



**State of New Jersey**  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**LORI GRIFA**  
*Commissioner*

**FINAL DECISION**

**October 26, 2010 Government Records Council Meeting**

Michael Pierone  
Complainant

Complaint No. 2008-195

v.

County of Warren  
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the September 13, 2010 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, finds that this Complaint should be dismissed because the Complainant withdrew his complaint via letter to the GRC and the Office of Administrative Law dated August 16, 2010 since the parties have settled on all outstanding issues in this matter. Therefore, 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 26<sup>th</sup> Day of October, 2010

Robin Berg Tabakin, Chair  
Government Records Council

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

Charles A. Richman, Secretary  
Government Records Council  
**Decision Distribution Date: October 28, 2010**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
October 26, 2010 Council Meeting**

**Michael Pierone<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-195**

v.

**County of Warren<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Payroll check register data for years 2000 to present.<sup>3</sup>

**Request Made:** June 11, 2008

**Response Made:** June 13, 2008

**Custodian:** Art Charlton

**GRC Complaint Filed:** September 2, 2008<sup>4</sup>

**Background**

**December 22, 2009**

Government Records Council's ("Council") Interim Order. At its December 22, 2009 public meeting, the Council considered the December 9, 2009 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, found that:

1. Because the Custodian disclosed to the Complainant the payroll check register data from the year 2000 to the date of the Complainant's OPRA request (as well as the year 2009) and provided certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of the Council's November 4, 2009 Interim Order, the Custodian has complied with said Order.
2. Although the Custodian failed to bear his burden of proving a lawful denial of access to the requested payroll register pursuant to N.J.S.A. 47:1A-6, there is no evidence in the record to suggest that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Additionally, the Custodian complied with the Council's Interim Order by disclosing the requested records to the Complainant. Therefore, it is concluded

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<sup>1</sup> Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

<sup>2</sup> Represented by Joseph J. Bell, Esq., Warren County Counsel (Rockaway, NJ).

<sup>3</sup> The Complainant requested additional records; however, said records are not the subject of this Denial of Access Complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

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 bear his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's November 4, 2009 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Custodian provided access to the requested payroll check register. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved because the Custodian provided access to the requested payroll check register despite having initially denied access to said records prior to the filing of this complaint. Further, the relief ultimately achieved had a basis in law because payroll records are subject to public access pursuant to N.J.S.A. 47:1A-10. As a result, 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, 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). As such, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

**December 29, 2009**

Council's Interim Order distributed to the parties.

**December 30, 2009**

Complaint transmitted to the Office of Administrative Law ("OAL").

**August 16, 2010**

Letter from Complainant's Counsel to GRC with copy to OAL. Counsel states that the parties have settled on their own regarding all outstanding issues in this matter and that pursuant to that settlement, the Complainant withdraws his Denial of Access Complaint.

**August 27, 2010**

OAL returns withdrawn complaint to the GRC.

**Analysis**

No analysis required.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that this Complaint should be dismissed because the Complainant withdrew his complaint via

letter to the GRC and the Office of Administrative Law dated August 16, 2010 since the parties have settled on all outstanding issues in this matter. Therefore, no further adjudication is required.

Prepared By: Dara Lownie  
Communications Manager/Information Specialist

Approved By: Catherine Starghill, Esq.  
Executive Director

September 13, 2010



**State of New Jersey**  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

**JON S. CORZINE**  
Governor

**CHARLES A. RICHMAN**  
Acting Commissioner

**INTERIM ORDER**

**December 22, 2009 Government Records Council Meeting**

Michael Pierone  
Complainant

Complaint No. 2008-195

v.

County of Warren  
Custodian of Record

At the December 22, 2009 public meeting, the Government Records Council (“Council”) considered the December 9, 2009 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, finds that:

1. Because the Custodian disclosed to the Complainant the payroll check register data from the year 2000 to the date of the Complainant’s OPRA request (as well as the year 2009) and provided certified confirmation of compliance to the GRC’s Executive Director within five (5) business days from receipt of the Council’s November 4, 2009 Interim Order, the Custodian has complied with said Order.
2. Although the Custodian failed to bear his burden of proving a lawful denial of access to the requested payroll register pursuant to N.J.S.A. 47:1A-6, there is no evidence in the record to suggest that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Additionally, the Custodian complied with the Council’s Interim Order by disclosing the requested records to the Complainant. 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 bear his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council’s November 4, 2009 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Specifically, the Custodian provided access to the requested payroll check register. Additionally, pursuant to



Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved because the Custodian provided access to the requested payroll check register despite having initially denied access to said records prior to the filing of this complaint. Further, the relief ultimately achieved had a basis in law because payroll records are subject to public access pursuant to N.J.S.A. 47:1A-10. As a result, 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, 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). As such, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Interim Order Rendered by the  
Government Records Council  
On The 22<sup>nd</sup> Day of December, 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: December 29, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
December 22, 2009 Council Meeting**

**Michael Pierone<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-195**

**v.**

**County of Warren<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Payroll check register data for years 2000 to present.<sup>3</sup>

**Request Made:** June 11, 2008

**Response Made:** June 13, 2008

**Custodian:** Art Charlton

**GRC Complaint Filed:** September 2, 2008<sup>4</sup>

**Background**

**November 4, 2009**

Government Records Council's ("Council") Interim Order. At its November 4, 2009 public meeting, the Council considered the October 21, 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, found that:

1. Because N.J.S.A. 47:1A-10 specifically grants access to a public employee's salary and payroll record, and because the requested payroll check register is a payroll record that contains a public employee's salary information, as well as because the Custodian has failed to provide a lawful basis for the denial of access to the net payments contained on the payroll check register, the Custodian has failed to bear his burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6. As such, the Custodian must disclose the payroll check register from 2000 to the date of the Complainant's OPRA request to the Complainant.

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<sup>1</sup> Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

<sup>2</sup> Represented by Joseph J. Bell, Esq., Warren County Counsel (Rockaway, NJ).

<sup>3</sup> The Complainant requested additional records; however, said records are not the subject of this Denial of Access Complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

2. **The Custodian shall comply with item #1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>5</sup>, to the Executive Director.**
3. The Council defers analysis of 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 pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

**November 6, 2009**

Council's Interim Order distributed to the parties.

**November 12, 2009**

E-mail from Custodian to Complainant. The Custodian states that the Information Systems Department has compiled the requested check register data which encompasses ten (10) Excel files.<sup>6</sup> The Custodian asks the Complainant whether he would prefer to receive these files via e-mail or on CD-ROM.

**November 13, 2009**

E-mail from Custodian to Complainant. The Custodian states that the Complainant should be in receipt of five (5) other e-mail messages from the Custodian, each containing two (2) Excel files of the requested payroll check registers for the years 2000 through 2009 at no cost. The Custodian asks the Complainant to verify receipt of said e-mails.

**November 16, 2009**

E-mail from Complainant to Custodian. The Complainant states that the data he received is compliant with his OPRA request.

**November 16, 2009**

Custodian's response to the Council's Interim Order. The Custodian certifies that as per the Council's Interim Order dated November 4, 2009, the Custodian disclosed the requested payroll check registers (years 2000 to 2009) to the Complainant on November 13, 2009. The Custodian certifies that he has enclosed a true and accurate copy of an e-mail from the Complainant dated November 16, 2009 in which the Complainant stated that the records provided to him complied with his OPRA request.

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<sup>5</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>6</sup> The Custodian states that he also compiled the year 2009 data since it was easier than stopping at June 2008 as was originally requested.



## Analysis

### **Whether the Custodian complied with the Council's November 4, 2009 Interim Order?**

In the Council's November 4, 2009 Interim Order, the Council directed the Custodian to disclose to the Complainant the payroll check register data from the year 2000 to the date of the Complainant's OPRA request and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>7</sup>, to the Executive Director within five (5) business days from receipt of the Council's Order.

On November 16, 2009, the fifth (5<sup>th</sup>) business day following receipt of the Council's Interim Order, the Custodian provided the GRC with a legal certification in which he certified that he provided the Complainant with the requested payroll check register from the year 2000 to 2009 on November 13, 2009. Additionally, the Custodian provided an e-mail from the Complainant dated November 13, 2009 in which the Complainant stated that the records provided to him are compliant with his OPRA request.

Therefore, because the Custodian disclosed to the Complainant the payroll check register data from the year 2000 to the date of the Complainant's OPRA request (as well as the year 2009) and provided certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of the Council's November 4, 2009 Interim Order, the Custodian has complied with said Order.

### **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.

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<sup>7</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."  
Michael Pierone v. County of Warren, 2008-195 – Supplemental Findings and Recommendations of the Executive Director

The Custodian provided the Complainant with a written response to his OPRA request on the second (2<sup>nd</sup>) business day following receipt of such request. In said response, the Custodian denied the request on the basis that disclosing the amount of each payroll check would violate the privacy of employees because it would reveal information about payroll deductions. The Custodian contended that the Complainant's request exceeds what is allowed to be disclosed under N.J.S.A. 47:1A-10. The Custodian also contended that although a public employee's salary is a public record, an employee's deductions are not subject to disclosure, which deductions could be ascertained by comparing the gross yearly pay to the biweekly net pay. The Custodian asserted that deductions for charitable contributions, insurance, pension, deferred compensation and the like are reflected in the net pay.

In its Interim Order dated November 4, 2009, the Council held that:

"...because N.J.S.A. 47:1A-10 specifically grants access to a public employee's salary and payroll record, and because the requested payroll check register is a payroll record that contains a public employee's salary information, as well as because the Custodian has failed to provide a lawful basis for the denial of access to the net payments contained on the payroll check register, the Custodian has failed to bear his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. As such, the Custodian must disclose the payroll check register from 2000 to the date of the Complainant's OPRA request to the Complainant."

As stated previously, the Custodian complied with the Council's November 4, 2009 Interim Order because the Custodian disclosed to the Complainant the payroll check register from the year 2000 to the date of the Complainant's OPRA request (as well as the year 2009) and provided certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of the Council's November 4, 2009 Interim Order.

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 failed to bear his burden of proving a lawful denial of access to the requested payroll register pursuant to N.J.S.A. 47:1A-6, there is no evidence in the record to suggest that the Custodian's actions had a positive element of conscious

wrongdoing or were intentional and deliberate. Additionally, the Custodian complied with the Council's Interim Order by disclosing the requested records to the Complainant. 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 bear his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 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 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 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 (7<sup>th</sup> 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 Custodian denied access to the requested payroll check register on the basis that disclosing the amount of each payroll check would violate the privacy of employees because it would reveal information about payroll deductions. However, the Council held that the requested payroll check register is a payroll record that contains a public employee’s salary information and is subject to disclosure pursuant to N.J.S.A. 47:1A-10. As such, the Council ordered the Custodian to disclose said records to the Complainant and the Custodian complied with the Council’s Order.

Therefore, pursuant to Teeters, supra, and the Council’s November 4, 2009 Interim Order, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Specifically, the Custodian provided access to the requested payroll check register. Additionally, pursuant to Mason, supra, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved because the Custodian provided access to the requested payroll check register despite having initially denied access to said records prior to the filing of this complaint. Further, the relief ultimately achieved had a basis in law because payroll records are subject to public access pursuant to N.J.S.A. 47:1A-10. As a result, 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, Teeters, supra, and Mason, supra. As such, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney’s fees.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian disclosed to the Complainant the payroll check register data from the year 2000 to the date of the Complainant’s OPRA request (as well as the year 2009) and provided certified confirmation of compliance to the GRC’s Executive Director within five (5) business days from receipt of the Council’s November 4, 2009 Interim Order, the Custodian has complied with said Order.

2. Although the Custodian failed to bear his burden of proving a lawful denial of access to the requested payroll register pursuant to N.J.S.A. 47:1A-6, there is no evidence in the record to suggest that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Additionally, the Custodian complied with the Council's Interim Order by disclosing the requested records to the Complainant. 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 bear his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6 appears negligent and heedless since he is vested with the legal responsibility of granting and denying access in accordance with the law.
  
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), and the Council's November 4, 2009 Interim Order, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Specifically, the Custodian provided access to the requested payroll check register. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved because the Custodian provided access to the requested payroll check register despite having initially denied access to said records prior to the filing of this complaint. Further, the relief ultimately achieved had a basis in law because payroll records are subject to public access pursuant to N.J.S.A. 47:1A-10. As a result, 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, 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). As such, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Prepared By: Dara Lownie  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

December 9, 2009



State of New Jersey  
GOVERNMENT RECORDS COUNCIL  
101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

JON S. CORZINE  
Governor

CHARLES A. RICHMAN  
Acting Commissioner

**INTERIM ORDER**

**November 4, 2009 Government Records Council Meeting**

Michael Pierone  
Complainant

Complaint No. 2008-195

v.

County of Warren  
Custodian of Record

At the November 4, 2009 public meeting, the Government Records Council ("Council") considered the October 21, 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. Because N.J.S.A. 47:1A-10 specifically grants access to a public employee's salary and payroll record, and because the requested payroll check register is a payroll record that contains a public employee's salary information, as well as because the Custodian has failed to provide a lawful basis for the denial of access to the net payments contained on the payroll check register, the Custodian has failed to bear his burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6. As such, the Custodian must disclose the payroll check register from 2000 to the date of the Complainant's OPRA request to the Complainant.
2. **The Custodian shall comply with item #1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>1</sup>, to the Executive Director.**
3. The Council defers analysis of whether the Custodian's actions rise to the level of a knowing and willful violation of OPRA and unreasonable denial of

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<sup>1</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."



access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

4. The Council defers analysis of whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 4<sup>th</sup> 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.

Janice L. Kovach, Secretary  
Government Records Council

**Decision Distribution Date: November 6, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
November 4, 2009 Council Meeting**

**Michael Pierone<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-195**

v.

**County of Warren<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Payroll check register data for years 2000 to present.<sup>3</sup>

**Request Made:** June 11, 2008

**Response Made:** June 13, 2008

**Custodian:** Art Charlton

**GRC Complaint Filed:** September 2, 2008<sup>4</sup>

**Background**

**June 11, 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.

**June 13, 2008**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the second (2<sup>nd</sup>) business day following receipt of such request. The Custodian states that access to the requested record is denied because disclosing the amount of each payroll check would violate the privacy of employees because it would reveal information about payroll deductions. The Custodian contends that the Complainant's request exceeds what is allowed to be disclosed under N.J.S.A. 47:1A-10.<sup>5</sup>

**September 2, 2008**

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

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<sup>1</sup> Represented by Walter M. Luers, Esq., of Law Offices of Walter M. Luers, LLC (Oxford, NJ).

<sup>2</sup> Represented by Joseph J. Bell, Esq., Warren County Counsel (Rockaway, NJ).

<sup>3</sup> The Complainant requested additional records; however, said records are not the subject of this Denial of Access Complaint.

<sup>4</sup> The GRC received the Denial of Access Complaint on said date.

<sup>5</sup> "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."



- Complainant's OPRA request dated June 11, 2008
- Custodian's response to the Complainant's OPRA request dated June 13, 2008<sup>6</sup>

The Complainant states that he submitted his OPRA request on June 11, 2008. The Complainant states that the Custodian denied access to his request on June 13, 2008 claiming that releasing the amount of each employee's payroll check would violate the privacy of employees because it would reveal information about payroll deductions.

The Complainant states that payroll records are specifically listed as personnel records that can be disclosed under OPRA. N.J.S.A. 47:1A-10. The Complainant asserts that it is unreasonable to withhold the net payment amounts because releasing said information does not reveal the type of deductions made.

Additionally, the Complainant requests that the GRC order the Custodian to provide immediate access to the requested records. The Complainant also requests that the Council award the Complainant reasonable prevailing party attorney's fees pursuant to N.J.S.A. 47:1A-6.

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

### **September 9, 2008**

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

### **September 16, 2008**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated June 11, 2008
- Custodian's response to the Complainant's OPRA request dated June 13, 2008<sup>7</sup>

The Custodian certifies that he received the Complainant's OPRA request on June 11, 2008. The Custodian certifies that he responded to the Complainant's request via e-mail dated June 13, 2008 in which the Custodian denied the Complainant's request on the basis that the payroll check register was exempt from disclosure pursuant to N.J.S.A. 47:1A-10. The Custodian asserts that the amount of an employee's paycheck revealing his/her take home pay goes beyond the scope of a payroll record. The Custodian contends that although a public employee's salary is a public record, an employee's deductions are not subject to disclosure, which deductions could be ascertained by comparing the gross yearly pay to the biweekly net pay. The Custodian asserts that deductions for charitable contributions, insurance, pension, deferred compensation and the like are reflected in the net pay.

Additionally, the Custodian states that the term "payroll record" is not defined in OPRA. The Custodian states that in McCormack v. New Jersey Department of Treasury, GRC Complaint No. 2005-164 (June 2008), the Council used the definition for "payroll

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<sup>6</sup> The Complainant attaches additional correspondence that is not relevant to the adjudication of this Denial of Access Complaint.

<sup>7</sup> The Custodian attaches additional correspondence that is not relevant to the adjudication of this Denial of Access Complaint.

record” contained in *N.J.A.C. 12:16-2.1*, a New Jersey Department of Labor regulation. The Custodian claims that the requested payroll register does not comport with said definition.<sup>8</sup>

The Custodian certifies that his search for the requested records involved collaborating with the Finance and Information Systems Departments to determine that the requested payroll checks do not fall within the exceptions listed under N.J.S.A. 47:1A-10.

The Custodian also 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”), no records responsive to the Complainant’s request have been destroyed.

### **November 17, 2008**

Complainant Counsel’s response to the Custodian’s SOI. The Complainant’s Counsel asserts that the GRC complaint cited by the Custodian, McCormack v. New Jersey Department of Treasury, GRC Complaint No. 2005-164 (June 2008), supports the Complainant’s claim that the Custodian unlawfully denied access to the payroll register. Counsel states that in said complaint, the Council ruled in favor of the Complainant, stating that “the records requested...fall squarely within the definition of a government record subject to disclosure pursuant to N.J.S.A. 47:1A-10.” Counsel contends that the Custodian’s knowledge of this decision supports a finding of a knowing and willful violation of OPRA.

Additionally, Counsel contends that it is not reasonable to withhold net payments made to public employees because knowing this information does not reveal the specific deductions taken by employees. Counsel states that without any evidence to support the Custodian’s assertion that particular deductions can be gleaned from a payroll check, the Custodian’s claim is based on speculation. Counsel reiterates the Complainant’s request for immediate access to the requested records and an award of reasonable prevailing party attorney fees.

### **November 21, 2008**

Letter from Custodian’s Counsel to GRC. Counsel states that in McCormack v. New Jersey Department of Treasury, GRC Complaint No. 2005-164 (June 2008), the Council did not define what is included in a payroll record. Specifically, Counsel states that the GRC did not address whether an employee’s net payment is included as part of a payroll record. Counsel asserts that the privacy interest of the employee outweighs the interest of the public in knowing the net amount of an employee’s paycheck. Counsel contends that because the issue of whether net payments are included as part of a payroll record is not clear, the Custodian cannot be found to have knowingly and willfully violated OPRA.

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<sup>8</sup> The Custodian also discusses the circumstances surrounding the other items in the Complainant’s OPRA request; however, said items are not the subject of this Denial of Access Complaint.  
Michael Pierone v. County of Warren, 2008-195 – Findings and Recommendations of the Executive Director

## 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 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.

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 Custodian in this complaint certified that he received the Complainant’s OPRA request on June 11, 2008. The Custodian certified that he provided the Complainant with a written response on June 13, 2008 in which the Custodian denied the request on the basis that disclosing the amount of each payroll check would violate the privacy of employees because it would reveal information about payroll deductions. The Custodian contends that the Complainant’s request exceeds what is allowed to be disclosed under N.J.S.A. 47:1A-10. The Custodian also contends that although a public employee’s salary is a public record, an employee’s deductions are not subject to disclosure, which deductions could be ascertained by comparing the gross yearly pay to

the biweekly net pay. The Custodian asserts that deductions for charitable contributions, insurance, pension, deferred compensation and the like are reflected in the net pay.

OPRA specifically grants access to an individual's salary and "payroll records" pursuant to N.J.S.A. 47:1A-10. In Jackson v. Kean 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 records at issue in this complaint are the payroll check register data for years 2000 to present. The question here is whether this check register constitutes a payroll record under OPRA. As the Custodian noted, OPRA does not define what is or is not a payroll record. Thus, we refer to the definition utilized by the Council in the prior complaints discussed above: Jackson, and McCormack. In said complaints, the Council first relies on the Black's Law Dictionary's definition of "payroll," which is "a list of

employees to be paid and the amount due to each of them.” The requested check register fits squarely within this definition because the register lists the employees and the amount paid to each of them.

The Council then turned to a Department of Labor regulation which described a payroll record as having the following characteristics: listing the total amount of remuneration paid to each employee, and the total amount of remuneration received by the employee. These items can be clarified as an employee’s gross pay – what he is paid in total, and an employee’s net pay – what he actually takes home after deductions. This information is contained on the requested check register, thus making the register a payroll record.

OPRA clearly grants access to a public employee’s salary and payroll record pursuant to N.J.S.A. 47:1A-10. Neither said provision, nor any other provision of OPRA, specifically grants confidentiality to the net payments contained on the payroll check registers. The Custodian erroneously raises privacy concerns despite the fact that OPRA clearly provides for the disclosure of salary and payroll information.

Therefore, because N.J.S.A. 47:1A-10 specifically grants access to a public employee’s salary and payroll record, and because the requested payroll check register is a payroll record that contains a public employee’s salary information, as well as because the Custodian has failed to provide a lawful basis for the denial of access to the net payments contained on the payroll check register, the Custodian has failed to bear his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6. As such, the Custodian must disclose the payroll check register from 2000 to the date of the Complainant’s OPRA request to the Complainant.

**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?**

The Council defers analysis of 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 pending the Custodian’s compliance with the Council’s Interim Order.

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

The Council defers analysis of whether the Complainant is a “prevailing party” pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney’s fees pending the Custodian’s compliance with the Council’s Interim Order.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because N.J.S.A. 47:1A-10 specifically grants access to a public employee's salary and payroll record, and because the requested payroll check register is a payroll record that contains a public employee's salary information, as well as because the Custodian has failed to provide a lawful basis for the denial of access to the net payments contained on the payroll check register, the Custodian has failed to bear his burden of proving a lawful denial of access, pursuant to N.J.S.A. 47:1A-6. As such, the Custodian must disclose the payroll check register from 2000 to the date of the Complainant's OPRA request to the Complainant.
2. **The Custodian shall comply with item #1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>9</sup>, to the Executive Director.**
3. The Council defers analysis of 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 pending the Custodian's compliance with the Council's Interim Order.
4. The Council defers analysis of whether the Complainant is a "prevailing party" pursuant to N.J.S.A. 47:1A-6 and entitled to reasonable attorney's fees pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Dara Lownie  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

October 21, 2009

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<sup>9</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."  
Michael Pierone v. County of Warren, 2008-195 – Findings and Recommendations of the Executive Director