

DEPARTMENT OF COMMUNITY AFFAIRS

NEW JERSEY GOVERNMENT RECORDS COUNCIL

Complaint Adjudication and OPRA Information Inquiry Procedures

Proposed New Rules: N.J.A.C. 5:103-1

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

Authority: N.J.S.A. 52:14B-3.

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

Proposal Number: PRN 2005-XX.

Submit written comments by XXX XX, 2005 to:

Catherine Starghill, Esq.

In-House Counsel

Government Records Council

P.O. Box 819

Trenton, NJ 08625-0819

Fax: (609) 633-6337

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 and the proposed rule follows (omitted sections are reserved):

Proposed N.J.A.C. 5:103-1.1 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. 5:103-1.2 provides for the liberal construction of these rules to permit the Council to discharge its statutory mandate.

Proposed N.J.A.C. 5:103-1.3 contains the definitions which are necessary for the implementation of the new subchapters.

Proposed N.J.A.C. 5:103-1.4 provides the description of the Council organization and contact information of the Council.

Proposed N.J.A.C. 5:103-1.5 provides the statutorily mandated powers and duties of the Council.

Proposed N.J.A.C. 5:103-2.1 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. 5:103-2.2 provides the relaxation of rules by the Council to prevent injustice and unfairness.

Proposed N.J.A.C. 5:103-2.3 provides the six (6) month deadline from the date of an OPRA request for filing a denial of access complaint with the Council.

Proposed N.J.A.C. 5:103-2.4 provides that the complainant and custodian are the parties to a complaint.

Proposed N.J.A.C. 5:103-2.5 provides the requirements of representatives of parties to a complaint before the Council.

Proposed N.J.A.C. 5:103-2.6 provides the requirements for all documents submitted to the Council for consideration in the adjudicatory process.

Proposed N.J.A.C. 5:103-2.7 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. 5:103-2.8 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. 5:103-2.9 provides the process for mediation of a complaint.

Proposed N.J.A.C. 5:103-2.10 provides the discretion of the Council to refer contested cases to the New Jersey Office of Administrative Law for an administrative hearing and decision recommendation.

Proposed N.J.A.C. 5:103-2.11 provides the procedures for the Council's adjudicatory process when no hearing is held.

Proposed N.J.A.C. 5:103-2.12 provides the procedures for the Council's adjudicatory process when a hearing is held.

Proposed N.J.A.C. 5:103-2.13 provides the procedures for the Council's *in camera* inspection of documents.

Proposed N.J.A.C. 5:103-2.14 describes the Council's decisions.

Proposed N.J.A.C. 5:103-2.15 describes the Council's procedures for reconsideration of its decisions.

Proposed N.J.A.C. 5:103-2.16 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. 5:103-2.17 provides the requirements for a party's request

for a stay of the Council's decision.

Proposed N.J.A.C. 5:103-2.18 provides the procedures for a party's application for prevailing party attorney's fees.

Proposed N.J.A.C. 5:103-2.19 provides the procedures for the Council's determination and imposition of a penalty for the knowing and willful violation of the Act.

Proposed N.J.A.C. 5:103-3.1 describes the information and resources available to the public and public agencies through the inquiry process established by the Council.

Proposed N.J.A.C. 5:103-4.1 provides the Council's discretion to issue advisory opinions.

Because the Council is provided a sixty (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 the rules provide all interested parties with an understanding of the Council's operations. More specifically, the proposed new rules articulate the Council's complaint adjudication and OPRA information inquiry procedures. The proposed new rules will serve as a guide for any

party involved in contested issues surrounding access to government records. The new rules also describe how individuals may utilize the Council as an information resource for understanding the Act.

Economic Impact

The adoption of these proposed new rules will not have any direct economic impact on New Jersey citizens pursuant to N.J.S.A. 47:1A-7.f.. The new rules articulate the procedures for the cost free alternative of pursuing a denial of access to government records complaint under the Act. 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.

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

A regulatory flexibility analysis is not required, since the proposed new rules impose no requirements on small businesses as the term is defined in N.J.S.A. 52:14B-16 et seq., but regulate only the Council members, Executive Director and staff of the Council, the complainants who institute denial of access complaints with the Council, records custodians who must respond to denial of access complaints instituted against them, and persons making information inquires of the Council.

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.

SUBCHAPTER 1. GENERAL PROVISIONS

5:103-1.1 Purpose and Scope

(a) The rules in this chapter apply to any person or entity that files a denial of access complainant 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 these special rules shall be governed by the Administrative Procedures Act contained in N.J.A.C. 1:1. To the extent that these special rules are inconsistent with

the Administrative Procedures Act, these rules shall apply.

5:103-1.2 Construction of the Rules

These rules shall be liberally construed to permit the Council to discharge its statutory function.

5:103-1.3 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.

“Adjudication” means any action in which the Council receives, hears or considers party document submissions, or other documentary evidence, testimony from any person or convenes for the purpose of deciding any or all issues presented by a complaint.

“Administrative Case Closure” means the 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.

“Administrative Case Disposition” means the decision of the Council as adjudicated with the power vested in the Executive Director for complaints in which the complainant voluntarily withdraws or settles his or her complaint through mediation or otherwise.

“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.

“Decision” means any interim, final or supplemental decisions rendered by the Council in its capacity as an adjudicatory body. It shall also mean administrative case closures and administrative case dispositions.

“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.

“Final Decision” means a decision issued by the Council that completely adjudicates a complaint.

“Hearing Officer” means a Council member, or the Council’s designee, authorized by a public vote of the Council to receive testimony and documentary evidence regarding a denial of access complaint, to inspect records or receive testimony *in camera*, as appropriate, 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 Decision” means a decision 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., N.J.S.A.

47:1A-7.d. and N.J.S.A. 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.

“Motion to Quash” means a party's request that the Council nullify a subpoena issued by the Council.

“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.

“*Pro hac vice*” means a Council-approved representation of a party to a denial of

access complaint by an out-of-state lawyer for one particular case.

“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 or matters not raised by the parties.

“Supplemental Decision” means a decision issued by the Council that follows a final decision.

“Vice Chairperson” means the Vice Chairperson of the Council.

5:103-1.4 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 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, 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, 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.

5:103-1.5 Powers and Duties of the Council

The Council shall have the following powers and duties pursuant to N.J.S.A.

47:1A-7.b.:

- (a) adjudicate complaints filed with the Council regarding access to government records;
- (b) make mediation services available free of charge to complainants and custodians;
- (e) respond to inquiries about the Act or the Council from the public and public

agencies;

(f) provide information about the Act and services available from the Council;

(g) 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;

(h) issue advisory opinions on the accessibility of government records,

(i) make training opportunities available to custodians, public officers, public employees and officials concerning the provisions of the Act; and

(j) prepare for custodians lists of the types of records in possession of public agencies, which are government records accessible under the Act.

SUBCHAPTER 2. COMPLAINT PROCESS

5:103-2.1 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-7e.

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

(g) 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.

(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.

5:103-2.2 Relaxation of Rules

(a) The Council or hearing officer may relax any rule herein to prevent injustice or unfairness and to effectuate the purposes of the Act, upon finding that good cause exists and that strict compliance with these rules will work an injustice or unfairness.

(b) When an act is required or allowed to be done within a specified time, the Council or hearing officer may order the period altered upon finding that strict adherence will work injustice, unfairness or interference with the proper effectuation of the Act.

5:103-2.3 Deadline for Filing a Denial of Access Complaint

A complainant shall have six (6) 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.

5:103-2.4 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.

5:103-2.5 Representation of the Parties to a Complaint

(a) Any party named in a complaint may represent themselves in any matter before the Council.

(b) 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.

(c) 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.

(d) 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. detailed explanation of the reasons for the objections.

(e) Attorneys not licensed to practice in New Jersey:

1. Attorneys not licensed to practice law in New Jersey may represent parties in any matter before the Council.

2. If the Council decides in favor of a party who raised an objection to representation by an attorney not licensed to practice law in New Jersey, the

attorney being objected to will not be acknowledged by the Council unless he or she:

i. Files a motion with the Council for admittance *pro hac vice*.

(1) Attorneys seeking admittance *pro hac vice* must be licensed in another jurisdiction and be in good standing therein.

(2) Attorneys seeking admission *pro hac vice* must serve said motion upon all parties.

ii. Works through an attorney licensed to practice law in New Jersey and provides the Council with a letter of representation from said licensed attorney.

5:103-2.6 Service of Documents Submitted to the Council

(a) 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, the facsimile number and/or e-mail address to which replies should be sent, and, where applicable, the name and case number of the complaint.

(b) Any person submitting any document or communication of any sort to the Council or its staff regarding a complaint shall also mail, e-mail, send via facsimile or hand-deliver a complete copy of the submission to all parties named in the complaint and to any other person the Council or hearing officer shall direct, except that a copy of a complaint received by the Council shall be provided to a custodian by Council staff

when the requestor has failed to do so.

(c) Any copy of a document submitted to the Council, its staff or any party to a Complaint and which has been delivered via Certified Return Receipt Requested, with proof of delivery thereof, shall be *prima facie* evidence of such service and the date thereof.

(d) E-mail transmissions shall be made pursuant to the Uniform Electronic Transactions Act, N.J.S.A. 12:12-1 through 12A: 12-26, to the extent its provisions are applicable and practicable.

(e) Copies of all submissions to the Council must be provided to all parties for the Council to consider the submissions in its adjudication process.

5:103-2.7 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) Complaint Amendments:

1. A complainant may amend his or her complaint as a matter of right within thirty (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 thirty (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) 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.

5:103-2.8 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 (7) 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 (7) 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) 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.

5:103-2.9 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 (5) 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 rules and regulations with respect to mediation as set forth herein.

(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.

5:103-2.10 Referral of a Contested Case to the Office of Administrative

Law

(a) The Council may, in its discretion, refer a complaint to the Office of Administrative Law (“OAL”) for an administrative hearing and decision recommendation as a contested case pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

(b) If the Council refers a matter to the OAL as a contested case, the Council shall review the initial decision of the OAL to determine whether to modify, reject or accept

such decision as the final decision of the Council.

5:103-2.11 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.

5:103-2.12 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 and regulations 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., insofar as they may be applicable and practicable pursuant to N.J.S.A. 47:1A-7.e.

(b) Notice of Hearings – The Council shall provide the parties with advance written notice of the proceedings. 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 hearing.
2. A statement of the legal authority and jurisdiction under which the hearing is to be held.
3. A reference to the particular sections of the statutes and rules involved.
4. A short and plain statement of the matters asserted. If the Council is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved.
5. A list of persons notified.
6. Deadlines for the parties to submit arguments, witness lists, and other documents to the Council.

(c) Pre-hearing Conference:

1. The Council may conduct pre-hearing conferences with the parties for the purposes of clarifying the hearing issues and procedural matters. Pre-hearing conferences may be held in person or by teleconference.
2. The Council shall provide the parties with advance written notice of pre-hearing conferences. The notice shall include in addition to such other information as may be deemed appropriate:

- i. A statement of the time, place and nature of the hearing.
- ii. A statement of the hearing issues and procedural matters.
- iii. A list of persons notified.

(d) Continuances or postponements of hearings:

1. Any party seeking a continuance or postponement of a hearing must:
 - i. Attempt, in writing, to obtain consent for the continuance or postponement from all parties to the complaint.
 - ii. Submit a written petition to the Council for approval of the continuance or postponement, as agreed to by all parties, not later than five (5) business days in advance of the scheduled hearing date.
 - iii. Copy all parties of record on the petition submitted to the Council.
 - iv. Include in the petition the reasons for the request and the rationale supporting each reason.
 - v. Include with the petition proof of the attempts to obtain consent for the continuance or postponement from all parties to the complaint and the results of such efforts.
2. The Council shall determine whether to grant a continuance or postponement and provide a written response to the petitioning party and all other parties to the complaint.
3. The Council may, in its own discretion, decide to continue or postpone

a hearing.

(e) Production of documents – At the request of the Council, any party shall produce documents with respect to a complaint before the Council pursuant to N.J.S.A. 47:1A-7.c.

(f) Witnesses:

1. At the request of the Council, a party shall ensure the attendance of witnesses with respect to any hearing conducted by the Council pursuant to N.J.S.A. 47:1A-7.c.

2. Parties unable to obtain cooperation or assurances from prospective witnesses may petition the Council to issue a subpoena to said witness or witnesses.

3. Parties must submit a list of witnesses to the Council not later than five (5) business days in advance of the scheduled hearing. Witness lists shall include, at a minimum, the following:

i. witness name;

ii. witness contact information including street address, telephone and fax numbers and e-mail address, if applicable;

iii. relevance of testimony to the hearing; and

iv. A statement of the witness' knowledge, special experience, training or education relating to the complaint.

4. The Council may examine, cross-examine, or otherwise initiate

testimony from any party or witness and may also cause the production of documentary evidence.

5. The Chairperson, Vice Chairperson, Secretary or designee of the Council shall be authorized to administer oaths and take testimony under oath.

(g) Subpoenas:

1. The Council may subpoena witnesses and documentary evidence with respect to an administrative hearing held by the Council.

2. Petitions to the Council for issuance of a subpoena shall be in writing and shall include, at a minimum, the following:

- i. witness name or title of the documentary evidence;
- ii. witness contact information or person in possession of the documentary evidence, including street address, telephone and fax numbers and e-mail address, if applicable;
- iii. relevance of testimony or the documentary evidence to the hearing; and
- iv. A statement of the witness' knowledge, special experience, training or education relating to the complaint.

3. Motions to Quash

i. A party may object to the issuance of a subpoena upon petition made to the Council not later than three (3) business days in advance of the scheduled date of compliance with the subpoena.

ii. The subpoena may be quashed or modified for good cause shown provided the Council agrees to quash or modify said subpoena.

iii. The petition seeking to quash or modify a subpoena shall detail the reasons for the objections and shall contain supporting rationale for each such reason.

4. Enforcement – The Council, pursuant to New Jersey Rules Governing the Courts, R. 4:67-6, shall have the authority to enforce compliance with subpoenas issued by the Council.

(h) Rules of evidence:

1. The Rules of Evidence will not be strictly applied.

2. The Council may, in its discretion, consider all testimonial evidence, even hearsay, as long as it is relevant, material and probative.

3. The Council may, in its discretion, curtail or exclude any evidence that is deemed by the Council to be irrelevant, immaterial and unduly repetitious.

(i) Burdens of proof

1. A public agency bears the burden of proving that a denial of access to a government record, in whole or in part, is authorized by law pursuant to N.J.S.A. 47:1A-6.

2. Complainants bear the burden of proving the allegations set forth in the complaint, by a fair preponderance of the credible evidence.

(j) 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 ten (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.

5:103-2.13 *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.
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.
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.
 - 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 numbers “1” and “2” of this subsection directly 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.

5:103-2.14 Decisions of the Council

(a) All Council decisions shall be reduced to writing and shall be sent to all parties to the complaint as soon as possible following adjudication.

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

1. Interim Decision,
2. Final Decision,
3. Supplemental Decision,
4. Administrative Case Closure,
5. Administrative Case Disposition.

(c) 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.

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

5:103-2.15 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 ten (10) business days following receipt of a Council order.

(c) Requests 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.

5:103-2.16 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 stay of the Council's final decision with the Council.

5:103-2.17 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 order.

(d) Requests must be in writing, delivered to the Council and contemporaneously

served upon all parties.

(e) 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.

(f) 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.

5:103-2.18 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 (10) 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. statement of client representation;
4. 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 increments [six (6) minutes];

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.

7. 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 ten (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.

3. The attorney's fees awarded shall be predicated upon three number of hours and rate based on:

- i. applicable law;
- ii. submissions of the parties; and
- iii. Council's own discretion.

5:103-2.19 Knowing and Willful Violations of the Act and Penalties

(a) Public officials, officers, employees or custodians who knowingly and willfully violate the Act and is 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:

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. INQUIRES

5:103-3.1 General Provisions

(a) Any person may telephone or write the Council with a request for information regarding the Act and Council procedures.

(b) The Council, where possible, will direct inquirers to available resources, i.e., 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

5:103-4.1 General Provisions

(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.