



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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ROBIN BERG TABAKIN, Chair
COMMISSIONER JOSEPH V. DORIA, JR.
COMMISSIONER LUCILLE DAVY
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

FINAL DECISION

December 18, 2008 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2007-167

v.

Warren County Office of the Prosecutor
Custodian of Record

At the December 18, 2008 public meeting, the Government Records Council ("Council") considered the December 10, 2008 Supplemental 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, accepts the settlement as reached by parties at the Office of Administrative Law on July 29, 2008. No further adjudication is required.

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 December, 2008

Robin Berg Tabakin, Chairman
Government Records Council
I attest the foregoing is a true and accurate record of the Government Records Council.



David Fleisher, Secretary
Government Records Council

Decision Distribution Date: December 22, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 18, 2008 Council Meeting**

John Paff¹
Complainant

GRC Complaint No. 2007-167

v.

Warren County Office of the Prosecutor²
Custodian of Records

Records Relevant to Complaint: Copies of the following records pertaining to State v. Philip Gentile, Indictment/Accusation No. 07-02-00060-A:

1. CDR form (complaint summons)
2. Any indictment or accusation
3. Any entered written plea agreement
4. Any document showing the disposition of the case as well as any sentence imposed

Request Made: June 4, 2007

Response Made: June 8, 2007

Custodian: Howard A. McGinn

GRC Complaint Filed: July 23, 2007

Background

February 27, 2008

Government Records Council's ("Council") Interim Order. At its February 27, 2008 public meeting, the Council considered the February 20, 2008 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, found that:

1. Because the Custodian failed to provide the Complainant with a lawful basis for the denial of access to the redacted portions of the requested records in writing within the statutorily mandated seven (7) business days, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. Additionally, because the Custodian's reliance on Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004), N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-2.2 and N.J.S.A. 52:4B-36 as a lawful basis for the denial of access to the redacted portions of the requested records are misplaced, the Custodian

¹ Represented by Walter M. Luers, Esq. (Oxford, NJ).

² Represented by Joseph Bell, Esq. (Rockaway, NJ).

has failed to meet his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. However, pursuant to N.J.S.A. 47:1A-1, the Custodian did not unlawfully deny access to the redacted portions of the requested records because the redacted portions are exempt from disclosure due to privacy concerns.

2. Although the Custodian failed to meet his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 because the Custodian's reliance on Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004), N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-2.2 and N.J.S.A. 52:4B-36 as a lawful basis for the denial of access to the redacted portions of the requested records is misplaced, pursuant to N.J.S.A. 47:1A-1, the Custodian did not unlawfully deny access to said redactions because the redacted portions are exempt from disclosure due to privacy concerns. 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 failure to meet his burden of proof appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.
3. The action sought by the Complainant came about due to the Complainant's filing of a Denial of Access Complaint and as such, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6 and Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Thus, this complaint should be referred to the Office of Administrative law for the determination of prevailing party attorney's fees.

March 3, 2008

Council's Interim Order distributed to the parties.

March 27, 2008

Complaint transmitted to the Office of Administrative Law.

July 29, 2008³

Stipulation of Settlement. The parties stipulate and agree pursuant to *N.J.A.C. 1:1-19.1* that they wish to settle this matter with the following terms:

1. The Complainant's Counsel agrees to accept the sum of \$1,000.00 to be paid by the County of Warren in full settlement of all claims for attorney's fees in connection with this matter and the County agrees to make that payment.
2. This settlement resolves all issues in the case.

The Complainant's Counsel signed the settlement on July 21, 2008. The Custodian signed the settlement on July 24, 2008.

³ The Office of Administrative Law received the settlement on said date.

Analysis

No analysis required.

Conclusions and Recommendations

The Executive Director respectfully recommends that the Council accept the settlement as reached by parties at the Office of Administrative Law on July 29, 2008. No further adjudication is required.

Prepared By: Dara Lownie
Senior Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

December 10, 2008



State of New Jersey

GOVERNMENT RECORDS COUNCIL

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COMMISSIONER JOSEPH V. DORIA, JR.
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ROBIN BERG TABAKIN
DAVID FLEISHER
CATHERINE STARGHILL Esq., Executive Director

INTERIM ORDER

February 27, 2008 Government Records Council Meeting

John Paff
Complainant

Complaint No. 2007-167

v.

Warren County Office of the Prosecutor
Custodian of Record

At the February 27, 2008 public meeting, the Government Records Council (“Council”) considered the February 20, 2008 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. Because the Custodian failed to provide the Complainant with a lawful basis for the denial of access to the redacted portions of the requested records in writing within the statutorily mandated seven (7) business days, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. Additionally, because the Custodian’s reliance on Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004), N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-2.2 and N.J.S.A. 52:4B-36 as a lawful basis for the denial of access to the redacted portions of the requested records are misplaced, the Custodian has failed to meet his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. However, pursuant to N.J.S.A. 47:1A-1, the Custodian did not unlawfully deny access to the redacted portions of the requested records because the redacted portions are exempt from disclosure due to privacy concerns.
2. Although the Custodian failed to meet his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 because the Custodian’s reliance on Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004), N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-2.2 and N.J.S.A. 52:4B-36 as a lawful basis for the denial of access to the redacted portions of the requested records is misplaced, pursuant to N.J.S.A. 47:1A-1, the Custodian did not unlawfully deny access to said redactions because the redacted portions are exempt from disclosure due to privacy concerns. 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 failure to meet his burden of proof appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

3. The action sought by the Complainant came about due to the Complainant's filing of a Denial of Access Complaint and as such, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6 and Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Thus, this complaint should be referred to the Office of Administrative law for the determination of prevailing party attorney's fees.

Interim Order Rendered by the
Government Records Council
On The 27th Day of February, 2008

Robin Berg Tabakin, Vice Chairman
Government Records Council

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

Government Records Council

Decision Distribution Date: March 3, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 27, 2008 Council Meeting**

**John Paff¹
Complainant**

GRC Complaint No. 2007-167

v.

**Warren County Office of the Prosecutor²
Custodian of Records**

Records Relevant to Complaint: Copies of the following records pertaining to State v. Philip Gentile, Indictment/Accusation No. 07-02-00060-A:

1. CDR form (complaint summons)
2. Any indictment or accusation
3. Any entered written plea agreement
4. Any document showing the disposition of the case as well as any sentence imposed

Request Made: June 4, 2007

Response Made: June 8, 2007

Custodian: Howard A. McGinn

GRC Complaint Filed: July 23, 2007

Background

June 4, 2007

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.

June 8, 2007

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. The Custodian states that he has enclosed the following requested records:

1. CDR form
2. Accusation and Waiver of Indictment
3. Plea Agreement Form
4. Judgment of Conviction

¹ Represented by Walter M. Luers, Esq. (Oxford, NJ).

² Represented by Joseph Bell, Esq. (Rockaway, NJ).

The Custodian notes that said copies are from the Prosecutor's file and that the original filed documents are contained in the records of the court. The Custodian states that certified copies of those documents as filed with the court can be obtained from the Criminal Case Management Office.

June 14, 2007

Letter from Complainant to Custodian. The Complainant states that the Custodian redacted the name and address of the victim of Mr. Gentile's crime from the records provided. The Complainant requests that the Custodian identify the statute, rule, or other authority that exempts a victim's name and address.

June 19, 2007

Letter from Custodian to Complainant. The Custodian states that he redacted the victim's identifying information pursuant to Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004), N.J.S.A. 47:1A-2.2, N.J.S.A. 47:1A-1.1 and N.J.S.A. 52:4B-36 (The Crime Victim's Bill of Rights).

July 23, 2007

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

- Complainant's OPRA request dated June 4, 2007
- Custodian's response to the Complainant's request dated June 8, 2007 (with records responsive attached)
- Letter from Complainant to Custodian dated June 14, 2007
- Letter from Custodian to Complainant dated June 19, 2007

The Complainant asserts that the Custodian improperly redacted the name of a victim of a crime from the records responsive to the Complainant's request, records which the Complainant states are also filed with the court. The Complainant states that he requested records concerning the indictment and disposition of a criminal action against Philip Gentile, an attorney charged with writing a bad check. The Complainant states that the case has been resolved because Mr. Gentile pled guilty.

The Complainant contends that the Custodian's authorities for the redactions do not apply. Specifically, the Complainant asserts that Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004) does not apply to this matter because in Perino, the requestor sought information about people who had made criminal complaints against him. The Complainant states that he has no connection to the victim, nor has he been convicted of any indictable offense. The Complainant contends that N.J.S.A. 47:1A-1.1 does not apply because the Complainant did not request victims' records and the records do not relate to an ongoing criminal investigation. The Complainant also asserts that N.J.S.A. 47:1A-2.2 only applies when the person who is making the request was convicted of an indictable offense and is seeking "personal information pertaining to the person's victim or the victim's family." Additionally, the Complainant alleges that N.J.S.A. 52:4B-36, which lists certain rights of crime victims and witnesses, does not exempt the disclosure of a victim's name in public records.

The Complainant requests that GRC declare that the Custodian violated OPRA, order the Custodian to provide unredacted copies of the requested records, and award attorneys fees as provided by N.J.S.A. 47:1A-6.

July 31, 2007

Offer of Mediation sent to both parties.

July 31, 2007

The Complainant declines mediation of this complaint. The Custodian did not respond to the Offer of Mediation.

July 31, 2007

Request for the Statement of Information sent to the Custodian.

August 3, 2007

Letter from Custodian to Complainant's Counsel. The Custodian states that although he believes that there are legitimate arguments in support of redacting the victim's name and address from the records released under OPRA, because the state of the law is not absolutely clear and to avoid the possible risk of the imposition of attorney's fees, the Custodian encloses unredacted copies of the requested records.

August 9, 2007

Letter from GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for a Statement of Information on July 31, 2007 and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely of the information provided by the Complainant.

August 10, 2007³

Custodian's Statement of Information ("SOI") with the following attachments:

- Complainant's OPRA request dated June 4, 2007
- Custodian's response to the Complainant's request dated June 8, 2007
- Letter from Complainant to Custodian dated June 14, 2007
- Letter from Custodian to Complainant dated June 19, 2007
- Letter from Custodian to Complainant's Counsel dated August 3, 2007

The Custodian certifies that he received the Complainant's OPRA request on June 4, 2007. The Custodian certifies that he provided redacted copies of the following records to the Complainant on June 8, 2007:

1. CDR Form – 1 page
2. Accusation and Waiver of Indictment – 2 pages
3. Plea Agreement Form – 3 pages
4. Judgment of Conviction – 3 pages

³ The Custodian's cover letter is dated August 10, 2007; however, the signature page of the SOI is dated June 8, 2007.

The Custodian certifies that he redacted the name and address of the victim of a crime from the requested records based on Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004), N.J.S.A. 47:1A-2.2, N.J.S.A. 47:1A-1.1 and N.J.S.A. 52:4B-36 (Crime Victim's Bill of Rights). The Custodian also certifies that he provided the Complainant's Counsel with unredacted copies of the requested records on August 3, 2007.

The Custodian states that the rights of crime victims have been recognized by the Legislature in the Crime Victim's Bill of Rights. The Complainant states that N.J.S.A. 52:4B-35 provides that "[t]he rights of these individuals should be given full recognition and protection."

The Custodian also states that courts have recognized that a citizen's home address has certain privacy implications. The Custodian asserts that a victim of a crime has a citizen's privacy rights. The Custodian states that the GRC recognized a citizen's expectation of privacy in Perino, supra. The Custodian contends that there is a potential for unsolicited contact and confrontation between the citizen and the Complainant. The Custodian asserts that a balancing test as to the Complainant's need for access versus the citizen's expectation of privacy is appropriate.

The Custodian states that he redacted the name and address of the victim in an attempt to protect the privacy rights of the victim. The Custodian also states that had the Complainant consented to mediation, the Custodian would have raised the issue of the balancing raised in Perino, supra, in an attempt to resolve this matter.

Additionally, the Custodian states that because the law is not clear and because the threat of the possible awarding of attorney's fees if the GRC determined that the Custodian unlawfully denied access to the redacted portions of the requested records, the Custodian provided the Complainant with unredacted copies of said records with a request that the Complainant honor the privacy rights of the victim, even if specifically not protected by OPRA.

August 15, 2007

Complainant Counsel's response to the Custodian's SOI. Counsel states that although the Prosecutor's Office provided unredacted copies of the requested records, thus conceding to the relief sought by the Complainant, the Prosecutor has not changed its policy of withholding information contained in publicly filed documents. Counsel asserts that this complaint is not moot and the GRC's investigation should continue. Counsel contends that the GRC should find that the Custodian violated OPRA because he failed to provide any evidence that the redactions are supported by law. Additionally, Counsel asserts that because this complaint was a catalyst for the Custodian to release the requested records in their unredacted form, pursuant to Teeters v. Division of Youth and Family Services, 387 N.J. Super. 423, 904 A.2d 747 (App. Div. 2006) and N.J.S.A. 47:1A-6, Counsel intends to apply for an award of a reasonable attorney's fee.

September 7, 2007

Letter from Custodian to GRC. The Custodian states that he has already provided the GRC with the basis for the redactions to the requested records. The Custodian also

states that N.J.S.A. 47:1A-6 provides that “[i]f it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney’s fee.” The Custodian contends that there has been no determination that access was improperly denied in this matter. The Custodian asserts that such determination became moot when the Custodian released unredacted copies of the requested records rather than proceed through litigation before the GRC.

The Custodian distinguishes this complaint from Teeters, *supra*, because in Teeters the GRC ruled that “DYFS had failed to meet OPRA’s requirements and that the records petitioner requested should be provided to her immediately...” The Custodian states that the Appellate Division relied on the fact that the petitioner

“...engaged in reasonable efforts to pursue her access rights to the records in question. She sought attorney assistance only after her self-filed complaints and personal efforts were unavailing. With that assistance, she achieved a favorable result that reflected an alteration of position and behavior on the Division’s part.” Id. at 432.

The Custodian states that in the complaint currently before the Council, the Complainant provided no reason for his desire to learn the identity of the crime victim contained within the requested records. The Custodian asserts that the Complainant could have provided his reasons for wanting to know the identity of the victim so that the balancing called for in Perino, *supra*, could be done. The Custodian also contends that neither he nor his office should be penalized for attempting to protect the victim’s rights articulated in Perino, *supra*, OPRA and the Crime Victim’s Bill of Rights, but subsequently making a business decision to not engage in further litigation when the agency’s efforts to mediate the matter and engage in a balancing test were hindered.

January 9, 2008

Letter from GRC to Complainant and Custodian. The GRC requests that the Complainant respond to the following questions so that the GRC may employ the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995):

1. Why do you need the requested record(s) or information?
2. How important is the requested record(s) or information to you?
3. Do you plan to redistribute the requested record(s) or information?
4. Will you use the requested record(s) or information for unsolicited contact of the individuals named in the government record(s)?

The GRC requests that the Custodian respond to the following questions:

1. The type of record(s) requested.
2. The information the requested record(s) do or might contain.
3. The potential harm in any subsequent non-consensual disclosure of the requested record(s).

4. The injury from disclosure to the relationship in which the requested record was generated.
5. The adequacy of safeguards to prevent unauthorized disclosure.
6. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access.

January 16, 2008

Letter from Custodian to GRC. The Custodian’s responses to the GRC’s questions are as follows:

Factors for Consideration in Balancing Test	Custodian’s Response
1. The type of record(s) requested.	Criminal complaint, accusation or indictment, plea agreement and judgment of conviction.
2. The information the requested records do or might contain.	The nature of the basic facts of the charge against the defendant. The name and address of the victim. The substance of the plea agreement and the sentence.
3. The potential harm in any subsequent non-consensual disclosure of the requested records.	If the name and address of the victim are disclosed the privacy rights of the victim may be violated.
4. The injury from disclosure to the relationship in which the requested record was generated.	Victims of crime could be deterred from reporting crimes or signing complaints. In subsequent situations, victims may be deterred from cooperation with prosecution if identity and location are disclosed as a result of filing a complaint.
5. The adequacy of safeguards to prevent unauthorized disclosure.	Redaction of the name and address of the victim can help to safeguard unauthorized disclosure.
6. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access.	None to the Custodian’s knowledge; however policies militating against access are NJ Constitution Article I, paragraph 22; The Crime Victims Bill of Rights <u>N.J.S.A. 52:4B-36</u> ; the exclusion of victim’s records in OPRA <u>N.J.S.A. 47:1A-1.1</u> ; and <u>Perino v. Borough of Haddon Heights</u> , GRC Complaint No. 2004-128 (November 2004)

January 24, 2008

Letter from Complainant’s Counsel to GRC. Counsel objects to the fact that the GRC received legal advice from the New Jersey Office of Attorney General regarding OPRA complaints including this instant complaint. Counsel states that his office represents parties who are potentially adverse to the Attorney General’s Office and requests that the GRC seek alternative non-conflicted counsel to advise on the issue of whether the GRC should apply the common law balancing test.

Counsel contends that the GRC should not apply the common law balancing test because the GRC is an administrative agency and not a court. Counsel asserts that by

filing a complaint with the GRC, the Complainant waived his right to common law claims against the Prosecutor’s Office. Counsel states that in Rosenblum v. Borough of Closter, 2006 WL 3487188 (App. Div. Dec. 5, 2006), an appeal in which the Attorney General’s Office represented the GRC, the court held that “[t]he GRC is not empowered to adjudicate disputes concerning the scope of common law rights.”

Additionally, Counsel states that although the GRC acknowledges in its letter to the Complainant that OPRA does not require a requestor to reveal his or her need for access, the GRC is asking the Complainant to do such.

Further, Counsel contends that even if the GRC may apply the common law balancing test, said test is not applicable here because the Custodian already provided the Complainant with unredacted copies of the requested records.

However, without waiving the Complainant’s objections and to preserve the right to prevail on this complaint, Counsel provides the following responses to the GRC’s questions:

Need for Access Questions	Complainant’s Response
1. Why do you need the requested record(s) or information?	The Complainant filed a common law access suit against the Office of Attorney Ethics. The Complainant sought records relating to disciplinary proceedings against Philip Gentile. As part of the lawsuit, the Complainant was researching information on Mr. Gentile including the nature of the charges and proceedings against him.
2. How important is the requested record(s) or information to you?	The information requested is important because it would assist the Complainant in monitoring the performance of government on disclosure issues.
3. Do you plan to redistribute the requested record(s) or information?	No.
4. Will you use the requested record(s) or information for unsolicited contact of the individuals named in the government record(s)?	No.

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*... a public agency has a responsibility and an obligation to safeguard from

public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy..." (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 ... *A government record shall not include ... victims' records* ... '*Victim's record*' means an individually-identifiable file or document held by a victims' rights agency which pertains directly to a victim of a crime ... '*Victim of a crime*' means a person who has suffered personal or psychological injury or death or incurs loss of or injury to personal or real property as a result of a crime ... '*Victims' rights agency*' means a public agency, or part thereof, the primary responsibility of which is providing services, including but not limited to food, shelter, or clothing, medical, psychiatric, psychological or legal services or referrals, information and referral services, counseling and support services, or financial services to victims of crimes, including victims of sexual assault, domestic violence, violent crime, child endangerment, child abuse or child neglect, and the Victims of Crime Compensation Board, established pursuant to P.L.1971, c.317 (C.52:4B-1 et seq.)." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA states that:

"...where it shall appear that a person who is convicted of any indictable offense under the laws of this State, any other state or the United States is seeking government records containing personal information pertaining to the person's victim or the victim's family, including but not limited to a victim's home address, home telephone number, work or school address, work telephone number, social security account number, medical history or any other identifying information, the right of access provided for in [OPRA]...shall be denied." N.J.S.A. 47:1A-2.2

OPRA also 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.

Further, OPRA provides that:

"[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than*

seven business days after receiving the request ... (Emphasis added.)
N.J.S.A. 47:1A-5.i.

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.

The Crime Victim’s Bill of Rights states that:

“[t]he rights of these individuals should be given full recognition and protection.” N.J.S.A. 52:4B-35.

The Crime Victim’s Bill of Rights also states that:

“[t]he Legislature finds and declares that crime victims and witnesses are entitled to the following rights:

- a. To be treated with dignity and compassion by the criminal justice system;
- b. To be informed about the criminal justice process;
- c. To be free from intimidation;
- d. To have inconveniences associated with participation in the criminal justice process minimized to the fullest extent possible;
- e. To make at least one telephone call provided the call is reasonable in both length and location called;
- f. To medical assistance if, in the judgment of the law enforcement agency, medical assistance appears necessary;
- g. To be notified if presence in court is not needed;
- h. To be informed about available remedies, financial assistance and social services;
- i. To be compensated for their loss whenever possible;
- j. To be provided a secure, but not necessarily separate, waiting area during court proceedings;
- k. To be advised of case progress and final disposition;
- l. To the prompt return of property when no longer needed as

evidence;

m. To submit a written statement about the impact of the crime to a representative of the county prosecutor's office which shall be considered prior to the prosecutor's final decision concerning whether formal criminal charges will be filed;

n. To make, prior to sentencing, an in-person statement directly to the sentencing court concerning the impact of the crime." N.J.S.A. 52:4B-36.

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 also 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.

OPRA also states that a custodian must provide a requestor with the specific basis for a denial of access in writing. N.J.S.A. 47:1A-5.g. A custodian's response either granting access, denying access, seeking clarification or requesting an extension of time must be within seven (7) business days from the date the custodian receives the request. N.J.S.A. 47:1A-5.i.

In this complaint, the Custodian certifies receiving the Complainant's request on June 4, 2007 and providing a written response on June 8, 2007, the fourth (4th) business day following receipt of the request, in which the Custodian provided the Complainant with redacted copies of the requested records. However, the Custodian did not provide the Complainant with a lawful basis for the denial of access to the redacted portions of the records until June 19, 2007, the eleventh (11th) business day following the Custodian's receipt of the request.

Therefore, because the Custodian failed to provide the Complainant with a lawful basis for the denial of access to the redacted portions of the requested records in writing within the statutorily mandated seven (7) business days, the Custodian violated N.J.S.A. 47:1A-5.g and N.J.S.A. 47:1A-5.i.

However, in the Custodian's Statement of Information dated August 10, 2007, the Custodian certifies that he redacted the name and address of the victim of a crime from the requested records based on Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004), N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-2.2 and N.J.S.A. 52:4B-36 (Crime Victim's Bill of Rights).

The Council held in Perino, supra, that "the name, address and phone number of the citizen who brought the complaint to the Borough's attention should remain redacted from the requested documentation." In Perino, supra, the requestor sought access to a record which indicates the name and address of an individual who filed a noise complaint against the requestor with the police. The Perino decision discusses the potential for

unsolicited contact if the address contained on the requested records were released. The facts of the complaint currently before the Council are distinguishable from the facts in Perino, *supra*, in that the Complainant here has no connection to the individual whose address is contained on the requested record. Therefore, the Custodian's reliance on Perino, *supra*, is misplaced.

N.J.S.A. 47:1A-1.1 states that victims' records, defined as an individually-identifiable file or document held by a victims' rights agency which pertains directly to a victim of a crime, are not government records. A victims' rights agency is defined as a public agency, or part thereof, the primary responsibility of which is providing services, including but not limited to food, shelter, or clothing, medical, psychiatric, psychological or legal services or referrals, information and referral services, counseling and support services, or financial services to victims of crimes, including victims of sexual assault, domestic violence, violent crime, child endangerment, child abuse or child neglect, and the Victims of Crime Compensation Board. N.J.S.A. 47:1A-1.1.

Because the Warren County Prosecutor's Office does not fall within the category of a victim's rights agency and because the requested records are not victim's records, the Custodian's reliance on N.J.S.A. 47:1A-1.1 is misplaced.

Additionally, N.J.S.A. 47:1A-2.2 states that persons convicted of an indictable offense shall not have access to his/her victim's home address, home telephone number, work or school address, work telephone number, social security account number, medical history or any other identifying information. Because the Complainant asserts that he has not been convicted of any indictable offense, this provision of OPRA does not apply to the facts of this complaint.

Further, the Legislative findings of the Crime Victim's Bill of Rights states that "[t]he rights of these individuals should be given full recognition and protection." N.J.S.A. 52:4B-35. Additionally, the NJ Legislature declares that crime victims and witnesses are entitled to certain rights pursuant to N.J.S.A. 52:4B-36. None of the rights detailed under said statutes relate to the redaction of the name and address of the victim of a crime from records released under OPRA. Thus, the Custodian's reliance on such is misplaced.

However, since the Complainant requests information that could adversely affect the privacy of the citizens, it is necessary to employ the balancing test set forth by the New Jersey Supreme Court and utilized in previous GRC cases. While the Open Public Records Act ("OPRA") does not require a requestor to reveal to a records custodian his or her need for access to the government records requested, the legal advice received from the New Jersey Attorney General's Office advises the GRC to make just such an inquiry to accurately perform the common law balancing test.

In Merino v. Ho-Ho-Kus, GRC Complaint No. 2003-110 (February 2004), the Council addressed the citizen's reasonable expectation of privacy pursuant to N.J.S.A. 47:1A-1 and found that the New Jersey Supreme Court, Appellate Division held that the GRC must enforce OPRA's declaration, in N.J.S.A. 47:1A-1, that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal

information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 368-69 (App. Div. 2003). See also National Archives and Records Administration v. Favish, 541 U.S. 157, 124 S.Ct. 1570 (U.S. March 30, 2004) (personal privacy interests are protected under FOIA).

The New Jersey Supreme Court has indicated that, as a general matter, the public disclosure of an individual's home address "does implicate privacy interests." Doe v. Poritz, 142 N.J. 1, 82 (1995). The Court specifically noted that such privacy interests are affected where disclosure of a person's address results in unsolicited contact. The Court quoted with approval a federal court decision that indicated that significant privacy concerns are raised where disclosure of the address "can invite unsolicited contact or intrusion based on the additional revealed information." *Id.* (citing Aronson v. Internal Revenue Service, 767 F. Supp. 378, 389 n. 14 (D. Mass. 1991)).

The Supreme Court concluded that the privacy interest in a home address must be balanced against the interest in disclosure. It stated that the following factors should be considered:

1. The type of record requested;
2. The information it does or might contain;
3. The potential for harm in any subsequent nonconsensual disclosure;
4. The injury from disclosure to the relationship in which the record was generated;
5. The adequacy of safeguards to prevent unauthorized disclosure;
6. The degree of need for access;
7. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access [*Id.* at 87-88].

The foregoing criteria was applied accordingly by the Court in exercising its discretion as to whether the privacy interests of the individuals named in the summonses are outweighed by any factors militating in favor of disclosure of the addresses.

To ascertain the degree of need for access from the Complainant, the GRC asked the Complainant the following questions:

1. Why do you need the requested record or information?
2. How important is the requested record or information to you?
3. Do you plan to redistribute the requested record or information?
4. Will you use the requested record or information?

The Custodian's and Complainant's responses to the foregoing questions are detailed below:

Factors for Consideration in Balancing Test	Custodian's Response
1. The type of record(s) requested.	Criminal complaint, accusation or indictment, plea agreement and judgment of conviction.

2. The information the requested records do or might contain.	The nature of the basic facts of the charge against the defendant. The name and address of the victim. The substance of the plea agreement and the sentence.
3. The potential harm in any subsequent non-consensual disclosure of the requested records.	If the name and address of the victim are disclosed the privacy rights of the victim may be violated.
4. The injury from disclosure to the relationship in which the requested record was generated.	Victims of crime could be deterred from reporting crimes or signing complaints. In subsequent situations, victims may be deterred from cooperation with prosecution if identity and location are disclosed as a result of filing a complaint
5. The adequacy of safeguards to prevent unauthorized disclosure.	Redaction of the name and address of the victim can help to safeguard unauthorized disclosure.
6. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access.	None to the Custodian's knowledge; however policies militating against access are NJ Constitution Article I, paragraph 22; The Crime Victims Bill of Rights <u>N.J.S.A. 52:4B-36</u> ; the exclusion of victim's records in OPRA <u>N.J.S.A. 47:1A-1.1</u> ; and <u>Perino v. Borough of Haddon Heights</u> , GRC Complaint No. 2004-128.

Need for Access Questions	Complainant's Response
1. Why do you need the requested record(s) or information?	The Complainant filed a common law access suit against the Office of Attorney Ethics. The Complainant sought records relating to disciplinary proceedings against Philip Gentile. As part of the lawsuit, the Complainant was researching information on Mr. Gentile including the nature of the charges and proceedings against him.
2. How important is the requested record(s) or information to you?	The information requested is important because it would assist the Complainant in monitoring the performance of government on disclosure issues.
3. Do you plan to redistribute the requested record(s) or information?	No.
4. Will you use the requested record(s) or information for unsolicited contact of the individuals named in the government record(s)?	No.

Balancing the Complainant's need for the redacted information (name and address of the victim) versus the potential harm should the information be released, the potential harm outweighs the Complainant's need for access in the matter currently before the Council. A citizen who reports a crime to a law enforcement agency has a reasonable

expectation of privacy that his or her personal information will not be released to the public. N.J.S.A. 47:1A-1 provides that "...a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy..." Should the personal information become public, the potential harm and chilling effect is that citizens may become deterred from reporting crimes for fear that their personal information will be released to members of the general public. Further, the Complainant's need for the requested records, researching the disciplinary proceedings against Philip Gentile including the nature of the charges and proceedings against him, does not outweigh the privacy concerns. The information contained on the redacted records released to the Complainant satisfies the Complainant's stated need for the requested records.

Therefore, because the Custodian failed to provide the Complainant with a lawful basis for the denial of access to the redacted portions of the requested records in writing within the statutorily mandated seven (7) business days, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. Additionally, because the Custodian's reliance on Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004), N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-2.2 and N.J.S.A. 52:4B-36 as a lawful basis for the denial of access to the redacted portions of the requested records is misplaced, the Custodian has failed to meet his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. However, pursuant to N.J.S.A. 47:1A-1, the Custodian did not unlawfully deny access to the redacted portions of the requested records because the redacted portions are exempt from disclosure due to privacy concerns.

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.

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 at 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 (App. Div. 1996) at 107).

Although the Custodian failed to meet his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 because the Custodian’s reliance on Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004), N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-2.2 and N.J.S.A. 52:4B-36 as a lawful basis for the denial of access to the redacted portions of the requested records are misplaced, pursuant to N.J.S.A. 47:1A-1, the Custodian did not unlawfully deny access to said redactions because the redacted portions are exempt from disclosure due to privacy concerns.⁴

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 failure to meet his burden of proof appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

Whether the Complainant is entitled to prevailing party attorney’s fees under OPRA?

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

⁴ The Custodian subsequently released the unredacted records to the Complainant.

determination, or a settlement of the parties that indicates access was improperly denied and the requested records are disclosed. *Id.*

In Teeters, *supra*, 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 the Open Public Records Act (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.

In the complaint currently before the Council, by filing a Denial of Access Complaint, the Complainant requested that the Council declare that the Custodian violated OPRA and order the Custodian to release unredacted copies of the requested records. As stated above, the Custodian is in violation of N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. because the Custodian failed to provide the Complainant with a lawful basis for the denial of access to the redacted portions of the requested records in writing within the statutorily mandated seven (7) business days. Additionally, prior to this complaint being adjudicated by the Council, the Custodian provided the Complainant with unredacted copies of the requested records (even though the redacted portions are exempt from disclosure due to privacy concerns).

Therefore, the action sought by the Complainant came about due to the Complainant’s filing of a Denial of Access Complaint and as such, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6 and Teeters, *supra*. Thus, this complaint should be referred to the Office of Administrative law for the determination of prevailing party attorney’s fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to provide the Complainant with a lawful basis for the denial of access to the redacted portions of the requested records in writing within the statutorily mandated seven (7) business days, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. Additionally, because the Custodian’s reliance on Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004), N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-2.2 and N.J.S.A. 52:4B-36 as a lawful basis for the denial of access to

the redacted portions of the requested records are misplaced, the Custodian has failed to meet his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. However, pursuant to N.J.S.A. 47:1A-1, the Custodian did not unlawfully deny access to the redacted portions of the requested records because the redacted portions are exempt from disclosure due to privacy concerns.

2. Although the Custodian failed to meet his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 because the Custodian's reliance on Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004), N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-2.2 and N.J.S.A. 52:4B-36 as a lawful basis for the denial of access to the redacted portions of the requested records is misplaced, pursuant to N.J.S.A. 47:1A-1, the Custodian did not unlawfully deny access to said redactions because the redacted portions are exempt from disclosure due to privacy concerns. 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 failure to meet his burden of proof appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.
3. The action sought by the Complainant came about due to the Complainant's filing of a Denial of Access Complaint and as such, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6 and Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006). Thus, this complaint should be referred to the Office of Administrative law for the determination of prevailing party attorney's fees.

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Executive Director

February 20, 2008