



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

November 18, 2009 Government Records Council Meeting

Martin O'Shea
Complainant

Complaint No. 2008-283

v.

Township of West Milford (Passaic)
Custodian of Record

At the November 18, 2009 public meeting, the Government Records Council ("Council") considered the November 10, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian's written response dated November 26, 2008 is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Morris v. Trenton Police Department, GRC Complaint No. 2007-160 (May 2008), because the Custodian failed to provide the Complainant with the specific legal basis for the redactions at the time of the denial.
2. Because the itemized deductions contained on the payroll check register relate to an individual's finances and are exempt from disclosure pursuant to Executive Order No. 26 (McGreevey 2002), and because said deductions are not included in the definition of a payroll record under *N.J.A.C. 12: 16-2.1*, said itemized deductions do not constitute a payroll record subject to disclosure under OPRA. As such, the Custodian has not unlawfully denied access to said deductions. However, the Custodian ultimately disclosed an unredacted copy of the requested records one (1) day prior to the filing of this Denial of Access Complaint.
3. Although the Custodian violated OPRA at N.J.S.A. 47:1A-5.g. by failing to provide the Complainant with the specific lawful basis for the redactions at the time of the denial, the Custodian did not unlawfully deny access to the redacted portions of the requested record. Additionally, although the evidence of record indicates that the Custodian was made aware of her failure to comply with N.J.S.A. 47:1A-5.g. by the Complainant via e-mail dated November 29, 2008, there is no evidence in the record that suggests that the Custodian's failure to provide the specific lawful basis for the redactions was



intentional or deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's insufficient response to the Complainant's OPRA request and violation of N.J.S.A. 47:1A-5.g. appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

4. Although the Custodian's change in behavior (providing a specific legal basis for the redactions made to the requested record) occurred after the filing of this Denial of Access Complaint, the redactions and the legal basis for said redactions became a moot issue one (1) day prior to the filing of this complaint because the Custodian released the unredacted record to the Complainant. Thus, the Custodian's change in behavior is moot and the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 18th Day of November, 2009

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: November 23, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 18, 2009 Council Meeting**

**Martin O'Shea¹
Complainant**

GRC Complaint No. 2008-283

v.

**Township of West Milford (Passaic)²
Custodian of Records**

Records Relevant to Complaint: Any record that shows the amount of compensation received by Councilman Salvatore Schimmenti for the month of October 2008.

Request Made: November 25, 2008

Response Made: November 26, 2008 and December 17, 2008

Custodian: Antoinette Battaglia

GRC Complaint Filed: December 18, 2008³

Background

November 25, 2008

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

November 26, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the first (1st) business day following receipt of such request. The Custodian states that she has attached a one (1) page record that shows the compensation paid to Councilman Schimmenti for the month of October 2008. The Custodian states that she has redacted the deductions taken from the Councilman's paycheck.

November 29, 2008

E-mail from Complainant to Custodian. The Complainant states that the Custodian failed to provide any specific legal basis for the redactions made to the requested record. The Complainant asks the Custodian to provide the legal citations for the redactions.

¹ Represented by Eric Taylor, Esq., of Taylor & Mitchell, LLC (Audubon, NJ).

² Represented by Fred Semrau, Esq., of Dorsey & Semrau (Boonton, NJ).

³ The GRC received the Denial of Access Complaint on said date.

December 17, 2008

E-mail from Custodian to Complainant. The Custodian states that she has attached an unredacted paystub for Councilman Schimmenti.

December 18, 2008

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:

- Complainant’s OPRA request dated November 25, 2008
- Custodian’s response to the Complainant’s OPRA request dated November 26, 2008 with record responsive to request attached
- E-mail from Complainant to Custodian dated November 29, 2008

The Complainant states that he submitted his OPRA request on November 25, 2008 via fax and e-mail. The Complainant states that he asked the Custodian to notify him in writing, pursuant to N.J.S.A. 47:1A-5.g., if any portions of the records responsive are redacted and the reasons for said redactions. The Complainant states that the Custodian responded to his request via e-mail on November 26, 2008 in which the Custodian attached a one (1) page payroll register for Councilman Salvatore Schimmenti for the month of October 2008 and redacted information that pertains to deductions made from his pay check. The Complainant states that he sent an e-mail to the Custodian on November 29, 2008 in which he informed the Custodian that she failed to provide the specific legal basis for the redactions made to the requested record. The Complainant states that as of the date of this complaint, he has not received a subsequent response from the Custodian.

The Complainant states that pursuant to OPRA, “if a custodian is unable to comply with a request for access, the custodian shall indicate the specific basis on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5.g. The Complainant asserts that the Custodian failed to provide him with the notice of non-compliance as required pursuant to N.J.S.A. 47:1A-5.g. and instead, redacted information without providing a detailed and lawful basis for said redactions.

Additionally, the Complainant seeks the following relief from the GRC: an order compelling the Custodian to provide the requested record without redactions, or an order compelling the Custodian to provide a detailed and lawful basis for each redaction pursuant to N.J.S.A. 47:1A-5.g. and Paff v. Township of Plainsboro, GRC Complaint No. 2005-29 (July 2005); a declaration that the Custodian violated OPRA by failing to provide a notice of non-compliance pursuant to N.J.S.A. 47:1A-5.g.; a determination as to whether the Custodian’s handling of this request constitutes a knowing and willful violation of OPRA; and an award of prevailing party attorney’s fees pursuant to N.J.S.A. 47:1A-6.

Further, the Complainant does not agree to mediate this complaint.

December 22, 2008

Letter from Custodian’s Counsel to Complainant’s Counsel. The Custodian’s Counsel states that one (1) day prior to receiving the Complainant’s Denial of Access

Complaint the Custodian provided the Complainant with an unredacted copy of the requested record. As such, the Custodian's Counsel requests that the Complainant withdraw said complaint.

January 6, 2009

Request for the Statement of Information ("SOI") sent to the Custodian.

January 8, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated November 25, 2008
- Custodian's response to the Complainant's OPRA request dated November 26, 2008 with record responsive to request attached
- E-mail from Custodian to Complainant dated December 17, 2008 with unredacted paystub attached
- Letter from Custodian's Counsel to Complainant's Counsel dated December 22, 2008

The Custodian certifies that she received the Complainant's OPRA request on November 25, 2008. The Custodian certifies that she provided the Complainant with a written response to his request on the next business day, November 26, 2008, and provided the Complainant with a redacted copy of Councilman Schimmenti's pay stub. The Custodian asserts that she redacted the deductions taken from the payroll check pursuant to N.J.S.A. 47:1A-10 which prohibits disclosure of personnel or pension records, except for "an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received." The Custodian also certifies that she provided the Complainant with an unredacted copy of the requested record on December 17, 2008 after Councilman Schimmenti authorized such disclosure.

Additionally, the Custodian certifies that in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM"), payroll registers must be retained for three (3) years and no records responsive were destroyed.

January 30, 2009

Complainant Counsel's response to the Custodian's SOI. The Complainant's Counsel states that the Complainant does not wish to withdraw this Denial of Access Complaint. Counsel asserts that the Custodian's disclosure of the unredacted record does not relieve her failure to properly respond to the Complainant's OPRA request. Specifically, Counsel contends that the Custodian failed to provide the specific legal basis for the redactions pursuant to N.J.S.A. 47:1A-5.g. Counsel states that the Complainant received no response from the Custodian when he asked her to provide the specific legal basis for the redactions. Instead, Counsel states that the Custodian provided the Complainant with an unredacted copy of the record. Counsel states that the Complainant continues to seek the relief from the GRC outlined in his Denial of Access Complaint.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... 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 ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA provides that:

“...If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5.g.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA exempts from public access an individual’s personnel records, except that:

“an individual's name, title, position, *salary, payroll record*, length of service, date of separation and the reason therefor, and the amount and type of any pension received *shall be a government record...*” (Emphasis added). N.J.S.A. 47:1A-10.

Executive Order No. 26 exempts the following information:

“[i]nformation describing *a natural person's finances*, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness, except as otherwise required by law to be disclosed.” (Emphasis added). Executive Order No. 26 (McGreevey 2002).

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all

records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The GRC first turns to the issue of whether the Custodian properly responded to the Complainant’s OPRA request.⁴ The Custodian certified that she received the Complainant’s OPRA request on November 25, 2008 and provided a written response to said request on the next business day, November 26, 2008. The Custodian certified that in said response she provided the Complainant access to the requested record and redacted the deduction amounts contained on the pay stub. The Complainant asserts that the Custodian violated N.J.S.A. 47:1A-5.g. by failing to provide the Complainant with the specific legal basis for said redactions at the time of the denial.

N.J.S.A. 47:1A-5.g. provides that if a custodian cannot comply with a request for access, the custodian must indicate the specific basis for non-compliance on the request form and promptly return it to the requestor. Additionally, N.J.S.A. 47:1A-6 places the “burden of proving that the denial of access is authorized by law” on the custodian. In order to comply with OPRA, the statute is clear that a denial must be specific and must be sufficient to prove that a custodian’s denial is authorized by OPRA.

GRC decisions have consistently reinforced the statutory mandate that custodians provide a legally valid reason for any denial of records. Specifically, in Morris v. Trenton Police Department, GRC Complaint No. 2007-160 (May 2008), the Custodian denied access to the requested records without providing the specific legal basis for said denial. The Council held that “while the Custodian’s denial of the Complainant’s request was within the time allowed by N.J.S.A. 47:1A-5.i., the Custodian’s failure to supply the requestor with a detailed lawful basis for denial violates N.J.S.A. 47:1A-5.g.”

In this instant complaint, the Custodian provided the Complainant with a written response on the first (1st) business day following receipt of his OPRA request in which the Custodian granted access to the requested record, with redactions, and failed to provide the specific legal basis for said redactions.

Therefore, the Custodian’s written response dated November 26, 2008 is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Morris, supra, because the Custodian failed to provide the Complainant with the specific legal basis for the redactions at the time of the denial.

Next, the GRC turns to whether the Custodian unlawfully denied access to the redacted portions of the requested record. Although the Custodian failed to provide the specific legal basis for the redactions at the time of the denial, in the Custodian’s SOI dated January 8, 2009, she cited N.J.S.A. 47:1A-10 as the basis for said redactions.

N.J.S.A. 47:1A-10 exempts from public access personnel records, with certain exceptions, including an individual’s salary and payroll records. In Jackson v. Kean

⁴ Although the Complainant did not identify a specific government record in his OPRA request, said request is not invalid as broad or unclear because the Custodian easily identified the Complainant’s OPRA request as seeking payroll records.

University, GRC Complaint No. 2002-98 (November 2003), the GRC found that “[n]either OPRA nor Executive Order #11 define the term ‘payroll record.’” The Council stated that:

“...we look to the ordinary meaning of that term, and are informed by other regulatory provisions defining that phrase. ‘Payroll’ is defined as a list of employees to be paid and the amount due to each of them. Black’s Law Dictionary (7th Ed., 1999). It is also clear that documents included within the payroll record exception are, in part, records required by law to be maintained or reported in connection with payment of salary to employees and is adjunct to salary information required to be disclosed. In this regard, N.J.A.C. 12: 16-2.1, a Department of Labor regulation entitled ‘Payroll records,’ requires the following:

Every employing unit having workers in employment, regardless of whether such unit is or is not an ‘employer’ as defined in the Unemployment Compensation Law, shall keep payroll records that shall show, for each pay period:

1. The beginning and ending dates;
2. The full name of each employee and the day or days in each calendar week on which services for remuneration are performed;
3. The total amount of remuneration paid to each employee showing separately cash, including commissions and bonuses; the cash value of all compensation in any medium other than cash; gratuities received regularly in the course of employment if reported by the employee, or if not so reported, the minimum wage rate prescribed under applicable laws of this State or of the United States or the amount of remuneration actually received by the employee from his employing unit, whichever is the higher; and service charges collected by the employer and distributed to workers in lieu of gratuities and tips;
4. The total amount of all remuneration paid to all employees;
5. The number of weeks worked.”

See also McCormack v. New Jersey Department of Treasury, GRC Complaint No. 2005-164 (June 2008).

The record at issue in this complaint is the payroll check register for Councilman Schimmenti. The Council has previously ruled in Pierone v. County of Warren, GRC Complaint No. 2008-195 (October 2009) that a check register fits squarely within the definition of a payroll record because the register lists the employees and the amount paid to each of them. However, the question here is whether the itemized deductions contained on a check register are subject to public access under OPRA. Thus, we refer to the definition of what constitutes a payroll record utilized by the Council in the prior complaints discussed above, Jackson and McCormack.

In said complaints, the Council turned to a Department of Labor regulation which described a payroll record as having the following characteristics: the beginning and ending dates, the name of each employee and the day or days in each calendar week on which services for remuneration are performed, the total amount of remuneration paid to each employee, the total amount of remuneration received by the employee, and the number of weeks worked. Said regulation does not identify specific monetary deductions as being part of an official payroll record.

Additionally, under Executive Order No. 26 (McGreevey 2002), information describing a natural person's finances is exempt from public access, except as otherwise required by law to be disclosed. As previously stated, OPRA specifically allows for the disclosure of an individual's salary and payroll records. However, the definition of a payroll record does not include the itemized monetary deductions.

Further, the itemized deductions may likely contain specific information pertaining to an individual's health benefits and the deductions for such coverage. Such information is exempt from disclosure under the Health Insurance Portability and Accountability Act ("HIPAA") and Michelson v Wyatt, 379 N.J. Super. 611; 880 A.2d 458, (August 2005).

Therefore, because the itemized deductions contained on the payroll check register relate to an individual's finances and are exempt from disclosure pursuant to Executive Order No. 26 (McGreevey 2002), and because said deductions are not included in the definition of a payroll record under *N.J.A.C. 12: 16-2.1*, said itemized deductions do not constitute a payroll record subject to disclosure under OPRA. As such, the Custodian has not unlawfully denied access to said deductions. However, the Custodian ultimately disclosed an unredacted copy of the requested records one (1) day prior to the filing of this Denial of Access Complaint.

Whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

"[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ..." N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

"... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]..." N.J.S.A. 47:1A-7.e.

The basis of the Complainant's Denial of Access Complaint is the Custodian's failure to provide the specific legal basis for the redactions made to the requested record at the time of the denial pursuant to N.J.S.A. 47:1A-5.g. The Complainant's Counsel stated that the Complainant brought such failure to the Custodian's attention in an e-mail dated November 29, 2008. Counsel stated that rather than providing the legal basis for the redactions, the Custodian responded by releasing an unredacted copy of the requested record. As stated above, because the Custodian failed to provide the specific legal basis for said redactions in her written response dated November 26, 2008, the Custodian's response was insufficient and in violation of N.J.S.A. 47:1A-5.g.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996)).

Although the Custodian violated OPRA at N.J.S.A. 47:1A-5.g. by failing to provide the Complainant with the specific lawful basis for the redactions at the time of the denial, the Custodian did not unlawfully deny access to the redacted portions of the requested record. Additionally, although the evidence of record indicates that the Custodian was made aware of her failure to comply with N.J.S.A. 47:1A-5.g. by the Complainant via an e-mail dated November 29, 2008, there is no evidence in the record that suggests that the Custodian's failure to provide the specific lawful basis for the redactions was intentional or deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's insufficient response to the Complainant's OPRA request and violation of N.J.S.A. 47:1A-5.g. appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees?

OPRA provides that:

"[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or

- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6.

In Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the court held that a complainant is a "prevailing party" if he/she achieves the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct. *Id.* at 432. Additionally, the court held that attorney's fees may be awarded when the requestor is successful (or partially successful) via a judicial decree, a quasi-judicial determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney's fees incurred in seeking access to certain public records via two complaints she filed under OPRA, N.J.S.A. 47:1A-6 and N.J.S.A. 47:1A-7.f., against the Division of Youth and Family Services ("DYFS"). The records sought involved an adoption agency having falsely advertised that it was licensed in New Jersey. DYFS eventually determined that the adoption agency violated the licensing rules and reported the results of its investigation to the complainant. The complainant received the records she requested upon entering into a settlement with DYFS. The court found that the complainant engaged in reasonable efforts to pursue her access rights to the records in question and sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. *Id.* at 432. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on DYFS's part. *Id.* As a result, the complainant was a prevailing party entitled to an award of a reasonable attorney's fee. Accordingly, the Court remanded the determination of reasonable attorney's fees to the GRC for adjudication.

Additionally, the New Jersey Supreme Court has ruled on the issue of "prevailing party" attorney's fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, "which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Mason, supra, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). The court in Buckhannon stated that the phrase "prevailing party" is a legal term of art that refers to a "party in whose favor a judgment is rendered." (quoting Black's Law Dictionary 1145 (7th ed. 1999)). The court in Mason, supra, at 76, held that "requestors are entitled to attorney's fees under OPRA, absent a judgment or an enforceable consent decree, when they can demonstrate (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.'" Singer v. State, 95 N.J. 487, 495, cert denied (1984)."

In this instant complaint, the Complainant asserted that the Custodian violated N.J.S.A. 47:1A-5.g. by failing to provide the Complainant with the specific legal basis for the redactions made to the requested record at the time of the denial. The

Complainant attempted to access said information from the Custodian via e-mail dated November 29, 2008 with no success. In response, the Custodian disclosed the unredacted record one (1) day prior to the filing of this Denial of Access Complaint after the subject of the record consented to such disclosure. By filing this complaint, the Complainant sought an order compelling the Custodian to either release the unredacted record or provide the specific legal basis for the redactions. As previously stated, the Custodian released the unredacted record one (1) day prior to the filing of this complaint. Additionally, in responding to the complaint, the Custodian provided the specific legal basis for the redactions – N.J.S.A. 47:1A-10.

In Teeters, supra, the court held that the Complainant was a prevailing party because she achieved a favorable result that reflected an alteration of position and behavior on DYFS's part. In this instant complaint, the Custodian did alter her behavior because she did not provide a specific legal basis for the redactions made to the requested record until she responded to this complaint. However, because the Custodian ultimately provided the Complainant with a copy of the unredacted record one (1) day prior to the filing of this Denial of Access Complaint, the redactions become a moot issue.

Therefore, although the Custodian's change in behavior (providing a specific legal basis for the redactions made to the requested record) occurred after the filing of this Denial of Access Complaint, the redactions and the legal basis for said redactions became a moot issue one (1) day prior to the filing of this complaint because the Custodian released the unredacted record to the Complainant. Thus, the Custodian's change in behavior is moot and the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's written response dated November 26, 2008 is insufficient pursuant to N.J.S.A. 47:1A-5.g. and Morris v. Trenton Police Department, GRC Complaint No. 2007-160 (May 2008), because the Custodian failed to provide the Complainant with the specific legal basis for the redactions at the time of the denial.
2. Because the itemized deductions contained on the payroll check register relate to an individual's finances and are exempt from disclosure pursuant to Executive Order No. 26 (McGreevey 2002), and because said deductions are not included in the definition of a payroll record under N.J.A.C. 12: 16-2.1, said itemized deductions do not constitute a payroll record subject to disclosure under OPRA. As such, the Custodian has not unlawfully denied access to said deductions. However, the Custodian ultimately disclosed an unredacted copy of the requested records one (1) day prior to the filing of this Denial of Access Complaint.

3. Although the Custodian violated OPRA at N.J.S.A. 47:1A-5.g. by failing to provide the Complainant with the specific lawful basis for the redactions at the time of the denial, the Custodian did not unlawfully deny access to the redacted portions of the requested record. Additionally, although the evidence of record indicates that the Custodian was made aware of her failure to comply with N.J.S.A. 47:1A-5.g. by the Complainant via e-mail dated November 29, 2008, there is no evidence in the record that suggests that the Custodian's failure to provide the specific lawful basis for the redactions was intentional or deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's insufficient response to the Complainant's OPRA request and violation of N.J.S.A. 47:1A-5.g. appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

4. Although the Custodian's change in behavior (providing a specific legal basis for the redactions made to the requested record) occurred after the filing of this Denial of Access Complaint, the redactions and the legal basis for said redactions became a moot issue one (1) day prior to the filing of this complaint because the Custodian released the unredacted record to the Complainant. Thus, the Custodian's change in behavior is moot and the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008).

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November 10, 2009