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RULE PROPOSALS

**COMMUNITY AFFAIRS
NEW JERSEY GOVERNMENT RECORDS COUNCIL**

39 N.J.R. 1557(a)

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

[Click here to view Interested Persons Statement](#)

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

Authorized By: New Jersey Government Records Council, Catherine Starghill, Esq., 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 2007-149.

Submit written comments by July 6, 2007 to:

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The agency proposal follows:

Summary

This notice of reproposal replaces and supersedes the original proposal published March 6, 2006 at 38 N.J.R. 1265(a), which expired on March 6, 2007. These rules are repropose in response to the enactment of the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 et seq. which makes government records readily accessible for inspection, copying, or examination by the citizens of New Jersey, with certain exceptions 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 ("GRC" or "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 without charge to citizens, and to answer inquiries about the Council and the Act.

Nothing in these repropose 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 the public comments and agency responses to the original new rule proposal follows:

1. COMMENT: N.J.A.C. 5:105-1.3. Thomas J. Cafferty of Scarinci & Hollenbeck, LLC, on behalf of the New Jersey Press Association, questions this proposed rule's definition of a Custodian or Records Custodian since it does not mirror the exact language of OPRA. The commenter suggests the proposed rule be changed to mirror the language of OPRA.

RESPONSE: The GRC agrees with the commenter and will change this definition so that it mirrors the language of OPRA.

2. COMMENT: N.J.A.C. 5:105-1.5(a)2 and 2.7. Thomas J. Cafferty of Scarinci & Hollenbeck, LLC, on behalf of the New Jersey Press Association, believes that these proposed rules are inconsistent with the Economic Impact statement which provides that "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." The proposed rules, however, provide that mediation is cost-free.

RESPONSE: While participants to mediation are not required to retain legal representation, the GRC agrees that if a participant to the mediation chooses to retain legal counsel then the mediation is not cost free to that participant. The GRC will remove the references to cost-free mediation.

3. COMMENT: N.J.A.C. 5:105-2.1(j) and 2.8(c). Edward J. Buzak, Esq. of Edward J. Buzak Law Offices believes that it is unreasonable and counterproductive to prevent oral presentations before the GRC. The commenter acknowledges that this proposed rule is consistent with OPRA (N.J.S.A. 47:1A-7.e.). However, the commenter states that oral presentations provide the parties the ability to explain the circumstances surrounding the OPRA request and afford the GRC an opportunity to ask questions and clarify facts. Further, the commenter believes that the GRC only considers facts that are specifically provided in the GRC forms submitted by the parties versus the GRC having the benefit of receiving complete legal briefs which provide a detailed factual account of the request, denial and legal positions of the parties.

RESPONSE: The GRC agrees with the commenter that the rule is consistent with the law. The parties are given ample opportunity to provide arguments and documentation as part of the Executive Director and staff review. The intent of the statute is to protect the public's right to access government records and the GRC is committed to conducting its hearings with that intent. Experience has shown that when the GRC did adopt the policy being recommended by the commenter, cases took much longer to resolve. In keeping with the intent of the statute to provide an expeditious and non-adversarial proceeding, the GRC believes that the current rule provides an opportunity for members of the public to request documents without incurring unnecessary legal costs. In addition, GRC takes this opportunity to assure the commentater that attachments to the GRC form are permitted and are considered equally with the information provided in the GRC form.

4. COMMENT: N.J.A.C. 5:105-2.1(h). Edward J. Buzak, Esq. of Edward J. Buzak Law Offices believes that the unclear nature of this proposed rule may lead some to incorrectly understand that the GRC has the ability to initiate a denial of access complaint against a records custodian. This proposed rule states that 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." The commenter suggests that this proposed rule be moved from the general complaint process provisions to the provisions on hearings and no hearings.

RESPONSE: The GRC's ability to raise issues or legal defenses is limited to complaints brought by the parties and the rule has been amended to more clearly reflect that limitation.

5. COMMENT: N.J.A.C. 5:105-2.2. Edward J. Buzak, Esq. of Edward J. Buzak Law Offices believes that it is unreasonable that public entities are required to supply government records within seven business days (sometimes immediately) when, pursuant to this proposed rule, a requestor has six months to file a complaint with the GRC. The commenter analogizes the requestor's filing of a denial of access complaints with prerogative writ matters which must be formally submitted to the Court within 45 days. Conversely, Mary Kathryn Roberts, Esq. of Riker, Danzig, Scherer, Hyland & Perretti, LLP, on behalf of Data Trace, Inc., believes that the deadline for requestors filing denial of access complaints, if any, should be no less than one year. Similarly, Thomas J. Cafferty of Scarinci & Hollenbeck, LLC, on behalf of the New Jersey Press Association, believes that any deadline imposed on a requestors filing denial of access complaints simply establishes one more obstacle for requestors seeking disclosure of government records.

RESPONSE: The protection of the public's right of access is the central consideration for the GRCs rules. The GRC does not believe that a 45-day deadline is sufficient to give a requestor enough time to determine whether he or she wants to pursue an action in Superior Court or before the GRC. Upon further consideration, the GRC is now not convinced that even one year is sufficient to do the same as is suggest by one commenter. Therefore, the GRC will delete the deadline in its entirety.

6. COMMENT: N.J.A.C. 5:105-2.5(a). Thomas J. Cafferty of Scarinci & Hollenbeck, LLC, on behalf of the New Jersey Press Association, believes that the GRC should replace "custodian of record" with "records custodian."

RESPONSE: The GRC agrees with the commenter and will make this change. In this reproposal, the GRC has adopted the statutory definition of "custodian of a government record" or "custodian" at N.J.A.C. 5:105-1.3. Please see the Response to Comment 1 above.

7. COMMENT: N.J.A.C. 5:105-2.5(i). Thomas J. Cafferty of Scarinci & Hollenbeck, LLC, on behalf of the New Jersey Press Association, believes that the requirement for letters of representation to be signed by the parties is unnecessarily burdensome compared to that which is required by New Jersey Courts.

RESPONSE: The GRC agrees with the commentator and has deleted the requirement that letters of representation be signed by the parties. Additionally, the GRC has eliminated the separate section addressing letters of representation and has now included such language in the section on "Parties to a complaint," N.J.A.C. 5:105-2.3.

8. COMMENT: N.J.A.C. 5:105-2.6(f). Mary Kathryn Roberts, Esq. of Riker, Danzig, Scherer, Hyland & Perretti, LLP, on behalf of Data Trace, Inc., states that while this proposed rule obligates the custodian to return the Statement of Information to the GRC based on when the GRC provides the form, there is no time period set forth for when the GRC must provide the form.

RESPONSE: A time limit is not appropriate for when the Statement of Information form may be provided to the custodian since the GRC is statutorily mandated to first offer the parties mediation before the GRC begins to investigate a denial of access complaint. The Statement of Information form only becomes relevant if mediation fails to resolve the matter and the complaint proceeds to the Council for adjudication (which occurs as determined by the parties' voluntary decision to discontinue mediation proceedings). Thus, the timeline of a denial of access complaint is largely determined by the parties' actions. Moreover, the custodian need not wait for a form to be provided by the GRC but may download the form from the GRC website.

9. COMMENT: N.J.A.C. 5:105-2.6(j). Mary Kathryn Roberts, Esq. of Riker, Danzig, Scherer, Hyland & Perretti, LLP, on behalf of Data Trace, Inc., states that while the proposed rules specify time limits with regard to how promptly a complainant can amend a complaint and the time in which custodians must return the Statement of Information to the GRC, there are no time limits imposed on the GRC for rendering decisions.

RESPONSE: No specific time limits are imposed on the GRC for rendering its decisions because of the variety of complaints received and the varying degrees of complexity which different complaints engender. However, it is the GRCs obligation and overarching purpose to ensure that complaints heard by the GRC are adjudicated timely and that the public's right to access is not unnecessarily delayed.

10. COMMENT: N.J.A.C. 5:105-2.7(f). Thomas J. Cafferty of Scarinci & Hollenbeck, LLC, on behalf of the New Jersey Press Association, objects to the prohibition of any person participating in mediation from divulging the content of any mediation session or any document produced in the course of mediation without written consent of the other party.

RESPONSE: The Council does not have the authority to adopt the commenter's suggestion. Confidentiality of mediation proceedings is mandated by the Uniform Mediation Act (N.J.S.A. 2A:23C-1 et seq.). Thus, the GRC is required by law to comply with the provisions of that statute.

11. COMMENT: N.J.A.C. 5:105-2.8. Thomas J. Cafferty of Scarinci & Hollenbeck, LLC, on behalf of the New Jersey Press Association, believes that the GRC's proposed rule which states that the "Council members will 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" is confusing. The commenter goes on to question when such findings and recommendations are made, how they are made, and whether and when the parties receive same to submit a response.

RESPONSE: Pursuant to N.J.S.A. 47:1A-7b, the Counsel is authorized to "receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian." The intent of the statute is to protect the public's right to access government records and the GRC is committed to conducting its hearings with that intent. Should a party feel dissatisfied with a GRC finding or recommendation, he or she may appeal the decision to the Appellate Division of the Superior Court (see N.J.A.C. 5:105-2.13 and N.J.S.A. 47:1A-7.e). Consistent with the commenter's reference to the GRC as an alternative to Superior Court and as part of the GRC's adjudicatory process, the GRC staff develops its findings and recommendations based on the written submissions of the parties and legal advice from the Office of the Attorney General or designated outside counsel (when the custodial agency is a State agency). The findings and recommendations are then submitted to the GRC members for adjudication of the matter. In lieu of parties submitting a response to findings and recommendations of GRC staff, parties may appeal decisions of the GRC to the Appellate Division of the Superior Court (see N.J.A.C. 5:105-2.13 and N.J.S.A. 47:1A-7.e).

12. COMMENT: N.J.A.C. 5:105-2.10(d). Thomas J. Cafferty of Scarinci & Hollenbeck, LLC, on behalf of the New Jersey Press Association, objects to the prohibition of a response by a complainant to a records custodian's certification and document index ordered by the GRC to be provided with the unredacted records in question so that the GRC may conduct its own *in camera* inspection.

RESPONSE: The GRC acknowledges the commenter's objection. To ensure that complainants are allowed an opportunity to respond to the submissions of custodians, the GRC will amend the rule to allow a complainant the opportunity to respond to a custodian's certification and document index submitted to the GRC for an *in camera* inspection.

13. COMMENT: N.J.A.C. 5:105-2.12. Thomas J. Cafferty of Scarinci & Hollenbeck, LLC, on behalf of the New Jersey Press Association, objects to the lack of the opportunity for the opposing party to respond to a party's request for reconsideration.

RESPONSE: The GRC acknowledges the commenter's objection. To ensure that parties are allowed an opportunity to respond to the submissions of opposing parties, the GRC will amend the rule to allow a party the opportunity to respond to another party's request for reconsideration submitted to the GRC.

14. COMMENT: N.J.A.C. 5:105-2.13(a). Michael A. Vranichik, on behalf of the New Jersey School Boards Association, states that while this proposed rule provides that final decisions of the GRC may be appealed to the Appellate Division of the Superior Court, it does not provide the time frame for making such appeal. Accordingly, the commenter suggests that the GRC expressly provide the time frame for such an appeal.

RESPONSE: The GRC agrees with the commenter and will make this change.

15. COMMENT: N.J.A.C. 5:105-2.13(b). Richard Gutman, Esq. states that using the word "shall" makes a request for a stay a prerequisite for filing an appeal and there is no reason to require a stay request from a complainant who wishes to appeal a decision of the GRC (presumably to appeal the amount of attorney's fees awarded). Likewise, Thomas J. Cafferty of Scarinci & Hollenbeck, LLC, on behalf of the New Jersey Press Association, states that there may be circumstances in which a party does not require a stay or the situation does not warrant one because a prevailing party on the issue of access appeals a decision only with regard to the amount of attorney's fees awarded.

RESPONSE: The GRC agrees with both commenters and will change the rule to address the specific circumstances of appeals by prevailing party complainants who only appeal GRC decisions with regard to the amount of attorney's fees awarded.

16. COMMENT: N.J.A.C. 5:105-2.13(b) and 2.14. Thomas J. Cafferty of Scarinci & Hollenbeck, LLC, on behalf of the New Jersey Press Association, states that these two provisions are at odds because N.J.A.C. 5:105-2.13(b) requires that prior to filing an appeal, a request for stay be filed with the GRC while N.J.A.C. 5:105-2.14 provides that a stay shall be granted upon request for a stay and a copy of the notice of appeal.

RESPONSE: The GRC agrees with the commenter and will delete the requirement of a copy of the notice of appeal from the Appellate Division of the Superior Court before the stay is granted by the GRC to provide consistency between N.J.A.C. 5:105-2.13(b) and 2.14(c). Additionally, the GRC will change the word "shall" to "may" since the grant of a stay is not mandatory. This is illustrated in the civil procedure allowing for a party to motion the Appellate Division of Superior Court for a stay pursuant to N.J. Court Rule 2:9-5(b) when an administrative agency denies a request for stay.

17. COMMENT: N.J.A.C. 5:105-2.14. Thomas J. Cafferty of Scarinci & Hollenbeck, LLC, on behalf of the New Jersey Press Association, objects to the lack of the opportunity for the opposing party to respond to a party's request for

a stay. The commenter also points out a typographical error (the exclusion of the word "not") in N.J.A.C. 5:105-2.14(f)3.

RESPONSE: The GRC acknowledges the commenter's objection. To ensure that parties' are allowed an opportunity to respond to the submissions of opposing parties, the GRC will amend the rule to allow a party the opportunity to respond to another party's request for stay submitted to the GRC. Additionally, the GRC will add the word "not" in the language now proposed as N.J.A.C. 5:105-2.14(h)3.

18. COMMENT: N.J.A.C. 5:105-2.14(d). Michael A. Vranichik, on behalf of the New Jersey School Boards Association, states that this proposed rule limits the GRC's grant of a stay of a final decision to the next GRC meeting. The commenter suggests that the stay be granted until the Appellate Division has determined to grant or deny the appeal.

RESPONSE: This proposed rule describes a grant of stay for an interim decision, not a final decision. Due to the obvious confusion, the GRC will add the words "of a Council's interim decision" to clarify this provision.

19. COMMENT: N.J.A.C. 5:105-2.15(a). Mary Kathryn Roberts, Esq. of Riker, Danzig, Scherer, Hyland & Perretti, LLP, on behalf of Data Trace, Inc., states the term "may" set forth in this provision concerning the award of attorney's fees suggests that prevailing party attorney's fees are discretionary which is inconsistent with the language of OPRA. Instead, the commenter suggests that the word "may" be replaced with the word "shall." Also, Thomas J. Cafferty of Scarinci & Hollenbeck, LLC, on behalf of the New Jersey Press Association, objects to the GRC's requirement that a "final decision" in favor of the complainant be rendered before prevailing party attorney's fees may be awarded.

RESPONSE: The GRC agrees with both commenters and will make these changes. Mr. Cafferty's suggestion is consistent with the recent court decision of *Teeters v. DYFS*, 38 N.J. Super. 423 (App.Div. 2006).

20. COMMENT: N.J.A.C. 5:105-2.15(f)2. Mary Kathryn Roberts, Esq. of Riker, Danzig, Scherer, Hyland & Perretti, LLP, on behalf of Data Trace, Inc., states the terms "if any" set forth in this proposed rule regarding the GRC determining the amount of reasonable attorney's fees should be deleted.

RESPONSE: The GRC agrees with the commenter and will make this change.

21. COMMENT: N.J.A.C. 5:105-2.15(b). Richard Gutman, Esq. states that the 10 business day deadline for filing attorney's fee applications is inconsistent and more burdensome than court practice. The commenter states that since the GRC and the Superior Court are alternative methods for enforcing OPRA, the GRC should extend this time frame to 20 days after entry of judgment consistent with court practice.

RESPONSE: The GRC agrees with the commenter and will make this change.

22. COMMENT: N.J.A.C. 5:105-3.1. Thomas J. Cafferty of Scarinci & Hollenbeck, LLC, on behalf of the New Jersey Press Association, states that the GRC left out "Court case decisions" from among the list of resources to which the GRC may direct inquirers in order to assist with questions regarding OPRA.

RESPONSE: While the GRC agrees with the commenter and will make this change, it should be noted that this provision includes the word "etc." so as not to exclude any resources that may be relevant to assisting an individual with a question regarding OPRA, including court decisions, executive orders, other state or federal citations and many others.

A summary of each section of the repropoed rules follows:

Subchapter 1 sets forth the chapter's general provisions.

Repropoed 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. This section was revised to clarify the purpose and scope of the repropoed rules.

Repropoed 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.

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

The definition of "Administrative Case Disposition" was revised to more precisely describe what has also been re-named "Administrative Complaint Disposition."

The definition of "advisory opinion" was revised to more precisely describe this officer of the GRC.

The definition of "Chairperson" was revised to more precisely describe this office of the GRC.

The definition of "complaint" was revised to delete that part of the previous definition which allowed submissions of complaints other than on the denial of access complaint form utilized by the GRC to ensure that all relevant information required for the proper adjudication of a complaint is ascertained from the complainant.

The definition of "government record" was revised to delete that part of the previous definition which indicated one type of record excluded from the statutory definition of a government record. This amendment was necessary since the other exclusions from the definition of a government record pursuant to N.J.S.A. 47:1A-1.1 were not also included in the original definition.

The definition of "*in camera*" was revised to include words providing additional clarity regarding the recognition of exemptions contained in laws other than the Act.

The definition of "Interim order" was revised to delete words that were repetitive.

The definition of "penalty" was revised to mirror the statutory language of the Act.

The definition of "Statement of Information" was revised to delete that part of the previous definition which allowed submissions other than on the Statement of Information form utilized by the GRC to ensure that all relevant information required for the proper adjudication of a complaint is ascertained from the custodian.

The definition of "*sua sponte*" was revised to add words for clarity.

The definition of "supplemental decision" was revised to more precisely describe this type of decision which is now also referred to as "revised final decision."

The definition of "Vice Chairperson" was revised to more precisely describe this officer of the GRC.

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

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

Reproposed 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.

Reproposed 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. N.J.A.C. 5:105-2.1(j) was revised to add "unless requested by the Council to do so" at the end of the second sentence to more precisely describe the restriction against oral testimony at the Council's monthly meetings.

Reproposed N.J.A.C. 5:105-2.2 (originally proposed as N.J.A.C. 5:105-2.3) provides that the complainant and custodian are the parties to a complaint. This provision was revised to include reference to a party's representation (which was previously included in a separate, stand-alone provision--N.J.A.C. 5:105-2.4).

Reproposed N.J.A.C. 5:103-2.3 (originally proposed as 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. N.J.A.C. 5:105-2.3(c) was revised to delete that part of the provision which allowed submissions of complaints other than on the denial of access complaint form utilized by the GRC to ensure that all relevant information required for the proper adjudication of a complaint is ascertained from the complainant. This amendment is consistent with that made to the definition of a "complaint" in N.J.A.C. 5:105-1.3. N.J.A.C. 5:105-2.3(e) was revised to delete the reference to the Council's ability to raise issue *sua sponte* which is already included in Subchapter 2, Complaint Process, at N.J.A.C. 5:105-2.1(h).

Reproposed N.J.A.C. 5:105-2.4 (originally proposed as 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.

N.J.A.C. 5:105-2.4(c) was revised to delete that part of the provision which allowed submissions other than on the Statement of Information form utilized by the GRC to ensure that all relevant information required for the proper adjudication of a complaint is ascertained from the custodian. This amendment is consistent with that made to the definition of a "Statement of Information" in N.J.A.C. 5:105-1.3.

N.J.A.C. 5:105-2.4(d) of the original proposal was deleted because this verbiage was combined with that of the prior provision.

N.J.A.C. 5:105-2.4(d) (N.J.A.C. 5:105-2.6(e) of the original proposal) was revised to delete the reference to the Council's ability to raise issues *sua sponte* which is already included in Subchapter 2, Complaint Process, N.J.A.C. 5:105-2.1(h).

N.J.A.C. 5:105-2.4(e) (N.J.A.C. 5:105-2.6(f) of the original proposal) was revised by adding words to add to the clarity of the provision.

N.J.A.C. 5:105-2.4(f) (N.J.A.C. 5:105-2.6(g) of the original proposal) was revised to shorten the required response time from seven business days to five business days to be consistent with the GRC's operating procedures.

N.J.A.C. 5:105-2.4(g) (N.J.A.C. 5:105-2.6(i) of the original proposal) was revised to articulate the custodian's responsibility to serve the complainant with a copy of the SOI.

N.J.A.C. 5:105-2.4(h) (N.J.A.C. 5:105-2.6(j) of the original proposal) was revised to shorten the required response time from seven business days to five business days to be more consistent with the GRC's operating procedures.

Reproposed N.J.A.C. 5:105-2.5 (originally proposed on N.J.A.C. 5:105-2.7) provides the process for mediation of a complaint. N.J.A.C. 5:105-2.5(d) was revised to mirror the statutory language of the Act. N.J.A.C. 5:105-2.5(f) was revised to more accurately reflect the requirements of the confidentiality subject to mediation proceedings for purposes of GRC proceedings and in conformance with the Uniform Mediation Act. (N.J.S.A. 2A:23C-1 et seq.). N.J.A.C. 5:105-2.5(k) was revised to more accurately reflect the GRC proceedings of complaints settled in mediation.

Reproposed N.J.A.C. 5:105-2.6 (originally proposed as N.J.A.C. 5:105-2.8) provides the procedures for the Council's adjudicatory process when no hearing is held.

Reproposed N.J.A.C. 5:105-2.7 (originally proposed as N.J.A.C. 5:105-2.9) provides the procedures for the Council's adjudicatory process when a hearing is held.

Reproposed N.J.A.C. 5:105-2.8 (originally proposed as N.J.A.C. 5:105-2.10) provides the procedures for the Council's *in camera* inspection of documents. N.J.A.C. 5:105-2.8(c) was revised to more accurately describe the GRC's *in camera* proceedings. At the time of the original proposal, this type of proceeding was new to the GRC and has since evolved to be less restrictive for the parties.

Reproposed N.J.A.C. 5:105-2.9 (originally proposed as N.J.A.C. 5:105-2.11) describes the Council's decisions. N.J.A.C. 5:105-2.9(a) was revised to mirror the amendments made to the definitions provisions and to include all decisions rendered by the Council (including "final decisions").

Reproposed N.J.A.C. 5:105-2.10 (originally proposed as N.J.A.C. 5:105-2.12) describes the Council's procedures for reconsideration of its decisions. N.J.A.C. 5:105-2.10(e) was revised to reflect the discretionary nature of an administrative agency's grant of reconsideration of its decisions consistent with 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.

Reproposed N.J.A.C. 5:105-2.11 (originally proposed as N.J.A.C. 5:105-2.13) provides the procedure for appeals from the Council's final decisions to the Appellate Division of the Superior Court of New Jersey.

Reproposed N.J.A.C. 5:105-2.12 (originally proposed as N.J.A.C. 5:105-2.14) provides the requirements for a party's request for a stay of the Council's decision. N.J.A.C. 5:105-2.14(c) was revised based on public comments. See Comments 16 and 17 above.

Reproposed N.J.A.C. 5:105-2.13 (originally proposed as N.J.A.C. 5:105-2.15) provides the procedures for a party's application for prevailing party attorney's fees.

Reproposed N.J.A.C. 5:105-2.14 (originally proposed as 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.

Reproposed 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.

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

Because the Council is providing a 60-day comment period for this notice of re-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 reproposed 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 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 re-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 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 custodian would incur those costs 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 shall, upon application, award reasonable attorney's fees. A public official, officer, employee or records custodian who knowingly and willfully violates 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. 5:105-2.17.

Federal Standards Statement

A Federal standards analysis is not required because the reproposed 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 reproposed new rules will result in an increase or decrease in the number of jobs in the State.

Agriculture Industry Impact

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

Regulatory Flexibility Analysis

The reproposed 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 complaint 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 repropoed 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 repropoed 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 are for the purpose of establishing procedures for the consideration of complaints filed pursuant to the Act, and for the benefit of any person seeking to utilize the Council as an information resource for understanding the Act and/or the functions of 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 Procedures 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 these rules are inconsistent with the Administrative Procedures Act and 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 Complaint Disposition" means a decision of the Council as to whether to accept or reject the Executive Director's recommendation of dismissal based on jurisdictional, procedural or other defects of the complaint.

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

"Chairperson" means the presiding officer of the Government Records 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 custodian has unlawfully denied the requestor access to a government record.

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

"Custodian of a Government Record" or "Custodian" means in the case of a municipality, the municipal clerk and in the case of any other public agency, the officer officially designated by formal action of that agency's director or governing body, as the case may be.

"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, inspects records or receives testimony *in camera*, and assembles 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 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 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.

"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, 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, or other applicable law.

"Inquiry" means a request from the public or a custodian, 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 requiring the records custodian or the complainant to perform some act in accordance with OPRA the compliance of which must be reported back to the Council.

"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 an official, officer, employee or 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 an OPRA 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.

"*Sua sponte*" means the Council's ability to raise issues, legal defenses or other matters not raised by the parties to a denial of access complaint.

"Supplemental decision" or "revised final decision" means a decision issued by the Council that follows a final decision.

"Vice Chairperson" means the presiding officer of the Council in the absence of the Chairperson.

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
 P.O. Box 819
 Trenton, New Jersey 08625-0819
 Toll Free: (866) 850-0511
 Direct Phone: (609) 292-6830
 Fax: (609) 633-6337

Email: grc@dca.state.nj.us

Website: www.nj.gov/grc

(c) All communications to Council members, Executive Director or staff shall be delivered to the contact information listed 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, shall 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 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 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 custodian against whom the complaint was filed pursuant to N.J.S.A. 47:1A-7e.

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- (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 shall be limited to the submissions of the parties submitted to the Council.
- (h) In response to the complaint before it, the Council may raise issues and defenses pertaining to that complaint on a *sua sponte* basis 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 unless requested by the Council to do so.

5:105-2.2 Parties to a complaint

The complainant and 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. If a party secures representation following submission of a denial of access complaint, the party must notify the Council and all other parties immediately. The representatives of any party named in a complaint shall file with the Council written notification and a copy of same shall be served upon all parties at the same time the Council receives the notification.

5:105-2.3 Complainant document submissions to the Council

- (a) The complainant submitting a completed denial of access complaint to the Council and custodian 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.
- (d) Complaint forms may be obtained from the Council's staff or downloaded from the Council's website.
- (e) The complainant 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.
- (f) The complaint may also include any attachments, affidavits, certifications or other documentation deemed relevant or supportive of the allegations set forth in the complaint.
- (g) The Council shall provide a copy of all complaints to the custodian 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 simultaneously 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 Executive Director.

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

(i) 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:

1. The 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.

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

5:105-2.4 Custodian document submissions to the Council

(a) Custodians shall submit a completed and signed statement of information (SOI) to the Council and the complainant that details the custodians' position for each complaint filed with the Council in all instances for which mediation is declined, mediation is not accepted by either party, or in which mediation is accepted but through which the parties do 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 complete the Council's SOI form provided by the Council's staff. SOI forms may also be downloaded from the Council's website.

(d) The custodian shall include in the SOI or the attachments thereto any information, defenses, and arguments that the custodian wishes to bring to the Council's attention for consideration in the adjudication of the complaint.

(e) The custodian may also include with the SOI any attachments, affidavits, certifications or documentation deemed appropriate or supportive of the defenses set forth in the SOI.

(f) Custodians shall submit a completed and signed SOI for each complaint to the Council's staff and the complainant not later than five business days from the date of receipt of the SOI form from the Council's staff. Custodians must sign the SOI. The Council will not accept additional submissions from the custodian unless the 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 submissions of the complainant.

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

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

(i) If a complainant amends his or her complaint, the custodian shall have five business days from the date of receipt of same to submit his or her position regarding the complaint amendment with the Council. The Council will not accept additional submissions beyond said time period unless the Executive Director orders same or offers his or her express approval for same. Failure to comply with this time period may result in the case being adjudicated based solely on the submissions of the complainant.

(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:

1. The 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 custodians to submit, within prescribed time limits, additional information deemed necessary for the Council to adjudicate the complaint.

5:105-2.5 Mediation

(a) Upon receipt of a complaint, the Council shall offer the services of a mediator without charge to the parties.

(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 selected by the Council will conduct all mediation proceedings.

(e) Mediation practices shall be governed by the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq.

(f) Neither the mediator nor any party to mediation shall divulge to anyone the content of any mediation session or share any document produced in the course of or resulting from mediation without the written consent of the party who made the statement or produced the document. No party may use the statements made or documents produced during mediation proceedings against another party in any proceeding before the Council if mediation fails to resolve all issues presented in the complaint and the complaint is referred to the Council for adjudication.

(g) Representatives of the parties may attend mediation proceedings and 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 complaint 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 administratively adjudicate any complaint upon receipt of a written mediation agreement fully executed by the parties which indicates that the matters presented in the complaint have been either resolved or voluntarily dismissed by all parties. Such mediation agreements shall be deemed confidential.

(l) The Council shall provide the parties notice of any dismissal by issuing an administrative complaint disposition in the matter.

5:105-2.6 Council complaint deliberations - no hearing

(a) The Council members shall review the findings and recommendations of the Executive Director, as well as all party submissions, and vote to modify, reject or accept such findings and recommendations 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 complaints 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.

5:105-2.7 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, pursuant to N.J.S.A. 47:1A-7.e, and 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 Procedures Rules, N.J.A.C. 1:1, insofar as they may be applicable and practicable.

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

5:105-2.8 *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 relevant:

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: The custodian, or his or her representative, shall:

1. 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; and
2. Deliver to the Executive Director of the Council, or such other person as the Council may designate, and to the complainant 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 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 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 be permitted to respond to the certification in (c)1 above and the index in (c)2 above within five business days.

(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 or at a special meeting 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 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.

5:105-2.9 Decisions of the Council

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

1. Interim orders;
2. Final decisions;
3. Supplemental decisions;
4. Revised final decisions; and
5. Administrative complaint dispositions.

(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.

5:105-2.10 Relief from Council decisions - reconsideration

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- (a) The Council, at 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 must be in writing, delivered to the Council and served on all parties.
- (d) Parties must file any objection to the request for reconsideration within 10 business days following receipt of the request.
- (e) The Council will provide all parties with written notification of its determination regarding the request for reconsideration.

5:105-2.11 Relief from Council decisions - appeals

- (a) A final decision of the Council may be appealed to the Appellate Division of the Superior Court within 45 days from the date the decision is issued to the parties in accordance with New Jersey Rules Governing the Courts. (See N.J.S.A. 47:1A-7.e.).
- (b) Prior to filing an appeal, the appealing party shall request a stay of the Council's final decision which orders disclosure of government records.
- (c) A request for a stay is not required when a prevailing party complainant appeals a final decision only with regard to the amount of attorney's fees awarded.

5:105-2.12 Stays of Council decisions

- (a) Requests for a stay of a final decision must be in writing, delivered to the Council and simultaneously served upon all parties.
- (b) Parties must file any objection to the request for a stay from a final decision within 10 business days following receipt of the request.
- (c) The Executive Director may grant a stay from a final decision based on consideration of the request and any objection to the request submitted to the Council.
- (d) 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's decision.
 1. Requests must be in writing, delivered to the Council and simultaneously served upon all parties.
 2. Parties must file any objection to the request for a stay from an interim order within 10 business days following receipt of the request.
- (e) The Executive Director may grant a stay for the period of time requested, but in no event for a period of time longer than the date of the next regularly scheduled meeting of the Council.
- (f) A request for a stay must be in writing and include a detailed analysis of the issue(s), which includes an analysis of 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 not granted; and

4. The public interest.

5:105-2.13 Prevailing party attorney's fees

(a) Reasonable attorney's fees shall be awarded when the requestor is successful (or partially successful) in obtaining access to government records after a denial of access complaint filed with the Council, access was improperly denied and the requested records are disclosed pursuant to a determination of the Council or voluntary settlement agreement between the parties.

(b) The complainant, or his or her attorney, shall submit an application to the Council for an award of attorney's fees within 20 business days following the effective date of a decision by the Council or a voluntary settlement agreement. The application must include a certification from the attorney(s) representing the complainant that includes:

1. The Council's complaint 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 complaint;
 5. Copies of weekly time sheets for each professional involved in the complaint, which includes detailed descriptions of all activities attributable to the project in 0.1 hour (six-minute) increments;
 6. Evidence that the rates charged are in accordance with prevailing market rates in the relevant community. Such evidence shall include:
 - 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 reasonable attorney's fees to be awarded to complainant's attorney; and
 3. Predicate the attorney's fees award upon the number of hours and rate based on:
 - i. Applicable law;
 - ii. Submissions of the parties; and
 - iii. The Council's own discretion.

5:105-2.14 Knowing and willful violations of the Act; penalties

(a) Public officials, officers, employees or custodians who knowingly and willfully violate the Act and are 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 ten (10) years of an initial violation; and
3. \$ 5,000 for a third violation that occurs within ten (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 shall be sent.

(b) The Council, where possible, will direct inquirers to available resources such as Council decisions, court 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 complaint-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.