Jersey citizens and state and local government records custodians because they serve as a systematic and user-friendly guide to the Council's processes. Such guidance will reduce the need for people to rely on costly legal services when involved in contested issues surrounding access to government records before the Council. Also, by giving citizens the resources they need to handle issues before the Council, the Council furthers its statutory responsibility to offer a charge free, judicial alternative for adjudicating cases involving denials of access to government records.

#### Economic Impact

The Council does not charge a fee for the submission of a complaint concerning denial of access to government records. See N.J.S.A. 47:1A-7.f. The Council believes that the proposed procedures provide a de minimis cost alternative to challenging a denial of access to government records by bringing an action in Superior Court. Anyone submitting a complaint, or the records custodian responding to a complaint, would incur the minimal administrative costs involved in submission of the complaint or response. Should the complaint result in mediation or a hearing, the complainant and records custodian would incur those costs that might be involved in attendance at and participation in those proceedings. Individuals may, at their sole discretion, incur the cost of retaining an attorney for representation before the

Council. However, parties to denial of access complaints adjudicated by the Council do not require legal representation. If a complainant is represented by an attorney, and prevails in the proceedings, the Council may, upon application, award reasonable attorney's fees. A public official, officer, employee or records custodian who knowingly and willfully violate the Act and is found to have unreasonably denied access to government records shall be subject to those civil penalties set forth in N.J.A.C. 5:105-2.19.

#### Federal Standards Statement

A Federal standards analysis is not required because the proposed new rules are governed by N.J.S.A. 47:1A-1 et seq., and are not subject to any Federal standards or requirements.

#### Jobs Impact

The Council does not believe that the proposed new rules will result in an increase or decrease in the number of jobs in the State.

#### Agriculture Industry Impact

The proposed new rules shall have no impact on the agriculture industry.

#### Regulatory Flexibility Analysis

The proposed new rules do not impose reporting or recordkeeping requirements on small businesses, as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. As detailed in the Summary above, the rules do impose compliance requirements on anyone, including small businesses, submitting to the Council a complaint concerning denial of access to government records. The costs of compliance with such requirements are discussed in the Economic Impact above. While small businesses may, at their sole discretion, retain an attorney for representation before the Council, such is neither necessary nor required under these rules. In developing the compliant process set forth in these rules, the Council sought to establish a fair and uniform process that would permit each side in a records access dispute to articulate their positions and concerns. The Council believes that in providing such a process, involving minimal costs to complainants, it has minimized the economic impact on those small businesses that might participate.

#### Smart Growth Impact

The proposed new rules are not anticipated to have an impact on the achievement of smart growth or upon the implementation of the State Development and Redevelopment Plan.

Full text of the proposed new rules follows:

## CHAPTER 105

### COMPLAINT ADJUDICATION AND OPEN PUBLIC RECORDS ACT (OPRA) INFORMATION INQUIRY PROCEDURES

#### SUBCHAPTER 1. GENERAL PROVISIONS

##### 5:105-1.1 Purpose and scope

(a) The rules in this chapter apply to any person or entity that files a denial of access complaint with the Council and any person or entity seeking to utilize the Council as an information resource for understanding the Act and/or the Council.

(b) Any aspect of the adjudicatory process for denial of access complaints not covered by this chapter shall be governed by the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1. To the extent that the rules in this chapter are inconsistent with the Administrative Procedure Act and the Uniform Administrative Procedure Rules, the rules in this chapter shall apply.

##### 5:105-1.2 Construction of the rules

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

##### 5:105-1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

"Act" or "OPRA" means the New Jersey Open Public Records Act, N.J.S.A. 47:1A-1 et seq.

"Administrative Case Disposition" means a decision of the Council as adjudicated with the power vested in the Executive Director for complaints that do not require a determination by the Council on access.

"Advisory Opinion" means an opinion issued by the Council regarding the accessibility of government records pursuant to N.J.S.A. 47:1A-7.b.

"Chairperson" means Chairperson of the Council.

"Complaint" or "OPRA Complaint" means a denial of access complaint submitted to the Council on a form authorized by the Council in which a requestor claims that a records custodian has unlawfully denied the requestor access to a government record. It shall also mean a written submission not on the Council's form, but which provides the information requested on the Council's form.

"Complainant" means a person who made an OPRA request of a public agency and files a denial of access complaint with the Council.

"Custodian" or "Records Custodian" means the person charged by a public agency with the responsibility for responding to requests for access to government records pursuant to the Act and responding to denial of access complaints filed against them with the Council.

"Effective date" means the date upon which the Council renders a decision related to a matter awaiting adjudication, or such other date upon which the Council desires to make a decision effective.

"Fair preponderance of the credible evidence" means superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

"Hearing Officer" means a Council member, or the Executive Director, who receives testimony and documentary evidence regarding a denial of access complaint, to inspect records or receive testimony in camera, and to assemble a record of those proceedings for later review and adjudication by the Council.

"Government record" or "record" means any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its

official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof pursuant to N.J.S.A. 47:1A-1.1. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

"Government Records Council" or "Council" means the public agency established by the Act to adjudicate denial of access complaints and provide information regarding the Act and the Council to requestors of government records, records custodians and the general public pursuant to N.J.S.A. 47:1A-7.a.

"In camera" or "in camera inspection" means a proceeding in which the Council or hearing officer inspects a government record and receives testimony, if any is necessary for the Council to determine whether the record requested by the complainant should be publicly accessible under the Act over the custodian's objection or claim that the record is exempt from disclosure by virtue of a provision in the Act.

"Inquiry" means a request from the public or custodians, submitted to the Council in writing or from the toll-free helpline, for information regarding or assistance with the Act, the Council, and issues and matters regarding access to government records.

"Interim order" means an order issued by the Council that addresses a complaint in part.

"Letter of Representation" means a letter submitted to the Council by a person representing a party in a proceeding before the Council.

"Mediation" means an informal, non-adversarial process led by a mediator and having the objective of helping the parties to a denial of access complaint reach a mutually acceptable, voluntary agreement pursuant to N.J.S.A. 47:1A-7.b., 47:1A-7.d. and 47:1A-7.e.

"Mediation Settlement Agreement" means a written agreement between the complainant and the custodian reached during the mediation process memorializing a resolution of some or all of the issues presented during the mediation process.

"Mediator" means a neutral person who is trained in dispute resolution techniques and who was selected by the Council to intervene between parties to a denial of access complaint in an

effort to help them resolve their differences pursuant to N.J.S.A. 47:1A-7.b.

"Party" means a complainant or custodian.

"Penalty" means the civil penalty which may be imposed upon a custodian who knowingly and willfully violates the Act, and is found to have unreasonably denied access to the requested government record under the totality of the circumstances pursuant to N.J.S.A. 47:1A-11.

"Person" means natural person, partnership, corporation, limited liability company, association or society.

"Prima facie evidence" means evidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.

"Public agency" or "agency" means any of the principal departments in the executive branch of State government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the legislature of the State and any office, board, bureau or commission within or created by the legislative branch; and any independent State authority, commission, instrumentality or agency pursuant to N.J.S.A. 47:1A-1.1. The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.

"Representative" means a person who has the authority from the Council or the State of New Jersey to represent a party in a proceeding before the Council.

"Requestor" means a person who delivers to a public agency a written request to copy, examine or inspect a government record pursuant to the Act.

"Secretary" means Secretary of the Council.

"Staff" or "Council staff" means the professional and clerical staff that the Council may employ as it deems necessary pursuant to N.J.S.A. 47:1A-7.a.

"Statement of Information" means a written response to a complaint, and all attachments thereto, submitted to the Council by a custodian or his or her representative. It shall also mean a written submission not on the Council's form, but which provides the information requested on the Council's form.

"Sua sponte" means the Council's ability to raise issues, legal defenses or other matters not raised by the parties.

"Supplemental Decision" means a decision issued by the Council after the complete adjudication of a complaint.

"Vice Chairperson" means the Vice Chairperson of the Council.

#### 5:105-1.4 Description of the Council

(a) The Council shall consist of the Commissioners of the Department of Community Affairs and the Department of Education, or their designees, and three members of the public (not more than two of which can be of the same political party) appointed by the Governor with the advice and consent of the Senate pursuant to N.J.S.A. 47:1A-7.a. The Council is supported by an Executive Director, and professional and clerical staff.

(b) Contact information for the Council:

State of New Jersey  
Government Records Council  
101 South Broad Street  
PO Box 819  
Trenton, New Jersey 08625-0819  
Toll Free Interactive Voice Recording Line: (856) 850-0511  
Direct Phone Line: (609) 292-6830  
Fax: (609) 633-6337  
grc@dca.state.nj.us

(c) All communications to Council members, the Executive Director or staff shall be delivered to the contact information listed in (b) above, or to any such other address that the Council may direct from time to time

(d) The Council's website, [www.nj.gov/grc](http://www.nj.gov/grc), may contain the Act, the Council's public meeting schedule, denial of access complaint forms, Council and legal decisions, frequently asked questions and other reference materials that the Council deems appropriate.

#### 5:105-1.5 Powers and duties of the Council

(a) The Council shall have the following powers and duties pursuant to N.J.S.A. 47:1A-7.b.:

1. Adjudicate complaints filed with the Council regarding access to government records;
2. Make mediation services available free of charge to complainants and custodians;
3. Respond to inquiries about the Act or the Council from the public and public agencies;
4. Provide information about the Act and services available from the Council;
5. Maintain a toll-free help-line and website to assist the public and records custodians in obtaining information about the Act, the Council and issues and matters regarding access to government records;
6. Issue advisory opinions on the accessibility of government records;
7. Make training opportunities available to custodians, public officers, public employees and officials concerning the provisions of the Act; and
8. Prepare for custodians lists of the types of records in possession of public agencies, which are government records accessible under the Act.

#### 5:105-1.6 Conformance

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

### SUBCHAPTER 2. COMPLAINT PROCESS

#### 5:105-2.1 General provisions

(a) Any requestor who is denied access, in whole or in part, to a government record by a records custodian, at the option of the requestor, may file a complaint with the Council pursuant to N.J.S.A. 47:1A-6 of the Act.

(b) The right to institute a proceeding before the Council shall solely be the right of the requestor pursuant to N.J.S.A. 47:1A-6 of the Act.

(c) The Council will handle complaints in a summary or expedited manner pursuant to N.J.S.A. 47:1A-6 of the Act.

(d) Upon receipt of a complaint, the Council will first determine whether any portion of the complaint is outside its jurisdiction, frivolous, or without factual basis. If the complaint falls within any of said categories, the Council shall reduce its determinations to writing and transmit a copy thereof to the complainant and to the records custodian against whom the complaint was filed. N.J.S.A. 47:1A-7.e.

(e) If the Council concludes that the complaint is within its jurisdiction and is neither frivolous nor without factual basis, the Council shall proceed with the adjudication process.

(f) At the request of the Council, any party shall produce documents and legal certifications to the facts and/or arguments presented with respect to matters before the Council pursuant to N.J.S.A. 47:1A-7.c.

(g) Discovery is limited to the submissions of the parties submitted to the Council.

(h) The Council may initiate action (including raising issues and defenses) sua sponte if it deems such action appropriate or necessary and if said action on behalf of the Council would be in the interest of furthering the provisions and intent of the Act.

(i) The Council shall not charge any party a fee in regard to actions filed with or proceedings before the Council pursuant to N.J.S.A. 47:1A-7.f.

(j) Council votes adjudicating a complaint shall be rendered at open public meetings of the Council. Parties are not permitted to make oral or written presentations to the Council regarding the complaint at the meetings.

#### 5:105-2.2 Deadline for filing a denial of access complaint

A complainant shall have six months from the date of his or her OPRA request for access to a government record to file a denial of access complaint with the Council.

### 5:105-2.3 Parties to a complaint

The complainant and records custodian shall always be parties to a complaint and, along with their legal representatives, shall be notified of all decisions or orders issued by the Council concerning a complaint.

### 5:105-2.4 Representation of the parties to a complaint

Representation of a party must be presented to the Council at the time the denial of access complaint is filed. If parties secure representation following submission of a denial of access complaint, parties must notify the Council immediately.

### 5:105-2.5 Complainant document submissions to the Council

(a) The complainant submitting a completed denial of access complaint to the Council and custodian of record initiates the complaint process.

(b) All submissions must be in writing.

(c) Complaints should be submitted on the Council's denial of access complaint form. If not submitted on said form, submissions must contain, at a minimum, all of the information requested on the Council's form.

(d) Complaint forms may be obtained from the Council's staff or downloaded from the Council's website.

(e) The complaint shall include in the complaint or the attachments thereto any information, issues, and arguments that the complainant wishes to bring to the Council's attention for consideration in the adjudication of the complaint. Failure by the complainant to include an issue in the complaint shall not preclude the Council from raising an issue sua sponte.

(f) The complaint may also include any attachments, affidavits, certifications or documentation deemed appropriate or supportive of the allegations set forth in the complaint.

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

(h) The following concern complaint amendments:

1. A complainant may amend his or her complaint as a matter of right within 30 business days after the filing of the initial complaint. Such amendments must be submitted in writing to the Council with copies served contemporaneously on all parties.

2. Additional amendments or supplements to a complaint submitted beyond the 30-business-day amendment period shall only be accepted for consideration in the adjudication of a complaint when such acceptance is authorized by the Council, acting through its Executive Director.

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

(i) Letters of representation: The representatives of any party named in a complaint shall file with the Council written authorization signed by the named party he or she represents and a copy of said authorization shall be served upon all parties at the same time the Council receives a copy.

(j) Objections to representation: Objections to a party's representative by another party to the complaint must be in writing, presented to the Council, served on all parties, and include, but not be limited to:

1. Council's case reference name and number;
2. Clear identification of the representative in question; and
3. A detailed explanation of the reasons for the objections.

(k) The Council, acting through its Executive Director, may require complainants to submit, within prescribed time limits, additional information deemed necessary for the Council to adjudicate the complaint.

#### 5:105-2.6 Custodian document submissions to the Council

(a) Custodians shall submit a completed and signed statement of information (SOI) to the Council and the complainant detailing his or her position with respect to all complaints filed with the Council in all cases where mediation was declined, not elected by either party, or where mediation was elected but through which the parties did not fully resolve the issues presented. The custodian shall sign the completed SOI even if it is completed by his or her legal representative.

(b) All submissions shall be in writing.

(c) The custodian shall endeavor to utilize the Council's SOI form. If the Council's SOI form is not used, custodian submissions must contain, at a minimum, all of the information requested in the SOI form.

(d) Council's staff will issue SOI forms to custodians for each complaint. SOI forms may also be downloaded from the Council's website.

(e) The custodian shall include in the SOI or the attachments thereto any information, defenses, and arguments that he or she wishes to bring to the Council's attention for consideration in the adjudication of the complaint. Failure by the custodian to include a defense in the SOI shall not preclude the Council from raising a defense sua sponte.

(f) The SOI may also include any attachments, affidavits, certifications or documentation supportive of the defenses set forth in the SOI.

(g) Custodians shall submit a completed and signed SOI for each complaint to the Council's staff not later than seven business days from the date of receipt of the SOI form from the Council's staff. Custodians must sign the SOI or defense submissions if the Council's SOI form is not used. The Council will not accept additional submissions from the custodian unless the Council, acting through its Executive Director, orders same or offers its express approval for same. Failure to comply with this time period may result in the complaint being adjudicated based solely on the record at that time.

(h) The Council shall provide complainants with copies of the completed and signed SOI if the custodian fails to do so.

(i) A custodian's failure to submit a completed and signed SOI may result in the Council's issuing a decision in favor of the complainant.

(j) If a complainant amends his or her complaint, the custodian shall have seven business days from the date of receipt of same to submit its position regarding the amendment with the Council. The Council will not accept additional submissions beyond said time period unless the Council, acting through its Executive Director, orders same or offers its express approval for same. Failure to

comply with this time period may result in the case being adjudicated based solely on the record at that time.

(k) Letters of representation: The representatives of any party named in a complaint shall file with the Council written authorization signed by the named party he or she represents and a copy of said authorization shall be served upon all parties at the same time the Council receives a copy.

(l) Objections to representation: Objections to a party's representative by another party to the complaint must be in writing, presented to the Council, served on all parties, and include, but not be limited to:

1. Council's case reference name and number;
2. Clear identification of the representative in question; and
3. A detailed explanation of the reasons for the objections.

(m) The Council, acting through its Executive Director, may require custodians to submit, within prescribed time limits, additional information deemed necessary for the Council to adjudicate the complaint.

#### 5:105-2.7 Mediation

(a) Upon receipt of a complaint, the Council shall offer the parties cost-free mediation.

(b) A complaint will be referred to a mediator only if the complainant and custodian agree to enter into mediation.

(c) A party who fails to respond to an offer of mediation within five business days from the date of its receipt shall be deemed to have rejected the offer to mediate the complaint.

(d) A mediator, who shall be trained in mediation and selected by the Council, will conduct all mediation proceedings.

(e) Mediation practices shall be governed by N.J.S.A. 2A:23C-1 to 2A:23C-13.

(f) Neither the mediator nor any person participating in mediation shall divulge to anyone the content of any mediation session or share any document produced in the course of mediation without the

written consent of the party who made the statement or produced the document.

(g) Representatives of the parties may attend mediation proceedings but shall be bound by the regulations with respect to mediation as set forth in this section.

(h) Parties may cease participation in the mediation process at any time and elect to have their complaint referred back to the Council for adjudication.

(i) The mediator may cease proceedings and refer the case back to the Council if he or she determines that the process is not productive.

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

(k) The Council shall dismiss any complaint upon receipt of a notice from the mediator that there exists a mediation settlement agreement that the matters presented in the complaint have been either resolved or voluntarily dismissed by all parties.

(l) The Council shall provide the parties notice of any dismissal by issuing a final decision in the matter.

#### 5:105-2.8 Council complaint deliberations - no hearing

(a) The Council members shall review staff findings and the Executive Director's recommendations, as well as all party submissions, and vote to modify, reject or accept such findings and recommendations as the Council's decision in the complaint during open public meetings.

(b) The Council shall convene in closed session as necessary in accordance with the Open Public Meetings Act, N.J.S.A. 10:4-6 to 10:4-21.

(c) Parties are not permitted to make oral or written presentations to the Council regarding the complaint at Council meetings unless expressly requested to do so by the Council.

(d) The Council will issue its decision as soon as practicable following the adjudicatory proceedings.

#### 5:105-2.9 Council complaint deliberations - hearing

(a) If the Council is unable to make a determination as to the accessibility of a record based upon the complaint and the custodian's response thereto, the Council may conduct a hearing in conformity with the rules provided for administrative hearings by a public agency in contested cases pursuant to the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1, insofar as they may be applicable and practicable pursuant to N.J.S.A. 47:1A-7.e.

(b) The following concern the filing of additional documentation or arguments:

1. The Council reserves the right not to consider documentation submitted by a complainant and/or custodian unless it has been submitted to the Council and the other parties named in the complaint not later than 10 business days in advance of the scheduled hearing.

2. A written statement by the party shall accompany each such submission explaining the relevance of such submission.

3. Parties filing submissions must provide copies to all parties to the complaint and provide proof of service to the Council contemporaneously therewith.

4. The Council will not accept any submissions at the hearing that has not been provided to all parties pursuant to these rules, unless the Chairperson authorizes said submissions.

5:105-2.10 In camera inspections

(a) The Council may, in its discretion, order an in camera inspection of the documents that are the subject of a denial of access complaint.

(b) Notice of inspection: The Council shall provide the custodian with advance written notice of the in camera inspection. The notice shall include, in addition to such other information as may be deemed appropriate:

1. A statement of the time, place and nature of the document inspection;

2. The documents requested to be inspected; and

3. The manner in which the documents are to be presented to the Council for inspection.

(c) Presentation of documents to the Council: In an open public meeting, the custodian and/or his or her representative will be called upon to hand-deliver the documents for inspection, in a sealed envelope, to the Executive Director of the Council, or such other person as the Council may designate, along with:

1. A certification signed by the custodian stipulating that the copies of the documents delivered to the Council are true and complete copies of the documents in question with no alterations or redactions; and

2. An in camera inspection index that:

i. Gives the title or name of each document, or any parts thereof, claimed to be exempt from disclosure;

ii. Provides a general nature description of each document. The descriptions should be general enough to explain the exemptions without compromising the alleged reason for their exemption from disclosure;

iii. Lists the reasons that each document, or any parts thereof, are alleged to be exempt from disclosure; and

iv. Lists a full explanation why the alleged reason for exemption from disclosure applies to each document.

(d) Complainants will not be permitted to respond to the certification in (c)1 above and the index in (c)2 above without the express permission of the Council.

(e) Neither the Council, nor anyone else authorized to inspect the documents, shall make copies of same.

(f) Anyone authorized to access the documents shall not take any notes making reference to specific information contained in the documents.

(g) The Council shall review the documents in closed session at any of its regular monthly meetings conducted pursuant to the Open Public Meetings Act, N.J.S.A. 10:4-6 to 10:4-21.

(h) The Council shall have the option, at its discretion and while in the public session of any its regular monthly meetings

conducted pursuant to the Open Public Meetings Act, N.J.S.A. 10:4-6 to 10:4-21, of asking the Custodian questions regarding the document(s) in question.

(i) Neither the complainant nor the custodian, nor any of their representatives, shall be present during the in camera inspection.

(j) After inspecting the documents, the Council shall announce its decision at an open public meeting and provide written notice of its decision to all parties to the complaint.

(k) During public session, anyone involved in the in camera inspection shall forego all mention of the specific contents of the documents. Reference shall only be made to the assigned reference number or to the general nature descriptions of the documents listed in the in camera inspection index.

(l) Upon completion of the in camera inspection, the Council will seal the documents and return them to the custodian.

#### 5:105-2.11 Decisions of the Council

(a) The Council shall issue the following types of decisions:

1. Interim order;
2. Supplemental Decision; and
3. Administrative Case Disposition.

(b) Unless the Council directs otherwise, the Executive Director shall stipulate the effective date of the Council's decisions for purposes of calculating all deadlines set forth in a decision and calculating when motions for reconsideration and appeals must be filed.

(c) Enforcement: The Council shall, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, have the authority to enforce compliance with the orders and decisions issued by the Council.

#### 5:105-2.12 Relief from Council decisions - reconsideration

(a) The Council, in its own discretion, may reconsider any decision it renders.

(b) Requests for reconsideration must be filed within 10 business days following receipt of a Council decision.

(c) Requests for reconsideration must be in writing, delivered to the Council and served on all parties.

(d) The Council will provide all parties with written notification of whether a request for reconsideration has been accepted and for what reasons.

#### 5:105-2.13 Relief from Council decisions - appeals

(a) A final decision of the Council may be appealed to the Appellate Division of the Superior Court within the time frame prescribed by law pursuant to N.J.S.A. 47:1A-7.e.

(b) Prior to filing an appeal, the appealing party shall file a request for a stay of the Council's final decision with the Council.

#### 5:105-2.14 Stays of Council decisions

(a) Requests for a stay of a final decision must be in writing, delivered to the Council and contemporaneously served upon all parties.

(b) The Council shall, acting through its Executive Director, grant a stay from a final decision based on the request submitted and a copy of the notice of appeal from the Appellate Division of the Superior Court.

(c) Requests for a stay of the effective date of a Council's interim decision must be made prior to the last day by which action was to have been taken in accordance with the Council interim decision.

(d) The Council, acting through its Executive Director, may grant a stay for the period of time, but in no event longer than the date of the next regular meeting of the Council.

(e) A request for a stay must be in writing and include a detailed analysis of the issue(s), which includes, but is not necessarily limited to, the appellant's positions with regard to the following factors that the Council will include in its Decision-making process:

1. The clear likelihood of success on the merits of the claim;
2. The danger of irreparable harm in the absence of a stay;

3. The harm to others if a stay is granted; and

4. The public interest.

5:105-2.15 Prevailing party attorney's fees

(a) Reasonable attorney's fees may only be awarded where the Council has rendered a final decision in favor of the complainant and in which the Council has found that the custodian unlawfully denied access to government records requested by the complainant in the matter pursuant to N.J.S.A. 47:1A-6.

(b) The complainant, or his or her attorney, shall submit an application to the Council for an award of attorney's fees within ten business days following the effective date of a final decision by the Council. The application must include a certification from the attorney(s) representing the complainant that includes, but not necessarily be limited to, the following:

1. The Council's case reference name and number;

2. Law firm affiliation;

3. A statement of client representation;

4. The hourly rates of all attorneys and support staff involved in the case;

5. Copies of weekly time sheets for each person involved in the case, which includes detailed descriptions of all activities attributable to the project in 0.1-hour increments (six-minute) increments;

6. Evidence that the rates charged are in accordance with prevailing market rates in the relevant community. Such evidence shall include, but is not necessarily limited to:

i. Years of related or similar experience;

ii. Skill level; and

iii. Reputation; and

7. A detailed listing of any expense reimbursements with supporting documentation for such costs.

(c) The complainant, or his or her attorney, must serve all parties with the application for attorney's fees and all attachments thereto.

(d) The custodian shall have 10 business days from the date of service to object to the attorney's fees requested.

(e) All objections to applications for attorney's fees must be in writing to the Council and served upon all the parties.

(f) The Council shall:

1. Consider all submissions of the parties concerning the attorney's fees application;

2. Determine the amount of a reasonable attorney fee, if any, to be awarded to complainant's attorney; and

3. Predicate the attorney's fees awarded upon the number of hours and rate based on:

i. Applicable law;

ii. Submissions of the parties; and

iii. The Council's own discretion.

5:105-2.16 Knowing and willful violations of the Act; penalties

(a) Public officials, officers, employees or custodians who knowingly and willfully violate the Act and one found to have unreasonably denied access under the totality of the circumstances shall be subject to a civil penalty pursuant to N.J.S.A. 47:1A-11.

(b) Penalty amounts are as follows:

1. \$ 1,000 for initial violation;

2. \$ 2,500 for a second violation that occurs within 10 years of an initial violation; and

3. \$ 5,000 for a third violation that occurs within 10 years of an initial violation.

(c) The Council shall not impose a penalty unless it has undertaken, or caused the Office of Administrative Law to have undertaken, an expedited or summary hearing to determine whether a

public official, officer, employee or custodian knowingly and willfully violated the Act and unreasonably denied access under the totality of the circumstances.

(d) Penalties shall be collected and enforced in proceedings in accordance with the Penalty Enforcement Law of 1999, N.J.S.A. 2A:58-10 et seq., and the rules of court governing actions for the collection of civil penalties.

(e) The New Jersey Superior Court shall have jurisdiction of proceedings for the collection and enforcement of the penalty imposed by the Council.

(f) Appropriate disciplinary proceedings may be initiated by a public agency against a public official, officer, employee or custodian against whom a penalty has been imposed.

### SUBCHAPTER 3. INQUIRIES

#### 5:105-3.1 Inquiries

(a) Any person may telephone or write the Council with a request for information regarding the Act and Council procedures. All written communications to the Council shall be dated, state the name of the sender, the street and/or P.O. Box address of the sender, and the facsimile number or e-mail address to which replies should be sent.

(b) The Council, where possible, will direct inquirers to available resources, that is, Council case decisions, Act citations, publications available through the Council, etc., that might assist inquirers.

(c) Guidance offered during the inquiry process is based solely on the facts provided and shall not constitute final decisions of the Council, is not legal advice and shall not alter any legal right or liability already existing in New Jersey or under Federal law.

### SUBCHAPTER 4. ADVISORY OPINIONS

#### 5:105-4.1 Advisory opinions

(a) The Council shall, in its discretion, issue advisory opinions as to whether a particular type of record is a government record which is accessible to the public pursuant to N.J.S.A. 47:1A-7.b.

(b) Advisory opinions address whether general categories of records are disclosable and do not serve as case-specific decisions of the Council.

(c) Advisory opinions do not constitute final decisions of the Council, are not legal advice and shall not alter any legal right or liability already existing in New Jersey or under Federal law.

(d) The issuance of advisory opinions shall not prejudice any party's rights to file a complaint with the Council.

#### INTERESTED PERSONS

Interested persons may submit comments, information or arguments concerning any of the rule proposals in this issue until the date indicated in the proposal. Submissions and any inquiries about submissions should be addressed to the agency officer specified for a particular proposal.

The required minimum period for comment concerning a proposal is 30 days. A proposing agency may extend the 30-day comment period to accommodate public hearings or to elicit greater public response to a proposed new rule or amendment. Most notices of proposal include a 60-day comment period, in order to qualify the notice for an exception to the rulemaking calendar requirements of N.J.S.A. 52:14B-3. An extended comment deadline will be noted in the heading of a proposal or appear in a subsequent notice in the Register.

At the close of the period for comments, the proposing agency may thereafter adopt a proposal, without change, or with changes not in violation of the rulemaking procedures at N.J.A.C. 1:30-6.3. The adoption becomes effective upon publication in the Register of a notice of adoption, unless otherwise indicated in the adoption notice. Promulgation in the New Jersey Register establishes a new or amended rule as an official part of the New Jersey Administrative Code.