



**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**

**March 29, 2011 Government Records Council Meeting**

Pat Walsh  
Complainant

Complaint No. 2008-266

v.

Township of Middletown (Monmouth)  
Custodian of Record

At the March 29, 2011 public meeting, the Government Records Council (“Council”) considered the March 22, 2011 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 her complaint via e-mail to the GRC dated March 4, 2011 (via her legal counsel) since the parties have reached a settlement 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 29<sup>th</sup> Day of March, 2011

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: April 1, 2011**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
March 29, 2011 Council Meeting**

**Pat Walsh<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-266**

v.

**Township of Middletown (Monmouth)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Financial disclosure statements filed in 2007 pursuant to the Government Ethics Law.<sup>3</sup>

**Request Made:** September 15, 2008

**Response Made:** September 23, 2008

**Custodian:** Heidi Brunt

**GRC Complaint Filed:** December 1, 2008<sup>4</sup>

**Background**

**July 27, 2010**

Government Records Council's ("Council") Interim Order. At its July 27, 2010 public meeting, the Council considered the July 20, 2010 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:

Because the Custodian has failed to establish in her request for reconsideration of the Council's November 18, 2009 Interim Order regarding the redactions made to the requested records and the Council's January 26, 2010 Interim Order regarding the award of attorney's fees were 1) based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State

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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 Brian Nelson, Esq. (Red Bank, NJ).

<sup>3</sup> The Complainant requested additional records which are not at issue in this complaint.

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

Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees pursuant to the Council's April 28, 2010 Interim Order.

**July 28, 2010**

Council's Interim Order distributed to the parties.

**September 21, 2010**

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

**March 4, 2011**

E-mail from the Complainant's Counsel to the GRC attaching a letter from the Complainant's Counsel to the Honorable Israel D. Dubin dated March 4, 2011. Counsel states that the terms of a settlement agreement between the parties has been fulfilled; thus, Counsel is withdrawing this complaint pursuant to said agreement.

**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 her complaint via e-mail to the GRC dated March 4, 2011 (via her legal counsel) since the parties have reached a settlement in this matter. Therefore, no further adjudication is required.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

March 22, 2011



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

**INTERIM ORDER**

**July 27, 2010 Government Records Council Meeting**

Pat Walsh  
Complainant

Complaint No. 2008-266

v.

Township of Middletown (Monmouth)  
Custodian of Record

At the July 27, 2010 public meeting, the Government Records Council ("Council") considered the July 20, 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 because the Custodian has failed to establish in her request for reconsideration of the Council's November 18, 2009 Interim Order regarding the redactions made to the requested records and the Council's January 26, 2010 Interim Order regarding the award of attorney's fees were 1) based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees pursuant to the Council's April 28, 2010 Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 27<sup>th</sup> Day of July, 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: July 28, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Pat Walsh<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-266**

v.

**Township of Middletown (Monmouth)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Financial disclosure statements filed in 2007 pursuant to the Government Ethics Law.<sup>3</sup>

**Request Made:** September 15, 2008

**Response Made:** September 23, 2008

**Custodian:** Heidi Brunt

**GRC Complaint Filed:** December 1, 2008<sup>4</sup>

**Background**

**January 26, 2010**

Government Records Council's ("Council") Interim Order. At its January 26, 2010 public meeting, the Council considered the January 19, 2010 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 provided the Complainant with the unredacted financial disclosure forms requested, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council's Interim Order, the Custodian has complied with the Council's November 18, 2009 Interim Order.
2. Although the Custodian unlawfully redacted addresses of real property owned pursuant to N.J.S.A. 40A:9-22.6(b), N.J.S.A. 40A:9-22.6(c) and the court's note in Kenny v. Byrne, 144 N.J. Super. 243, 252 (App. Div. 1976) and failed to bear her burden of proving that said redactions were lawful pursuant to N.J.S.A. 47:1A-6, because the Custodian complied with

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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 Brian M. Nelson, Esq., of Menna, Supko & Nelson, LLC. (Shrewsbury, NJ).

<sup>3</sup> The Complainant requested additional records which are not at issue in this complaint.

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

the Council's Interim Orders dated November 18, 2009, 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.

3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), 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. 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. Further, the relief ultimately achieved had a basis in law. Therefore, 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). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

#### **January 28, 2010**

Council's Interim Order distributed to the parties.

#### **February 10, 2010**

Custodian's motion for reconsideration with the following attachments:

- Complainant's OPRA request dated September 15, 2008.
- E-mail from Ms. Lauren Kirkman ("Ms. Kirkman"), Deputy Municipal Clerk, to the Complainant dated September 24, 2008.
- Complainant's Denial of Access Complaint dated December 1, 2008.
- E-mail from the Custodian to the GRC dated December 19, 2008.
- E-mail from the GRC to the Custodian dated December 19, 2008.
- E-mail from the GRC to the Custodian dated December 19, 2008.
- E-mail from the Custodian to the GRC dated January 2, 2009.
- Custodian's Statement of Information ("SOI") dated January 2, 2009.
- Letter from the Complainant's Counsel to the Custodian's Counsel dated January 27, 2009.
- Letter from the GRC to the Complainant's Counsel dated June 15, 2009.
- E-mail from the Complainant's Counsel to the GRC dated June 15, 2009.
- GRC's Interim Order dated November 18, 2009.
- Letter from the Custodian to the GRC dated November 25, 2009.
- GRC's Interim Order dated January 26, 2010.<sup>5</sup>

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<sup>5</sup> The Custodian also attached an OPRA request dated January 13, 2009 for financial disclosure statements for 2005 and 2006; however, that request is not relevant to the instant complaint.

The Custodian certifies that she received the Complainant's request on September 15, 2008. The Custodian certifies that she worked with the Complainant to clarify exactly what records the Complainant was seeking. The Custodian certifies that she contacted the GRC on September 16, 2008 to inquire whether redaction of home addresses and telephone numbers was appropriate. The Custodian certifies that she was advised that such redactions were appropriate.

The Custodian certifies that after reviewing a series of recent court decisions relating to privacy concerns, reviewing the State Ethics Commission's practice of redacting home addresses and telephone numbers pursuant to Executive Order No. 21 (Gov. McGreevey, 2002), obtaining advice from the GRC and consulting with Counsel, the Custodian directed Ms. Kirkman to redact home addresses and telephone numbers of non-elected officials' financial disclosure statements. The Custodian certifies that she thought the redactions were appropriate based on her belief that there was a reasonable expectation of privacy for such non-elected officials, many of whom are volunteers serving on advisory boards and commissions. The Custodian certifies that the records were scanned and e-mailed to the Complainant on September 24, 2008.

The Custodian certifies that the Complainant's Counsel forwarded notice that the instant complaint was filed with the GRC on December 16, 2008. The Custodian certifies that at no time prior to the filing of this complaint did the Complainant express dissatisfaction with the Township's response. The Custodian contends that she believes that the Township's response did not constitute a denial of access; rather, the redactions were reasonable based on privacy interests to which the Complainant never objected.

The Custodian certifies that she sent an e-mail to the GRC on December 19, 2008 requesting an extension of time to submit an SOI and requesting that the Complainant consider mediating this complaint. The Custodian certifies that the GRC e-mailed her on the same day providing a brief synopsis of six (6) complaints in which the GRC upheld redaction of home addresses. The Custodian certifies that, after several attempts by the Custodian's Counsel to contact the Complainant regarding mediation, she submitted an SOI on January 2, 2009. The Custodian certifies that the Complainant's Counsel contacted the Custodian's Counsel on January 27, 2009 acknowledging receipt of several messages in late December and offering a potential settlement only if reasonable attorney's fees were included.<sup>6</sup>

The Custodian certifies that the GRC sent a letter to the Complainant's Counsel on June 15, 2009 requesting that Counsel advise as to the status of said complaint. The Custodian certifies that the Complainant's Counsel responded via e-mail stating that he would confer with the Complainant; this e-mail represents the last correspondence received by the Custodian. The Custodian states that she received the GRC's November 18, 2009 Interim Order on November 20, 2009. The Custodian certifies that she provided certified confirmation of compliance to the GRC on November 25, 2009. The Custodian certifies that she received the Council's January 26, 2010 Interim Order on January 29, 2010, which indicates that although the Custodian's actions did not rise to a level of a

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<sup>6</sup> The Custodian certifies that she consulted with Counsel and determined that the pursuit of attorney's fees by the Complainant's Counsel as part of a settlement would be an unacceptable expense to the taxpayers. Pat Walsh v. Township of Middletown (Monmouth), 2008-266 – Supplemental Findings and Recommendations of the Executive Director 3



knowing and willful violation of OPRA, the Complainant is a prevailing party entitled to attorney's fees.

On behalf of the Custodian, the Custodian's Counsel submitted a legal brief requesting a reconsideration of the GRC's January 26, 2010 Interim Order pursuant to *N.J.A.C. 5:105-2.10* in which the GRC determined that 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)," and a stay pursuant to *N.J.A.C. 5:105-2.12(f)*. Counsel asserts that the position of the Township is that the award of attorney's fees is not warranted given the facts presented in the instant complaint. Further, Counsel contends that awarding prevailing party attorney's fees in the instant complaint will encourage abuses of OPRA for the personal gain of a growing number of attorneys practicing in this area under the guise of advancing public interest at taxpayer expense.

Counsel notes that although the Township is not seeking reconsideration of the GRC's determination that the redaction of home addresses on the financial disclosure statements was unlawful, Counsel notes that the Township objects to such determination. Counsel argues that the GRC's oversimplified reliance on the Local Government Ethics Law found at N.J.S.A. 40A:9-22.6 (providing that financial disclosure statements are public records) and dicta in Kenny v. Byrne, 144 N.J. Super. 243, 252 (App. Div. 1976) are misplaced with respect to the narrow scope of the Custodian's redaction of home addresses. Counsel asserts that the issue is not whether the disclosure statements are public record, but whether home addresses contained within the statements may be lawfully redacted for public employees, certain contractors and volunteer members of advisory boards and commissions that have no decision making authority that could conflict with their ownership of certain real property where they reside. Counsel notes that the recently adopted Citizen Service Act (P.L. 2009, c. 141) explicitly requires the maintenance of confidentiality under OPRA of, "[a]ddress, phone number and e-mail address" of those applying to serve on local authorities, boards and commissions. N.J.S.A. 40A:9-9.2b(3). Counsel avers that the Township reserves its right to assert such argument upon appeal of the GRC's final decision.

Counsel states that the instant matter concerns the Complainant's request for financial disclosure statements filed for 2007. Counsel states that the Complainant submitted an OPRA request to the Township on September 15, 2008. Counsel states that the Custodian assisted the Complainant in clarifying the records sought. Counsel states that on September 16, 2008, the Custodian sought advice of Counsel regarding redactions of home addresses and telephone numbers and was advised that redactions are appropriate due to privacy concerns. Counsel states that on September 22, 2008, the Custodian directed Ms. Kirkman to make the appropriate redactions. Counsel asserts that the Custodian and Ms. Kirkman spent several hours attempting to provide the requested financial disclosure statements to the Complainant via e-mail despite encountering issues with the Complainant's lack of e-mail inbox capacity.

Counsel states that despite the extraordinary efforts of the Custodian and Ms. Kirkman, the Custodian received on December 16, 2008 notification of the instant Denial

of Access Complaint regarding redactions made to the financial disclosure statements. Counsel states that the Complainant also rejected mediation, even though the Complainant had not previously taken issue with the redactions. Counsel argues that instead of contacting the Custodian to resolve the issues, the Complainant hired an attorney and filed a complaint with the GRC.

Counsel also notes that the Custodian received guidance from the GRC on December 19, 2008 that the redaction of home addresses is appropriate.

Counsel states that the Complainant denied or ignored the Township's repeated attempts to mediate the instant complaint, at which time the Custodian filed an SOI with the GRC on January 2, 2009. Counsel states that the Custodian again requested that the Complainant engage in mediation, which the Complainant's Counsel finally acknowledged on January 27, 2009 only to state that settlement was possible if attorney's fees were included therein. Counsel asserts that the Township determined that payment of attorney's fees in the instant complaint would be an unacceptable cost to the taxpayers.

Counsel states that the Custodian received correspondence from the GRC on June 15, 2009 requesting that the Complainant advise whether she wished to proceed with the adjudication of this complaint. Counsel states that the Complainant's Counsel responded stating that he would consult with the Complainant and advise; however, the Complainant's Counsel never responded.<sup>7</sup> Counsel states that the Custodian received the Council's November 18, 2009 Interim Order on November 20, 2009 and fully complied on November 25, 2009. Counsel states that the Custodian subsequently received the Council's January 26, 2010 Interim Order on January 29, 2010, which held that the Complainant was a prevailing party entitled to attorney's fees even though the Custodian was found to have not knowingly and willfully violated OPRA. Counsel states that the Township now seeks a reconsideration of the Council's January 26, 2010 Interim Order holding that the Complainant is entitled to prevailing party attorney's fees and a stay of same pursuant to the facts of this complaint and the law provided hereafter.

Counsel states that in order for attorney's fees to be awarded to a prevailing party under OPRA, there must be a casual nexus between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. *See Teeters v. DYFS*, 387 N.J. Super. 423 (App. Div. 2006). Counsel contends that no such casual nexus exists in the instant complaint because the Complainant never requested unredacted financial disclosure statements for 2007. Counsel notes that the Township provided the Complainant with unredacted copies of financial disclosure statements for 2005 and 2006 in response to a separate OPRA request in which the Complainant specifically asked for such records in unredacted form.

Additionally, Counsel argues that this complaint is factually distinguishable from Teeters. Counsel states that in that case, the Complainant sought counsel "only after her

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<sup>7</sup> The Custodian's Counsel contends in the Statement of Facts that based upon the substitution of a new GRC case manager handling this complaint and the Complainant Counsel's failure to clearly indicate whether the Complainant was proceeding to adjudication of this complaint, it was not even clear to the Custodian whether this matter was still being adjudicated by the GRC.

self-filed complaints and personal efforts were unavailing.” Teeters at 432. Counsel asserts that in the instant complaint, instead of the Complainant making a request to secure unredacted copies of the 2007 financial disclosure statements or questioning why such redactions were made, the Complainant hired an attorney and filed a Denial of Access Complaint months after receiving the records (which were redacted by the Custodian based in part on reliance of guidance by the GRC). Counsel contends that the Custodian continued to receive guidance from the GRC advising that home addresses are subject to redaction.

Counsel argues that by awarding attorney’s fees in the instant complaint, the GRC is effectively adopting the rebuttable presumption sought in relation to the award of prevailing party attorney’s fees, which position was rejected by the Supreme Court as moving beyond the catalyst theory. Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008). Counsel contends that this is not an instance in which the Custodian failed to appropriately respond to the records request because the Custodian went above and beyond what is required under OPRA by assisting the requestor to prepare her request and provided the requested records in the electronic medium requested. Counsel asserts that accordingly, the Complainant is not automatically entitled to prevailing party attorney’s fees merely because the Custodian disclosed a requested record after the filing of a Denial of Access Complaint. *Id.* Counsel states that the Supreme Court has held that “our cases involve the award of counsel fees after the entry of some form of court order or enforceable settlement, while leaving open the possibility of attorney’s fees *if a litigant can prove the necessary factual causal nexus.*” (Emphasis added.) *Id.* Counsel contends there has been no such proof in the instant matter and the facts indicate that there is no causal nexus.

Counsel states that in Mason, the Supreme Court expressed that if a rebuttable presumption is applied, “plaintiffs would have an incentive to file suit immediately after a request for disclosure is denied or not responded to in a timely fashion, based in part on the expectation of an award of attorney’s fees.” *Id.* at 78.<sup>8</sup> Counsel states that the court continued, stating that, “[a]s a result, courts could expect to see more aggressive litigation tactics and fewer efforts at accommodations. And in the former instances, OPRA cases designated to obtain swift access to government records would end up as battles over attorney’s fees.” *Id.* at 78-79. Counsel states that the court held that the catalyst theory “empowers courts to award fees *when the requestor can establish a ‘causal [sic] nexus’* between the litigation and the production of requested records.” (Emphasis added.) *Id.* at 79. Counsel states that the court held that establishing a casual nexus, “requires a fact sensitive inquiry on a case-by-case basis, evaluating the reasonableness of, and motivation for, an agency’s decisions, and viewing each matter on its merits.” *Id.* Counsel contends that such an analysis of the facts has not been carried out in the instant matter.

Counsel argues that when the facts of the instant complaint are examined, it is clear that no causal nexus exists because identical records were released in redacted form long before any determination by the GRC. Counsel asserts that the disputed records

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<sup>8</sup> Counsel asserts that, not surprisingly, the Complainant’s Counsel sought prevailing party attorney’s fees at the time of the filing of the instant Denial of Access Complaint.  
Pat Walsh v. Township of Middletown (Monmouth), 2008-266 – Supplemental Findings and Recommendations of the Executive Director 6

were never requested by the Complainant in unredacted form during the adjudication of this complaint, even while the Complainant, through Counsel, continued to pursue the instant complaint to recover prevailing party attorney's fees. Further, Counsel argues that the Complainant's Counsel refused and ignored requests by the Township to engage in mediation; however, the Complainant's Counsel did agree to mediation at one point only if attorney's fees would be paid. Counsel asserts that the Mason court's concerns, *supra*, regarding the pursuit of attorney's fees, have come to fruition in the instant complaint.

Counsel states that OPRA's provision for "a reasonable attorney's fee" pursuant to N.J.S.A. 47:1A-6 should not be permitted to be abused when a complainant or their attorney needlessly drags a matter out for more than two (2) years when it could have been quickly resolved. Counsel asserts that the Complainant herein repeatedly rejected and ignored offers to mediate the matter. Counsel also asserts that the court in Mason, *supra*, noted that OPRA encourages compromise and efforts to work through certain problematic requests:

"[t]he statute is designed both to promote prompt access to government records and to encourage requestors and agencies to work together toward that end by accommodating one another." *Id.* at 78.

Counsel avers that OPRA established the GRC to resolve disputes through an "informal mediation program." *Id.* and N.J.S.A. 47:1A-7.b. Counsel argues that the Complainant should be barred from receiving prevailing party attorney's fees regardless of whether a causal nexus is ever proven because the Complainant, through Complainant's Counsel, declined to participate in mediation.

Counsel contends that the Complainant Counsel's pursuit of prevailing party attorney's fees resulted in the needless adjudication of this complaint over more than two (2) years.<sup>9</sup> Counsel states that the Appellate Division recently held that a trial court properly denied an application for attorney's fees where documents were released to the plaintiff in redacted form to protect personal information contained in applications for public housing. *See Papraniku v. Cherry Hill Township*, Docket No. A-1763-07T3 (unpublished April, 2009).

Counsel concludes by asserting that the GRC should follow the court's holding in Papraniku because the redactions made to the records in the instant complaint were reasonably made due to privacy concerns and no causal nexus between the filing of the complaint and the release of the requested records has been proven by the Complainant that could result in a determination that the Complainant is a prevailing party entitled to reasonable attorney's fees. Further, Counsel contends that the facts of this complaint demonstrate that there was never any request made for unredacted copies of the requested

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<sup>9</sup> The Custodian's Counsel reiterates that the Complainant failed to simply submit a request for unredacted copies of the 2007 financial disclosure statements (after obtaining unredacted copies of 2005 and 2006 financial disclosure statements in response to two (2) separate OPRA requests for such) which would have avoided the lengthy adjudication of this matter. Further, the Custodian's Counsel asserts that it is unclear whether the Complainant was aware that she could have received unredacted copies of the records more than a year ago but for the Complainant Counsel's demand for attorney's fees. The Custodian Counsel asserts that this should have been evident upon receipt of the unredacted records for 2005 and 2006.

2007 financial disclosure statements and efforts to mediate this complaint were repeatedly rejected and ignored. Counsel asserts that it is therefore evident that any attorney's fees incurred by the Complainant were a sole result of the Complainant's pursuit of this complaint in bad faith. Counsel requests that, for the foregoing reasons, it is respectfully recommended that the GRC reconsider its decision that the Complainant "is a prevailing party entitled to an award of a reasonable attorney's fee" and reverse such determination.<sup>10</sup>

### Analysis

#### **Whether the Complainant has met the required standard for reconsideration of the Council's January 26, 2010 Interim Order?**

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

Applicable case law holds that:

"[a] party should not seek reconsideration merely based upon dissatisfaction with a decision." *D'Atria v. D'Atria*, 242 *N.J. Super.* 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, *Cummings v. Bahr*, 295 *N.J. Super.* 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. *D'Atria, supra*, 242 *N.J. Super.* at 401. 'Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.' *Ibid.*" *In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey*, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of his motion for reconsideration, the Custodian submitted a certification stating that the redactions were made pursuant to legal advice obtained from Counsel, as well as from the GRC staff, and that such redactions were made for privacy

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<sup>10</sup> The Complainant's Counsel submitted objections to the Township's request for reconsideration on March 24, 2010; however, these objections were dated and received after the ten (10) business day time frame allotted for such submissions under the GRC's promulgated regulations. *See N.J.A.C. 5:105-2.10*. Pat Walsh v. Township of Middletown (Monmouth), 2008-266 – Supplemental Findings and Recommendations of the Executive Director 8

concerns. Additionally, the Custodian argues that the Complainant did not request unredacted copies of the requested 2007 financial disclosure statements therefore the Custodian provided the records responsive to the request. The Custodian also submitted extensive argument that the Complainant intentionally refused mediation or settlement of this matter in order to incur and increase attorney's fees.

As the moving party, the Custodian was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra.*

Although Counsel notes that the Township is not requesting reconsideration of the Council's decision to order disclosure of the requested financial disclosure forms, the GRC must address this issue because it is an integral part of the causal nexus in determining whether prevailing party attorney's fee were warranted in the instant complaint.

The Custodian argues that otherwise public personal financial disclosure statements filed by individuals pursuant to Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq., nonetheless may be redacted to protect the home addresses of public employees, certain contractors and volunteer members of advisory boards and commissions that have no decision making authority that could conflict with their ownership of certain real property where they reside. By way of example, Custodian cites to the newly-adopted Citizen's Service Act (P.L. 2009, c. 141),<sup>11</sup> which specifically requires confidentiality under OPRA of the "address, phone number and e-mail address" of individuals who apply to serve on local authorities, boards and commissions. N.J.S.A. 40A:9-9.2b(3). Finally, Custodian contends that the GRC's reliance on N.J.S.A. 40A:9-22.6 (stating that financial disclosure statements are public records) and dicta in Kenny v. Byrne, 144 N.J. Super. 243, 252 (App. Div. 1976) is both misplaced and "oversimplified."

As the Council observed in its November 18, 2009 Findings and Recommendations, the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq., requires local government officers to annually file a financial disclosure statement listing sources of income, fees, honoraria, gifts, reimbursements or prepaid expenses, the names and addresses of business organizations in which the local government officer or a member of his immediate family had an interest during the preceding calendar year and the address and brief description of all real property in the State in which the local government officer or a member of his immediate family held an interest during the preceding calendar year. *See N.J.S.A.* 40A:9-22.6(a). For local government officers serving the municipality, the original statement must be filed with the municipal clerk in the municipality in which the local government officer serves. For local government officers serving the county, the original statement must be filed with the county clerk in

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<sup>11</sup> A2784, adopted October 19, 2009. The Council notes that the Citizen's Service Act was adopted in October, 2009. The events which gave rise to the Denial of Access Complaint in this matter transpired in September, 2008.

the county in which the local government officer serves. A copy of the statement shall be filed with the Local Finance Board in the Division of Local Government Services, New Jersey Department of Community Affairs. N.J.S.A. 40A:9-22.6(b). Finally, “[a]ll financial disclosure statements filed shall be public records.” N.J.S.A. 40A:9-22.6(c).

OPRA provides for ready access to government records by the citizens of this State. *See* Mason v. City of Hoboken, 196 N.J. 51, 64-65 (2008). The statute directs that “all government records shall be subject to public access unless exempt,” and that “any limitations on the right of access ... shall be construed in favor of the public's right of access.” N.J.S.A. 47:1A-1. Consistent with those aims, 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 in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof.” N.J.S.A. 47:1A-1.1.12

OPRA exempts twenty-one (21) categories of information from the definition of a government record, including the “social security number, credit card number, unlisted telephone number, or driver license number of any person.” N.J.S.A. 47:1A-5.a. Home addresses are not included in this provision. Nevertheless, OPRA specifically commands that public agencies have “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.” N.J.S.A. 47:1A-1. *See also* Burnett v. County of Bergen, 198 N.J. 408, 422 (2009).

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<sup>12</sup> Interestingly, the New Jersey Division of Archives and Records Management uses the following definition of “public records”:

“except where the context indicates otherwise, the words “public records” mean any paper, written or printed book, document or drawing, map or plan, photograph, microfilm, data processed or image processed document, sound-recording or similar device, or any copy thereof which has been made or is required by law to be received for filing, indexing, or reproducing by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received by any such officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, in connection with the transaction of public business and has been retained by such recipient or its successor as evidence of its activities or because of the information contained therein.” N.J.S.A. 47:3-16 (Destruction of Public Records Law (1953)).”

However, the Appellate Division has conclusively held that the financial disclosure statements required by N.J.S.A. 40A:9-22.1 et seq., though broad in scope, are reasonably related to a legitimate governmental purpose and do not invade the privacy of local officials. Department of Community Affairs, Local Finance Bd. v. Cook, 282 N.J. Super. 207, 211 (App.Div. 1995). *See also* Abraham v. Township of Teaneck Ethics Bd., 349 N.J. Super. 374 (App.Div. 2002)(affirming a final determination of Local Finance Board of the Department of Community Affairs, New Jersey, that appellant mayor violated N.J.S.A. 40A:9-22.6(4), by failing to disclose his interest in a company on his financial disclosure statement, although mayor later amended same to show the financial interest; the court stated: the Act's disclosure requirements are intended to guide the ethical conduct of public officers who stand in a fiduciary relationship to the people whom they have been elected or appointed to serve, and to determine the existence of actual or apparent conflicts of interest regarding the public officer's public duties). *See, e.g.,* Price v. Corzine, 2007 U.S. Dist. LEXIS 15218 (D.N.J. Mar. 2, 2007)(complaint challenging the online publication of financial history portion of financial disclosure statements filed with the New Jersey Ethics Commission pursuant to the Casino Control Act, N.J.S.A. 5:12-58(e) was dismissed where the public availability of that information was not challenged).

Moreover, a review of the Local Government Ethics Law Financial Disclosure Statement required to be filed annually by N.J.S.A. 40A:9-22.113 discloses that the completion of a home address on the form is noted as being optional, as is the completion of a home and business telephone number. Thus, a filer may opt to keep confidential his or her home address, thus protecting any privacy concerns.

Therefore, the Custodian has failed to establish that the Council's November 18, 2009 Interim Order was based upon a "palpably incorrect or irrational basis" or that it is obvious that the GRC did not consider the significance of probative, competent evidence in rejecting the Custodian's contention that the home addresses of local government officials who file financial disclosure statements pursuant to the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq. must be redacted.

Moreover, the Custodian has failed to establish that the award of attorney's fees in this matter was based upon a "palpably incorrect or irrational basis" or that it is obvious that the GRC did not consider the significance of probative, competent evidence.

The Custodian argues that attorney's fees should not have been awarded in the instant matter because the Complainant refused to engage in mediation, thereby willfully incurring attorney's fees. The Custodian's argument assumes that, if the Complainant had engaged in mediation, the Custodian would have released the records in unredacted form. Such a contention does not rise to the level of competent, credible evidence sufficient to support a determination that the GRC's award of attorney's fees in the instant matter was 1) based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra.*

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<sup>13</sup> Available online at <http://www.state.nj.us/dca/lgs/ethics/findisc.pdf>.



Therefore, because the Custodian has failed to establish in her motion for reconsideration of the Council's November 18, 2009 Interim Order regarding the redactions made to the requested records and the Council's January 26, 2010 Interim Order regarding the award of attorney's fees were 1) based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees pursuant to the Council's January 26, 2010 Interim Order.

Moreover, the Custodian certified that on December 19, 2009 the GRC provided her with advice via e-mail supporting the redaction of home addresses, citing six (6) prior decisions of the GRC in which the redaction of home addresses was upheld. The Custodian submitted this e-mail as part of the request for reconsideration.

One of the statutorily-mandated duties of the GRC is to "...operate an informational website and a toll-free helpline staffed by knowledgeable employees of the council during regular business hours which shall enable any person, including records custodians, to call for information regarding the law..." N.J.S.A. 47:1A-7.b. The GRC routinely responds to requests via telephone and e-mail in order to offer guidance based on the limited information presented. The evidence of record indicates that the materials provided to the Custodian pursuant to the request for guidance, specifically, six (6) prior decisions of the GRC in which the redaction of home addresses was upheld, was appropriate under the circumstances. Such circumstances include the limited facts presented to the GRC as part of the inquiry.

Finally, the Custodian's Counsel argued in his legal brief that had the Complainant submitted a second (2<sup>nd</sup>) request for unredacted copies of the 2007 financial disclosure forms, the Township would have made such available. Counsel noted that the Complainant was granted access to unredacted copies of 2005 and 2006 financial disclosure forms in response to a separate OPRA request in which the Complainant specifically asked for such records in unredacted form.

Notwithstanding the fact that OPRA provides that government records may be redacted for privileged material or for material which is not otherwise subject to disclosure (see N.J.S.A. 47A:1-5.a.), the GRC notes that a requestor is not required to specifically request unredacted records under OPRA. OPRA provides that:

"[i]f the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to [OPRA], the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record." N.J.S.A. 47:1A-5.g.

The above provision clearly shows that a custodian may only redact a record if there is a legal exemption to disclosure for such material. Counsel's assertion that unredacted copies of the records would have been provided to the Complainant had she specifically requested them (similar to the Township's response to the Complainant's request for redacted copies of 2005 and 2006 financial disclosure forms) undermines the Custodian's contention that the redactions made to the requested records had a basis in law.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that because the Custodian has failed to establish in her request for reconsideration of the Council's November 18, 2009 Interim Order regarding the redactions made to the requested records and the Council's January 26, 2010 Interim Order regarding the award of attorney's fees were 1) based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees pursuant to the Council's April 28, 2010 Interim Order.

Prepared By: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

July 20, 2010



**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

**INTERIM ORDER**

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

Pat Walsh  
Complainant

Complaint No. 2008-266

v.

Township of Middletown (Monmouth)  
Custodian of Record

At the January 26, 2010 public meeting, the Government Records Council (“Council”) considered the January 19, 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:

1. Because the Custodian provided the Complainant with the unredacted financial disclosure forms requested, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council’s Interim Order, the Custodian has complied with the Council’s November 18, 2009 Interim Order.
2. Although the Custodian unlawfully redacted addresses of real property owned pursuant to N.J.S.A. 40A:9-22.6(b), N.J.S.A. 40A:9-22.6(c) and the court’s note in Kenny v. Byrne, 144 N.J. Super. 243, 252 (App. Div. 1976) and failed to bear her burden of proving that said redactions were lawful pursuant to N.J.S.A. 47:1A-6, because the Custodian complied with the Council’s Interim Orders dated November 18, 2009, 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.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), 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. 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. Further, the relief ultimately achieved had a basis in law. Therefore, 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). Thus, 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 26<sup>th</sup> Day of January, 2010

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: January 28, 2010**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Pat Walsh<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-266**

v.

**Township of Middletown (Monmouth)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Financial disclosure statements filed in 2007 pursuant to the Government Ethics Law.<sup>3</sup>

**Request Made:** September 15, 2008

**Response Made:** September 23, 2008

**Custodian:** Heidi Abs

**GRC Complaint Filed:** December 1, 2008<sup>4</sup>

**Background**

**November 18, 2009**

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

1. Based on the language of N.J.S.A. 40A:9-22.6(b), N.J.S.A. 40A:9-22.6(c) and the court's note in Kenny v. Byrne, 144 N.J. Super. 243, 252 (App. Div. 1976), the Custodian has unlawfully redacted addresses of real property owned by public officials. Additionally, the Custodian has failed to bear her burden of proof that said redactions were authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian shall release the requested financial disclosure statements without redactions for real property owned.
  
2. **The Custodian shall comply with Item No. 1 above within five (5) business days from receipt of the Council's Interim Order and simultaneously provide**

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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 Brian Nelson, Esq. (Red Bank, NJ).

<sup>3</sup> The Complainant requested additional records which are not at issue in this complaint.

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

**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 knowingly and willfully violated OPRA and unreasonably denied 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 pending the Custodian's compliance with the Council's Interim Order.

**November 20, 2009**

Council's Interim Order distributed to the parties.

**November 25, 2009**

Custodian's response to the Council's Interim Order attaching the following:

- Custodian's certification dated November 24, 2009.
- Letter from the Custodian to the Complainant dated November 25, 2009.
- Copy of compact disc ("CD") containing unredacted copies of the requested financial disclosure forms.

The Custodian certifies that attached is the letter and CD provided to the Complainant in accordance with the Council's November 18, 2009 Interim Order.

The Custodian asserts that she believed that her redactions of real property owned and telephone numbers for those individuals voluntarily serving on boards and commissions were lawful. The Custodian argues that she consulted Counsel, reviewed recent court decisions relating to privacy concerns and contacted the GRC in order to arrive to the conclusion that the information should be redacted. The Custodian notes that she is still concerned with releasing the redacted information, particularly in light of the adoption of the Citizens Service Act (P.L. 2009, c. 141) that requires maintenance of confidentiality under OPRA of the "[a]ddress, phone number and e-mail address" of those applying to serve on local authorities, boards and commissions. *See N.J.S.A. 40A:9-9.2 (b)(3)*. Finally, the Custodian contends that because the Complainant never indicated that she was dissatisfied with the redacted financial disclosure records and rejected the offer to mediate, the Complainant should not be entitled to prevailing party attorney's fees.

**Analysis**

**Whether the Custodian complied with the Council's November 18, 2009 Interim Order?**

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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."  
Pat Walsh v. Township of Middletown (Monmouth), 2008-266 – Supplemental Findings and Recommendations of the Executive Director 2

The Council's November 18, 2009 Interim Order specifically directed the Custodian to disclose the requested financial disclosure forms without redactions for real property owned. Said Order also directed the Custodian to provide certified confirmation of compliance to the GRC's Executive Director within five (5) business days from receipt of said Order.

On November 25, 2009, the Custodian sent a letter to the Complainant attaching a CD containing the requested financial disclosure forms without redactions. The Custodian simultaneously provided legal certification of compliance with the Council's Interim Order to the GRC and the Complainant's Counsel on November 25, 2009, or the third (3<sup>rd</sup>) business day following receipt of the said Order.

Therefore, because the Custodian provided the Complainant with the unredacted financial disclosure forms requested, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council's Interim Order, the Custodian has complied with the Council's November 18, 2009 Interim Order.

**Whether the Custodian's unlawful redaction of addresses of properties owned on financial disclosure statements rises 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, 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 unlawfully redacted addresses of real property owned pursuant to N.J.S.A. 40A:9-22.6(b), N.J.S.A. 40A:9-22.6(c) and the court's note in Kenny v. Byrne, 144 N.J. Super. 243, 252 (App. Div. 1976) and failed to bear her burden of proving that said redactions were lawful pursuant to N.J.S.A. 47:1A-6, because the Custodian complied with the Council's Interim Orders dated November 18, 2009, 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.

**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 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.

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 the instant complaint, the Custodian provided access to the requested financial disclosure forms with redactions of telephone numbers and real properties owned on September 24, 2008. The Complainant filed a Denial of Access Complaint on December 1, 2008, in which the Complainant's Counsel requested that the GRC order the Custodian to provide the requested financial disclosure forms without redactions for addresses of real property owned.

In its November 18, 2009 Interim Order, the GRC determined that Custodian unlawfully redacted addresses of real property owned pursuant to N.J.S.A. 40A:9-22.6(b), N.J.S.A. 40A:9-22.6(c) and the court's note in Kenny v. Byrne, 144 N.J. Super. 243, 252 (App. Div. 1976) and failed to bear her burden of proving that said redactions were lawful pursuant to N.J.S.A. 47:1A-6. Further, the GRC ordered the Custodian to provide access to the requested financial disclosure forms without redactions for real property owned. The Custodian certified on November 25, 2009 that a CD containing the unredacted financial disclosure forms was sent to the Complainant on the same date in compliance with the Council's November 18, 2009 Interim Order.

Therefore, pursuant to Teeters, *supra*, 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. 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. Further, the relief ultimately achieved had a basis in law. Therefore, 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*. Thus, 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 provided the Complainant with the unredacted financial disclosure forms requested, and because the Custodian provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council's Interim Order, the Custodian has complied with the Council's November 18, 2009 Interim Order.
2. Although the Custodian unlawfully redacted addresses of real property owned pursuant to N.J.S.A. 40A:9-22.6(b), N.J.S.A. 40A:9-22.6(c) and the court's note in Kenny v. Byrne, 144 N.J. Super. 243, 252 (App. Div. 1976) and failed to bear her burden of proving that said redactions were lawful pursuant to N.J.S.A. 47:1A-6, because the Custodian complied with the Council's Interim Orders dated November 18, 2009, 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.
3. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), 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. 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. Further, the relief ultimately achieved had a basis in law. Therefore, 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). Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees.

Prepared By: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

January 19, 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**

**November 18, 2009 Government Records Council Meeting**

Pat Walsh  
Complainant

Complaint No. 2008-266

v.

Township of Middletown (Monmouth)  
Custodian of Record

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

1. Based on the language of N.J.S.A. 40A:9-22.6(b), N.J.S.A. 40A:9-22.6(c) and the court's note in Kenny v. Byrne, 144 N.J. Super. 243, 252 (App. Div. 1976), the Custodian has unlawfully redacted addresses of real property owned by public officials. Additionally, the Custodian has failed to bear her burden of proof that said redactions were authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian shall release the requested financial disclosure statements without redactions for real property owned.
2. **The Custodian shall comply with Item No. 1 above within five (5) business days from receipt of the Council's Interim Order 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 knowingly and willfully violated OPRA and unreasonably denied 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 pending the Custodian's compliance with the Council's Interim Order.

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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."



Interim Order Rendered by the  
Government Records Council  
On The 18<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.

Harlynn A. Lack, Secretary  
Government Records Council

**Decision Distribution Date: November 20, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

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

**Pat Walsh<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-266**

v.

**Township of Middletown (Monmouth)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Financial disclosure statements filed in 2007 pursuant to the Government Ethics Law.<sup>3</sup>

**Request Made:** September 15, 2008

**Response Made:** September 23, 2008

**Custodian:** Heidi Abs

**GRC Complaint Filed:** December 1, 2008<sup>4</sup>

**Background**

**September 15, 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. The Complainant states that the preferred method of delivery is via e-mail.

**September 23, 2008**

Ms. Lauren Kirkland's ("Ms. Kirkland"), Deputy Municipal Clerk, response to the OPRA request. On behalf of the Custodian, Ms. Kirkland responds in writing to the Complainant's OPRA request on the sixth (6<sup>th</sup>) business day following receipt of such request. Ms. Kirkland requests that the Complainant forward a payment of \$20.00 for the conversion of the records responsive into an electronic file and the records will be provided upon receipt of payment.

**September 24, 2008**

E-mail from Ms. Kirkland to the Complainant. Ms. Kirkland states that the records responsive to the Complainant's request are attached. Ms. Kirkland advises that some financial disclosures statements were submitted on double sided paper while others were submitted on single sided paper. Ms. Kirkland states that in order to provide the records electronically the records had to be scanned. Ms. Kirkland states that because of

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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 Brian Nelson, Esq. (Red Bank, NJ).

<sup>3</sup> The Complainant requested additional records which are not at issue in this complaint.

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

the scanning process, the blank pages intermingled into the PDF file are merely the back side of the single sided records and do not represent redactions or missing pages.

**September 24, 2008**

E-mail from Ms. Kirkland to the Complainant. Ms. Kirkland advises that the Complainant's e-mail account will not accept the e-mail because of its size and must split the PDF file up. Ms. Kirkland states that if the Complainant fails to receive the records through the split e-mails, a disk will be prepared for pickup free of charge.<sup>5</sup>

**December 1, 2008**

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

- Complainant's OPRA request dated September 15, 2008.
- E-mail from Ms. Kirkland to the Complainant dated September 24, 2008 attaching the records responsive.
- Three (3) e-mails from Ms. Kirkland to the Complainant dated September 24, 2008 attaching the records responsive.
- Eighty-two (82) financial disclosure forms containing redactions for home addresses and telephone numbers.

The Complainant's Counsel states that this Denial of Access Complaint has been filed because the Township redacted information from the requested financial disclosure statements that should not have been redacted. Specifically, Counsel contends that the Custodian redacted the addresses of properties owned by Township officials and employees.<sup>6</sup>

Counsel contends that although OPRA provides that several categories of information are exempt from disclosure, the address of properties owned by public officials is not one of those categories. Counsel further contends that the redacted information is vital to the Complainant.

Counsel requests that the GRC order the Township to provide the Complainant with copies of the financial disclosure statements that disclose the location of properties owned by Township officials and employees. Additionally, Counsel requests that the GRC make a determination that the Complainant is a prevailing party entitled to prevailing party attorney's fees pursuant to N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

**December 16, 2008**

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

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<sup>5</sup> This background entry represents all three (3) e-mails sent to the Complainant attaching a portion of the PDF containing the records responsive to the Complainant's OPRA request.

<sup>6</sup> Counsel notes that the Custodian also redacted telephone numbers, but that those redactions are not at issue in the instant complaint.

**December 19, 2008**

E-mail from the Custodian to the GRC. The Custodian requests an extension of time to submit the requested SOI.<sup>7</sup>

**December 19, 2008**

E-mail from the GRC to the Custodian. The GRC grants an extension of time until January 2, 2009 to submit the SOI.

**January 2, 2009**

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated September 15, 2008.
- E-mail from the Custodian to the Complainant dated September 23, 2008.

The Custodian certifies that her search for the requested records included locating the records in files at the Township Clerk's Office. The Custodian also certifies that no records responsive were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM").

The Custodian certifies that she received the Complainant's OPRA request on September 15, 2008. The Custodian certifies that she worked with the Complainant to amend the Complainant's request. The Custodian certifies that she gave the request to Ms. Kirkman, who retrieved the records and made redactions of addresses of properties owned by Township employees, appointments and board and commission members based on advice received from the GRC. The Custodian certifies that Ms. Kirkman provided access to the redacted records with the Complainant's method of delivery on September 24, 2008. The Custodian certifies that addresses for Township Mayor and Council were not redacted.<sup>8</sup>

The Custodian states that pursuant to OPRA, Bernstein v. Borough of Allendale, GRC Complaint No. 2004-195 (July 2005) and Executive Order No. 21 (Gov. McGreevey, 2002)("E.O. No. 21"), "...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..." N.J.S.A. 47:1A-1. The Custodian contends that the Township's position is that release of the addresses of employees and members of boards and commissions would be a violation of the citizen's reasonable expectation of privacy in that it opens these individuals to the possibility of compromised home and personal security.

Additionally, the Custodian states that the New Jersey Supreme Court has indicated as a general matter that the public disclosure of an individual home address

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<sup>7</sup> The Custodian also requests that the Complainant consider mediating the instant complaint; however, the Complainant declined to mediate this complaint in the Denial of Access Complaint.

<sup>8</sup> The Custodian notes that the Complainant filed her complaint outside the forty-five (45) day filing deadline as indicated in Mason v. City of Hoboken, 196 N.J. 51 (2008); however, this the filing deadline only applies to complaints filed with the Supreme Court.

“does implicate privacy matters.” Doe v. Poritz, 142 N.J. 1, 82 (1995). The Custodian contends that ordering disclosure of the addresses would discourage citizens from volunteering for fear of retribution or retaliation against them personally for decisions made in the workplace, as well as decisions made by members of various boards. The Custodian avers that in employing the balancing test, the release of the addresses of employees and board and commission members would jeopardize the privacy of employees and board and commission members, their families and jeopardize the safety of police officers. The Custodian further contends that there is no safeguard against the redistribution of information and the possibility of an individual utilizing OPRA to obtain home addresses in order to seek retaliatory action.

The Custodian avers that the New Jersey Ethics Commission website contains a disclaimer in the financial disclosure search page that says “Financial Disclosure Statements have been edited, to the extent possible to remove personal information that is not releasable to the public and is not required under Executive Order No. 1.”<sup>9</sup> The Custodian contends that it is unreasonable to expand disclosure of addresses at a local government level to be more encompassing than that of the State. The Custodian contends that redacting individuals’ addressing does not subvert Executive Order No. 1.

The Custodian asserts that in reading N.J.S.A. 47:1A-10, which holds that personnel records are exempt from disclosure except for name, title, position, salary, payroll record and so on, does not include an exception for an employee’s home address. The Custodian asserts that release of this information on a financial disclosure statement creates a loophole to access that can compromise the personal safety of employees and board members, as well as discouraging individuals from volunteering or taking such positions.

Finally, the Custodian argues that the Complainant should not be entitled to prevailing party attorney’s fees because she made no attempts to inform the Township that she was dissatisfied with the redacted records, thus negating her requirement to mitigate her damages by notifying the Township of her concern.<sup>10</sup>

## **February 20, 2009**

The Complainant Counsel’s response to the Custodian’s SOI. Counsel argues that the Custodian has failed to cite to any authority that requires the redaction of home addresses and other addresses of property owned by public officers, employees, board and committee members and all others required to file financial disclosure statements. Counsel further contends that even the portion of E.O. 21, which affirmatively states that home addresses “shall not be disclosed” was explicitly repealed by Executive Order No. 26 (Gov. McGreevey, 2002).

Counsel asserts that the GRC must determine whether the public interest in disclosure is outweighed by the Township officials’ right to privacy. Counsel contends that the public’s need for individual home addresses and addresses of property owned is

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<sup>9</sup> Executive Order No. 1 (Gov. Corzine, 2006) requires all public officials as defined in the order to submit Financial Disclosure Statements to the New Jersey State Ethics Commission.

<sup>10</sup> The Custodian’s Counsel provided additional arguments that are either not relevant to this complaint or restates the assertions already presented to the GRC.



strong. Counsel asserts that public employees must disclose their ownership and income interests to ensure that they do not have actual or perceived conflicts of interest in executing their duties. Counsel argues that the public is ill-served if the financial disclosure statements contained critical information that was inaccessible to the public. Counsel contends that upholding the redactions of the addresses would defeat the purpose of the financial disclosure statement's very existence.

Counsel asserts that there is no evidence that disclosure of the addresses would discourage citizens from volunteering or working in local government. Additionally, Counsel asserts that public employees and officials are not conscripted into public service, but seek out a position which negates a small amount of privacy that said persons might otherwise be entitled to.

Finally, Counsel argues that any potential privacy interest is severely restricted because the information being sought is usually available in the public domain. Counsel points out that, to the extent that ownership interests in real estate property are held through corporations, that information may only be discoverable through the requested financial disclosure statements. Counsel avers that, for the above reasons, the GRC should order disclosure of all the redacted addresses.

### **Analysis**

#### **Whether the Custodian unlawfully denied access to the redacted addresses contained on the financial disclosure forms?**

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 ...” (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 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 Complainant in this complaint takes issue with the Custodian’s redactions of addresses of properties owned on the financial disclosure statements responsive to the Complainant’s request. The Complainant’s Counsel argues that addresses of properties owned by a public official is not expressly stated as subject to exemption under OPRA. Additionally, Counsel contends that the public’s need for access outweighs the Township’s right to privacy: specifically, a member of the public has the right to ensure that public officials do not have actual or perceived conflicts of interest in executing their duties. Counsel asserts that allowing the redactions of the addresses of properties owned would ultimately defeat the purpose of submitting a financial disclosure form.

Conversely, the Custodian argues that pursuant to Bernstein v. Borough of Allendale, GRC Complaint No. 2004-195 (July 2005) and Executive Order No. 21 (Gov. McGreevey, 2002)(“E.O. No. 21”), the release of the redacted addresses would violate the citizens’ reasonable expectation of privacy and leave the public officials open to the possibility of compromise of home and personal security. Additionally, the Custodian argues that based on the New Jersey Ethics Commission website, which contains a disclaimer alerting the public that financial disclosure statements have been edited to remove personal information that is not public and not required by E.O. No. 1, it is unreasonable to expand disclosure to encompass more than the State requires.

Pursuant to the Local Government Ethics Law, all financial disclosure statements filed are public records. N.J.S.A. 40A:9-22.6(c). The Local Government Ethics Law was enacted on February 20, 1991 and became effective ninety (90) days thereafter on May 21, 1991. *L. 1991, c. 29, § 27*. The Act establishes a statutory code of ethics, N.J.S.A. 40A:9-22.5, applicable to, among others, “local government officers,” N.J.S.A. 40A:9-22.3(g), including elected officials. N.J.S.A. 40A:9-22.3(g)(1). The code of ethics generally provides that a local government officer shall not engage in any activity that places him in an actual or apparent conflict of interest regarding his public duties. N.J.S.A. 40A:9-22.5(a) to (k). To that end, the Law requires local government officers to annually file a financial disclosure statement containing information about, among other things, the address and brief description of all real property in the State in which the local government officer or a member of his immediate family held an interest during the preceding calendar year. N.J.S.A. 40A:9-22.6(b). *See also, Abraham v. Township of Teaneck Ethics Board*, 349 N.J. Super. 374, 377 (App. Div. 2002). Further, N.J.S.A. 40A:9-22.6(c) states that “[a]ll financial disclosure statements filed shall be public records.”

Moreover, in upholding the constitutionality of Executive Order No. 15 (Byrne, 1975), which required certain employees of the Executive Branch of State Government to file for public disclosure comprehensive financial statements of all assets and liabilities,

business interests and sources of income, the Appellate Division noted that:

“there can be little question that there exists a significant interest of the public to demand financial disclosure from its officials in the quest for more responsible clean government. The public official, on the other hand, should be ready to subordinate his right of privacy to the extent that it may be appropriate to effectuate the common weal. By accepting public employment an individual steps from the category of a purely private citizen to that of a public citizen. And in that transition he must of necessity subordinate his private rights to the extent that they may compete or conflict with the superior right of the public to achieve honest and efficient government.” Kenny v. Byrne, 144 N.J. Super. 243, 252 (App. Div. 1976).

In the instant complaint, the Custodian redacted home addresses and addresses of real properties owned for all public officials with the exception of the Mayor and Council. However, N.J.S.A. 40A:9-22.6(b) specifically requires that a public official divulge such information.

Considering the Custodian’s assertions, there is a clear distinction between E.O. No. 1 and N.J.S.A. 40A:9-22.6(b). E.O. No. 1 does not require that a public official (defined as the Governor and a list of other State agency and commission positions but does not include members of local government) to disclose the actual addresses of all properties owned, whereas N.J.S.A. 40A:9-22.6(b) of the Local Government Ethics Law clearly lists addresses of real property owned by a public official or immediate family member as required to be provided on a financial disclosure statement. Additionally, the court’s dialogue in Kenny, *supra*, further supports the Complainant Counsel’s assertion that seeking public service positions negates any amount of privacy to which said officials otherwise would be entitled.

Therefore, based on the language of N.J.S.A. 40A:9-22.6(b), N.J.S.A. 40A:9-22.6(c) and the court’s note in Kenny, *supra*, the Custodian has unlawfully redacted addresses of properties owned by public officials. Additionally, the Custodian has failed to bear her burden of proof that said redactions were authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian shall release the requested financial disclosure statements without redactions for real property owned.

**Whether the Custodian’s unlawful redaction of addresses of properties owned on financial disclosure statements rises 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 knowingly and willfully violated OPRA and unreasonably denied 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 pending the Custodian’s compliance with the Council’s Interim Order.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Based on the language of N.J.S.A. 40A:9-22.6(b), N.J.S.A. 40A:9-22.6(c) and the court’s note in Kenny v. Byrne, 144 N.J. Super. 243, 252 (App. Div. 1976), the Custodian has unlawfully redacted addresses of real property owned by public officials. Additionally, the Custodian has failed to bear her burden of proof that said redactions were authorized by law. N.J.S.A. 47:1A-6. Therefore, the Custodian shall release the requested financial disclosure statements without redactions for real property owned.
2. **The Custodian shall comply with Item No. 1 above within five (5) business days from receipt of the Council’s Interim Order and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4<sup>11</sup>, to the Executive Director.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied 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 pending the Custodian’s compliance with the Council’s Interim Order.

Prepared By: Frank F. Caruso  
Case Manager

Approved By: Catherine Starghill, Esq.  
Executive Director

November 10, 2009

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<sup>11</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."  
Pat Walsh v. Township of Middletown (Monmouth), 2008-266 – Findings and Recommendations of the Executive Director