



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Commissioner

FINAL DECISION

December 21, 2010 Government Records Council Meeting

Jesse Wolosky
Complainant

Complaint No. 2009-151

v.

Township of Sparta (Sussex)
Custodian of Record

At the December 21, 2010 public meeting, the Government Records Council (“Council”) considered the December 14, 2010 *In Camera* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has complied with the Council’s October 26, 2010 Interim Order by providing the Council with all records set forth in Paragraph 5 of the Order within five (5) business days of receiving the Council’s Order.
2. Because the records submitted for *in camera* examination contain very specific identifying information which could reveal the identity of the complaining party if it were disclosed, the Custodian’s redactions to the requested records are appropriate; the Custodian therefore did not unlawfully deny access to the requested records. N.J.S.A. 47:1A-6; Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004).
3. Although the Custodian, by not proving the denial of access to requested e-mails was authorized by law and by failing to provide the Complainant with a lawful basis for the denial of access to redacted portions of the records violated N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-6., the Custodian did respond in a timely manner to the Council’s Interim Order. Further, there is no evidence in the record to suggest that the Custodian’s actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.
4. The filing of this complaint did not bring about a change (voluntary or otherwise) in the Custodian’s conduct. Therefore, pursuant to 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), the Complainant is not a “prevailing party” entitled to an award of reasonable attorney’s fees.

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 21st Day of December, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

James W. Requa, Secretary
Government Records Council

Decision Distribution Date: January 4, 2011

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
December 21, 2010 Council Meeting**

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2009-151

v.

**Township of Sparta (Sussex)²
Custodian of Records**

Records Relevant to Complaint:³

Request dated February 23, 2009

The Complainant requests, in pdf format via e-mail, a copy of the complaint received by the Township of Sparta regarding the Complainant in which it was alleged that the Complainant maintains an illegal dwelling unit.

Request dated March 2, 2009

The Complainant requests the following records in pdf format via e-mail:

1. An unredacted copy of the *Zoning Enforcement/Violation Report* regarding the Complainant in which it was alleged that the Complainant maintains an illegal dwelling unit (“Report No. 392”).⁴
2. A copy of the e-mail dated February 13, 2008 that was referenced in Report No. 392.
3. A copy of the e-mail dated February 29, 2008 that was referenced in Report No. 392.
4. A copy of the e-mail dated March 1, 2008 that was referenced in Report No. 392.
5. A copy of Mr. Spekhardt’s e-mail to the Township Manager that was forwarded to Mr. Troast, further identified as the correspondence referenced in the third (3rd) line of narrative in Report No. 392.⁵

Request Made: February 23, 2009 and March 2, 2009

Responses Made: February 26, 2009 and March 6, 2009

Custodian: Mary J. Coe

GRC Complaint Filed: May 5, 2009⁶

Records Submitted for *In Camera* Examination: E-mails referenced in Report No. 392 dated January 5, 2008, February 13, 2008, February 29, 2008 and March 1, 2008 which are

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

² Represented by Richard A. Stein, Esq., of Laddey, Clark & Ryan, LLP (Sparta, NJ).

³ There were other records requested that are not relevant to this complaint.

⁴ This is *Zoning Enforcement Violation Report* Number 392 dated January 5, 2008 and is the “complaint” that the Complainant requested as Item No. 1 of his OPRA request dated February 23, 2009.

⁵ The enumerated items set forth in the Complainant’s OPRA request do not correspond to the numbered records relevant to the complaint.

⁶ The GRC received the Denial of Access Complaint on said date.

the same four (4) e-mails that were disclosed to the Complainant in redacted form in the Custodian's letter to Complainant's Counsel dated March 19, 2009.

Background

October 26, 2010

Government Records Council's Interim Order. At the October 26, 2010 public meeting, the Government Records Council ("Council") considered the October 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. In response to the Complainant's February 23, 2009 request, the Custodian did not unlawfully deny the Complainant access to the requested record by releasing it with the complaining party's name redacted because, on balance, the potential for harm by disclosing the complaining party's identity outweighs the Complainant's need for access pursuant to N.J.S.A. 47:1A-1. and the Council's decision in Wilcox v. Township of West Caldwell, GRC Complaint No. 2004-28 (October 2004).
2. Because the Custodian lawfully redacted the complaining party's name from Report No. 392, the Custodian did not unlawfully deny the Complainant access to said report by refusing to disclose the record in to the Complainant in unredacted form.
3. Because the Custodian responded to the Complainant's OPRA request dated March 2, 2009 by refusing to disclose in redacted or unredacted form Item No. 2, Item No. 3 and Item No. 4, which are e-mails dated February 13, 2008, February 29, 2008 and March 1, 2008, respectively, and because the Custodian failed to prove that the denial of access was authorized by law, the Custodian unlawfully denied the Complainant access to the records and failed to meet her burden of proving that such denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.
4. Because the Custodian failed to provide the Complainant with a lawful basis for the denial of access to the redacted portions of Items No. 2 through 4 in writing within the statutorily mandated seven (7) business days, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
5. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of Items No. 2 through No. 5, which are the e-mails referenced in Report No. 392 dated January 5, 2008, February 13, 2008, February 29, 2008 and March 1, 2008 and are the same four (4) e-mails that were disclosed to the Complainant in redacted form in the Custodian's letter to Complainant's Counsel dated March 19, 2009, to determine the validity of the assertion by the Custodian that the redacted segments contain information that could potentially identify the person reporting the zoning code violation which prompted the preparation of Report No. 392.

6. **The Custodian must deliver to the Council in a sealed envelope nine (9) copies of the requested unredacted records described in paragraph 5 above, a document or redaction index, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4, that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
7. The Council defers analysis of whether the Custodian's denial of access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

October 27, 2010

Council's Interim Order ("Order") distributed to the parties.

October 28, 2010

Certification of the Custodian in response to the Council's Interim Order with the following attachments:

- E-mail to Michael Spekhardt regarding subject Jesse Wolosky dated January 5, 2008
- E-mail from Joseph Drossel regarding subject Jesse Wolosky dated February 13, 2008.
- E-mail from Joseph Drossel regarding subject Jesse Wolosky dated February 29, 200.
- E-mail to Joseph Drossel regarding subject Jesse Wolosky dated March 1, 2008.

Analysis

The Custodian submitted in a timely manner nine (9) copies each of e-mails referenced in Report No. 392 dated January 5, 2008, February 13, 2008, February 29, 2008 and March 1, 2008 to the GRC for an *in camera* examination, a document or redaction index and a certification dated October 28, 2010 that the documents provided are the documents requested by the Council for the *in camera* inspection.

An *in camera* examination was performed on the submitted records. The *in camera* examination disclosed that the redactions to the records contain very specific identifying information which, if disclosed, could reveal the identity of the complaining party.

Such a result would be contrary to the Council's decision in Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004). In Perino, the complainant sought a police call record for a noise complaint. The call record contained the name, address and phone number of the complaining party. The Council stated that "...after careful consideration of all the interests at stake, the Council should find that the name, address and phone number of the citizen who brought the complaint to the Borough's attention should remain redacted from the requested documentation. The complainant's

stated need for access does not outweigh the [complaining] citizen's expectation of privacy."⁷ In arriving at its conclusion, the Council considered the potential harm of unsolicited contact and confrontation between the citizen and the OPRA complainant and/or its agents or representatives.

The complainant in Perino stated that she sought the requested information to support her zoning appeal. The Council found the complainant's argument unpersuasive and determined that "...the subject property's lack of conformity with zoning regulations was based on a property inspection by the Township, not the citizen's verbal representations. It is the Township that brought the action against the OPRA Complainant, not the citizen." The Council therefore made it clear in Perino that information in a record that could identify a complaining party should be held confidential.

In the matter before the Council, Complainant's Counsel asserted that the Complainant seeks the redacted information to defend potential zoning violation charges which the Township has threatened to prefer against him. However, as in Perino, the redacted material contains very specific identifying information which could reveal the identity of the complaining party if it were disclosed. Based on the Council's decision in Perino, the Custodian's redactions to the requested records are therefore appropriate; the Custodian therefore did not unlawfully deny access to the requested records.

Therefore, because the records submitted for *in camera* examination contain very specific identifying information which could reveal the identity of the complaining party if it were disclosed. The Custodian's redactions to the requested records are therefore appropriate; the Custodian therefore did not unlawfully deny access to the requested records. N.J.S.A. 47:1A-6; Perino, *supra*.

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

The Custodian denied the Complainant access to e-mails dated January 5, 2008, February 13, 2008, February 29, 2008 and March 1, 2008 but did not prove that such denial of access was authorized by law. Subsequently, the Custodian did disclose the records in redacted form but failed to provide the Complainant with a lawful basis for the denial of access to the redacted portions of the records in writing within the statutorily mandated time frame.

Although the Custodian, by not proving the denial of access to requested e-mails was authorized by law and by failing to provide the Complainant with a lawful basis for the denial of access to redacted portions of the records violated N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-6., the Custodian did respond in a timely manner to the Council's Interim Order. Further, there is no evidence in the record to suggest that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

⁷ The Council in Perino also applied the balancing test as promulgated in Doe v. Poritz, 142 N.J. 1, (1995). Jesse Wolosky v. Township of Sparta (Sussex), 2009-151 – *In Camera* Findings and Recommendations of the Executive Director

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

OPRA provides that:

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

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

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

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

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

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

Additionally, the New Jersey Supreme Court has ruled on the issue of “prevailing party” attorney’s fees. In Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), the court discussed the catalyst theory, “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” Mason, *supra*, at 71, (quoting Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 131 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)). In Buckhannon, the Supreme Court stated that the phrase “prevailing party” is a legal term of art that refers to a “party in whose favor a

judgment is rendered.” (quoting Black’s Law Dictionary 1145 (7th ed. 1999). The Supreme Court rejected the catalyst theory as a basis for prevailing party attorney fees, in part because “[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” *Id.* at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863, but also over concern that the catalyst theory would spawn extra litigation over attorney’s fees. *Id.* at 609, 121 S. Ct. at 1843, 149 L. Ed. 2d at 866.

As the New Jersey Supreme Court noted in Mason, Buckhannon is binding only when counsel fee provisions under federal statutes are at issue. 196 N.J. at 72, citing Teeters, *supra*, 387 N.J. Super. at 429; *see, e.g.*, Baer v. Klagholz, 346 N.J. Super. 79 (App. Div. 2001) (applying Buckhannon to the federal Individuals with Disabilities Education Act), *certif. denied*, 174 N.J. 193 (2002). “But in interpreting New Jersey law, we look to state law precedent and the specific state statute before us. When appropriate, we depart from the reasoning of federal cases that interpret comparable federal statutes.” 196 N.J. at 73 (citations omitted).

The Mason Court then examined the catalyst theory within the context of New Jersey law, stating that:

“New Jersey law has long recognized the catalyst theory. In 1984, this Court considered the term "prevailing party" within the meaning of the federal Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988. Singer v. State, 95 N.J. 487, 495, *cert. denied*, New Jersey v. Singer, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984). The Court adopted a two-part test espousing the catalyst theory, consistent with federal law at the time: (1) there must be "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved;" in other words, plaintiff's efforts must be a "necessary and important factor in obtaining the relief," *Id.* at 494-95, 472 A.2d 138 (internal quotations and citations omitted); and (2) "it must be shown that the relief ultimately secured by plaintiffs had a basis in law," *Id.* at 495. *See also* North Bergen Rex Transport v. TLC, 158 N.J. 561, 570-71 (1999)(applying Singer fee-shifting test to commercial contract).

Also prior to Buckhannon, the Appellate Division applied the catalyst doctrine in the context of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49, and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410 (App. Div. 2000). The Appellate Division explained that "[a] plaintiff is considered a prevailing party 'when actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Id.* at 420 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494, 503 (1992)); *see also* Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (noting that Hensley v. Eckerhart "generously" defines "a prevailing party [a]s one who succeeds 'on any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit'" (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1938, 76 L. Ed. 2d 40, 50 (1983))). The panel noted that the "form of the judgment is not entitled to conclusive weight"; rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst that

prompted defendant to take action and correct an unlawful practice. Warrington, *supra*, 328 N.J. Super. at 421. A settlement that confers the relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters. *Id.* at 422.

This Court affirmed the catalyst theory again in 2001 when it applied the test to an attorney misconduct matter. Packard-Bamberger, *supra*, 167 N.J. at 444. In an OPRA matter several years later, New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 137, 143-44 (2005)(NJDPM), this Court directed the Department of Corrections to disclose records beyond those it had produced voluntarily. In ordering attorney's fees, the Court acknowledged the rationale underlying various fee-shifting statutes: to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to "even the fight" when citizens challenge a public entity. *Id.* at 153.

After Buckhannon, and after the trial court's decision in this case, the Appellate Division decided Teeters. The plaintiff in Teeters requested records from the Division of Youth and Family Services (DYFS), which DYFS declined to release. 387 N.J. Super. at 424. After the GRC preliminarily found in plaintiff's favor, the parties reached a settlement agreement leaving open whether plaintiff was a "prevailing party" under OPRA. *Id.* at 426-27.

The Appellate Division declined to follow Buckhannon and held that plaintiff was a "prevailing party" entitled to reasonable attorney's fees; in line with the catalyst theory, plaintiff's complaint brought about an alteration in DYFS's position, and she received a favorable result through the settlement reached. *Id.* at 431-34. In rejecting Buckhannon, the panel noted that "New Jersey statutes have a different tone and flavor" than federal fee-shifting laws. *Id.* at 430. "Both the language of our statutes and the terms of court decisions in this State dealing with the issue of counsel fee entitlements support a more indulgent view of petitioner's claim for an attorney's fee award than was allowed by the majority in Buckhannon" *Id.* at 431, 904 A.2d 747. As support for this proposition, the panel surveyed OPRA, Packard-Bamberger, Warrington, and other cases.

OPRA itself contains broader language on attorney's fees than the former RTKL did. OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1A-6. Under the prior RTKL, "[a] plaintiff in whose favor such an order [requiring access to public records] issues . . . may be awarded a reasonable attorney's fee not to exceed \$ 500.00." N.J.S.A. 47:1A-4 (repealed 2002). The Legislature's revisions therefore: (1) mandate, rather than permit, an award of attorney's fees to a prevailing party; and (2) eliminate the \$ 500 cap on fees and permit a reasonable, and quite likely higher, fee award.⁸ Those changes expand counsel

⁸ The significance of awarding fees to "requestors" and not "plaintiffs" is less clear because OPRA's fee-shifting provision refers both to individuals filing suit in Superior Court and those choosing the GRC's more information mediation route; the phrase "requestors" may simply have been used to encompass both groups. Likewise, one cannot obtain an "order" from the GRC, so the absence of that language in OPRA is not necessarily revealing.

fee awards under OPRA.” Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51, 73-76 (2008).

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 Mason, the plaintiff submitted an OPRA request on February 9, 2004. Hoboken responded on February 20, eight business days later, or one day beyond the statutory limit. *Id.* at 79. As a result, the Court shifted the burden to Hoboken to prove that the plaintiff’s lawsuit, filed on March 4, was not the catalyst behind the City’s voluntary disclosure. *Id.* Because Hoboken’s February 20 response included a copy of a memo dated February 19 -- the seventh business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff’s lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. *Id.* at 80.

Here, after the complaint was filed the GRC determined that the Custodian did not unlawfully deny the Complainant access to the requested unredacted copy of the complaint received by the Township of Sparta regarding the Complainant in which it was alleged that the Complainant maintains an illegal dwelling unit. The GRC further determined that the Custodian did not unlawfully deny the Complainant access to Report No. 392 by refusing to disclose the record to the Complainant in unredacted form. The GRC also conducted an *in camera* examination of the requested e-mails dated January 5, 2008, February 13, 2008, February 29, 2008 and March 1, 2008 and determined that the Custodian did not unlawfully redact said e-mails.

As such, the filing of this complaint did not bring about a change (voluntary or otherwise) in the Custodian’s conduct. Therefore, pursuant to Teeters, *supra*, and Mason, *supra*, the Complainant is not a “prevailing party” entitled to an award of reasonable attorney’s fees.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has complied with the Council’s October 26, 2010 Interim Order by providing the Council with all records set forth in Paragraph 5 of the Order within five (5) business days of receiving the Council’s Order.
2. Because the records submitted for *in camera* examination contain very specific identifying information which could reveal the identity of the complaining party if it were disclosed, the Custodian’s redactions to the requested records are appropriate; the Custodian therefore did not unlawfully deny access to the requested records. N.J.S.A. 47:1A-6; Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004).

3. Although the Custodian, by not proving the denial of access to requested e-mails was authorized by law and by failing to provide the Complainant with a lawful basis for the denial of access to redacted portions of the records violated N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and N.J.S.A. 47:1A-6., the Custodian did respond in a timely manner to the Council's Interim Order. Further, there is no evidence in the record to suggest that the Custodian's actions had a positive element of conscious wrongdoing or were intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

4. The filing of this complaint did not bring about a change (voluntary or otherwise) in the Custodian's conduct. Therefore, pursuant to 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), the Complainant is not a "prevailing party" entitled to an award of reasonable attorney's fees.

Prepared By: John E. Stewart, Esq.
Mediator

Approved By: Catherine Starghill, Esq.
Executive Director

December 14, 2010



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

CHRIS CHRISTIE
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INTERIM ORDER

October 26, 2010 Government Records Council Meeting

Jesse Wolosky
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Township of Sparta (Sussex)
Custodian of Record

At the October 26, 2010 public meeting, the Government Records Council (“Council”) considered the October 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, finds that:

1. In response to the Complainant’s February 23, 2009 request, the Custodian did not unlawfully deny the Complainant access to the requested record by releasing it with the complaining party’s name redacted because, on balance, the potential for harm by disclosing the complaining party’s identity outweighs the Complainant’s need for access pursuant to N.J.S.A. 47:1A-1. and the Council’s decision in Wilcox v. Township of West Caldwell, GRC Complaint No. 2004-28 (October 2004).
2. Because the Custodian lawfully redacted the complaining party’s name from Report No. 392, the Custodian did not unlawfully deny the Complainant access to said report by refusing to disclose the record in to the Complainant in unredacted form.
3. Because the Custodian responded to the Complainant’s OPRA request dated March 2, 2009 by refusing to disclose in redacted or unredacted form Item No. 2, Item No. 3 and Item No. 4, which are e-mails dated February 13, 2008, February 29, 2008 and March 1, 2008, respectively, and because the Custodian failed to prove that the denial of access was authorized by law, the Custodian unlawfully denied the Complainant access to the records and failed to meet her burden of proving that such denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.
4. Because the Custodian failed to provide the Complainant with a lawful basis for the denial of access to the redacted portions of Items No. 2 through 4 in writing within the statutorily mandated seven (7) business days, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.



5. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of Items No. 2 through No. 5, which are the e-mails referenced in Report No. 392 dated January 5, 2008, February 13, 2008, February 29, 2008 and March 1, 2008 and are the same four (4) e-mails that were disclosed to the Complainant in redacted form in the Custodian's letter to Complainant's Counsel dated March 19, 2009, to determine the validity of the assertion by the Custodian that the redacted segments contain information that could potentially identify the person reporting the zoning code violation which prompted the preparation of Report No. 392.
6. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records described in paragraph 5 above, a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
7. The Council defers analysis of whether the Custodian's denial of access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
8. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 26th Day of October, 2010

Robin Berg Tabakin, Chair
Government Records Council

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

Charles A. Richman, Secretary
Government Records Council

Decision Distribution Date: October 27, 2010

¹ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

³ "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."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

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

**Jesse Wolosky¹
Complainant**

GRC Complaint No. 2009-151

v.

**Township of Sparta (Sussex)²
Custodian of Records**

Records Relevant to Complaint:³

Request dated February 23, 2009

The Complainant requests, in pdf format via e-mail, a copy of the complaint received by the Township of Sparta regarding the Complainant in which it was alleged that the Complainant maintains an illegal dwelling unit.

Request dated March 2, 2009

The Complainant requests the following records in pdf format via e-mail:

1. An unredacted copy of the *Zoning Enforcement/Violation Report* regarding the Complainant in which it was alleged that the Complainant maintains an illegal dwelling unit (“Report No. 392”).⁴
2. A copy of the e-mail dated February 13, 2008 that was referenced in Report No. 392.
3. A copy of the e-mail dated February 29, 2008 that was referenced in Report No. 392.
4. A copy of the e-mail dated March 1, 2008 that was referenced in Report No. 392.
5. A copy of Mr. Spekhardt’s e-mail to the Township Manager that was forwarded to Mr. Troast, further identified as the correspondence referenced in the third (3rd) line of narrative in Report No. 392.⁵

Request Made: February 23, 2009 and March 2, 2009

Responses Made: February 26, 2009 and March 6, 2009

Custodian: Mary J. Coe

GRC Complaint Filed: May 5, 2009⁶

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

² Represented by Laddey, Clark & Ryan, LLP (Sparta, NJ).

³ There were other records requested that are not relevant to this complaint.

⁴ This is *Zoning Enforcement Violation Report* Number 392 dated January 5, 2008 and is the “complaint” that the Complainant requested as Item No. 1 of his OPRA request dated February 23, 2009.

⁵ The enumerated items set forth in the Complainant’s OPRA request do not correspond to the numbered records relevant to the complaint.

⁶ The GRC received the Denial of Access Complaint on said date.

Background

February 23, 2009

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

February 26, 2009

Custodian's response to the Complainant's February 23, 2009 OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. The Custodian states that she has disclosed a copy of the record relevant to the complaint, which is titled *Zoning Enforcement/Violation Report*; however, the Custodian states that the person reporting the land management code violation which prompted the preparation of this report wanted to remain anonymous and for that reason the name of that individual was redacted from the record. The Custodian cites N.J.S.A. 47:1A-1 and the Council's decision in Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004) as legal authority for making the redaction.

March 2, 2009

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.

March 6, 2009

Custodian's response to the Complainant's March 2, 2009 OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. The Custodian states that Items No. 1 through Number 4 of the records relevant to the complaint will not be disclosed to the Complainant for the same reasons the Custodian set forth in her February 26, 2009 response to the Complainant's February 23, 2009 OPRA request for Report No. 392. The Custodian also states that the municipality did not retain a copy of the record responsive to Item No. 5 of the Complainant's March 2, 2009 OPRA request.

March 16, 2009

Letter from Complainant's Counsel to the Custodian. Counsel informs the Custodian that a citizen's expectation of privacy under OPRA does not extend to the names of individuals who make complaints. Counsel further informs the Custodian that Item No. 5 of the records relevant to the complaint for the Complainant's March 2, 2009 request is a government record and as such is subject to disclosure. Counsel also states that the Custodian's reason for withholding an individual's name does not justify withholding an entire e-mail, and he asks the Custodian to disclose all requested e-mails along with an unredacted copy of Report No. 392, otherwise Counsel states he will take legal action to compel production of said records.

March 17, 2009

Letter from Custodian to Complainant's Counsel. The Custodian states that she is replying to Counsel's letter dated March 16, 2009. The Custodian emphasizes that

persons who make anonymous complaints are entitled to a reasonable expectation of privacy. The Custodian also clarifies her response to the Complainant's March 2, 2009 OPRA request, stating that her intention was not to assert that Item No. 5 of the records relevant to the complaint was not a government record because it might be on an off-site or personal e-mail account, but rather that such record was not retained by the Township and therefore does not exist as a government record.

March 19, 2009

Letter from Custodian to Complainant's Counsel. The Custodian states she has found a copy of the record responsive to Item No. 5 of the records relevant to the complaint and encloses it along with all of the requested e-mails. The Custodian further states that the name of the complaining party and all information that would identify that person is redacted.

May 5, 2009

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

- E-mail from a redacted sender to Michael Spekhardt dated January 5, 2008
- Report No. 392 with the name of the person who reported the violation redacted dated January 5, 2008
- Complainant's OPRA request dated February 23, 2009
- Custodian's response to the OPRA request dated February 26, 2009
- E-mail from a redacted sender to Joseph Drossel dated March 1, 2008
- Complainant's OPRA request dated March 2, 2009
- Custodian's response to the OPRA request dated March 6, 2009
- Letter from the Complainant's Counsel to the Custodian dated March 16, 2009
- Letter from the Custodian to the Complainant's Counsel dated March 17, 2009
- Letter from the Custodian to the Complainant's Counsel dated March 19, 2009

The Complainant states that he submitted his OPRA requests on February 23, 2009 and March 2, 2009. The Complainant acknowledges that the Custodian provided a response to his requests but the Complainant filed this complaint because he alleges the Custodian redacted several e-mails and a zoning report without legal justification.

The Complainant states he filed an OPRA request dated February 23, 2009, wherein he requested a copy of a complaint that alleged the Complainant maintained an illegal dwelling unit. The Complainant further states that the Custodian responded to the Complainant's February 23, 2009 OPRA request on February 26, 2009 and forwarded to the Complainant Report No. 392. The Complainant states that the Custodian redacted the complaining party's name from the report, and asserts that the Custodian's reasons for doing so are set forth in the Custodian's response to the OPRA complaint, which the Complainant states he attached to his Denial of Access Complaint.⁷

⁷ The Custodian mentioned in her written response that per N.J.S.A. 47:1A-1, "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." The Custodian stated that the citizen who made the complaint requested anonymity. The *Jesse Wolosky v. Township of Sparta (Sussex)*, 2009-151 – Findings and Recommendations of the Executive Director

The Complainant states that he filed another OPRA request dated March 2, 2009, in which he requested a copy of Report No. 392 in unredacted form. The Complainant also states that he requested, *inter alia*, four (4) e-mails that were referenced in Report No. 392.

The Complainant states that on March 6, 2009, the Custodian responded to his March 2, 2009 OPRA request, refusing to disclose an unredacted copy of Report No. 392. The Complainant states the Custodian also claimed one (1) of the requested e-mails is not subject to disclosure because it is not a government record and that the remaining three (3) e-mails will be withheld in their entirety to protect the identity of the complaining party.

The Complainant's Counsel states that he wrote a letter to the Custodian dated March 16, 2009, wherein he objected to the Custodian's refusal to disclose the records requested by the Complainant. The Complainant's Counsel further states that the Custodian replied to his letter dated March 16, 2009 by sending two letters to him: one (1) dated March 17, 2009 and one (1) dated March 19, 2009. Counsel states that in the former letter, the Custodian refused to change any of her prior positions with respect to disclosure of the records requested by the Complainant; however in the latter letter Counsel states that the Custodian stated that she located the e-mail which prompted preparation of Report No. 392, along with three (3) additional e-mails responsive to the Complainant's request. Counsel also states that the Custodian disclosed to him all of the e-mails, which he asserts are heavily redacted. Counsel alleges that by the time the Custodian sent him the e-mails the statutorily mandated seven (7) business day period for the Custodian to respond had expired.

The Complainant contends that the Custodian unlawfully refused him access to the requested records because names are not secret. The Custodian cites the Council's decision in Mourad v. Borough of Saddle River, GRC Complaint No. 2004-30 (May 2004) in support of his contention. The Complaint asserts that pursuant to Bernstein v. Borough of Wallington, GRC Complaint No. 2005-01 (April 2005), where the Council permitted access to the names and addresses of dog license owners, the GRC should consider the following factors when deciding whether the Custodian should have released the complaining party's name:

- The type of record requested.
- The information the record does or may contain.
- The potential for harm in a subsequent nonconsensual disclosure.
- The injury from disclosure to the relationship in which the record was generated.
- The adequacy of safeguards to prevent unauthorized disclosure.
- The degree of need for access.
- Whether there is an express statutory mandate for disclosure.

The Complainant states that not only do all of the aforementioned factors weigh in favor of disclosure, but that the complaining party was not anonymous but rather

Custodian further cited Perino v. Borough of Haddon Heights, 2004-128 (November 2004) in support of her actions.

requested anonymity. (Emphasis in original.) Further, the Complainant alleges that his need for access to the redacted information is high because Report No. 392 prompted an investigation of the Complainant and resulted in several threatening e-mails being sent by the Township of Sparta to the Complainant. The Complainant alleges that he needs the redacted information to access the strength and seriousness of Sparta's potential actions against him.

The Complainant states that, even if the GRC holds that the name of the complaining party should not be disclosed, there is no justification for the Custodian to redact entire paragraphs in the requested e-mails because it is unlikely disclosure of such information would identify the author.

The Complainant requests the following relief from the Council: (1) a finding that the Custodian violated OPRA by redacting the name and other identifying information from the requested e-mails without sufficient justification, (2) an order granting the Complainant access to the redacted portions of the e-mails and (3) a finding that the Complainant is a prevailing party and award reasonable attorney fees.

The Complainant does not agree to mediate this complaint.

July 28, 2009

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

August 4, 2009

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated February 23, 2009
- Custodian's response to the OPRA request dated February 26, 2009
- Complainant's OPRA request dated March 2, 2009
- Custodian's response to the OPRA request dated March 6, 2009
- Letter from the Custodian to the Complainant's Counsel dated March 17, 2009
- Letter from the Custodian to the Complainant's Counsel dated March 19, 2009

The Custodian certifies that her search for the requested records involved:

Request dated February 23, 2009

The Custodian certifies that she checked with Zoning Code Enforcement Officer Joseph Drossel for a record that was responsive to the Complainant's request and Mr. Drossel provided a copy of Report No. 392 to the Custodian. The Custodian further certifies that this record was sent to the Custodian's Counsel for legal advice regarding redactions before it was disclosed.

Request dated March 2, 2009 Item No. 1

There was no search required for this record because it was located in fulfillment of the Complainant's February 23, 2009 OPRA request.

Request dated March 2, 2009 Item Nos. 2, 3 and 4

The Custodian certifies she initially never conducted a search for these records because they identified the identity of a complaining party. The Custodian further certifies that she later disclosed the records to the Complainant in redacted form but does not explain how she conducted the search for the records.

Request dated March 2, 2009 Item No. 5

The Custodian certifies that she had Mr. Spekhardt, the author of the e-mail record, Mr. Troast, the Township Planner and Mr. Underhill, the Township Manager check for the record to no avail. The Custodian further certifies that this record, after it was found was sent to the Custodian's Counsel for legal advice regarding redactions before it was disclosed.

Request dated March 2, 2009 Item No. 6

The Custodian conducted a search of the files in the Clerk's office and located three (3) records responsive to the Complainant's request.

The Custodian also certifies that in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management, Items No. 2 through No. 6 of the Complainant's March 2, 2009 OPRA request must be retained for three (3) years. The Custodian did not certify as to the retention period for Item No.1 on either of the Complainant's OPRA requests.

The Custodian certifies that she received the Complainant's OPRA requests on February 23, 2009 and March 2, 2009, respectively. The Custodian further certifies that she provided a written response to the Complainant on February 26, 2009 and March 6, 2009.⁸

The Custodian avers that she provided all records requested by the Complainant in the Complainant's two (2) OPRA requests. The Custodian certifies that the issue which led to the Complainant filing this complaint can be narrowed to her refusal to disclose certain records without redactions. However, the Custodian certifies that the redactions made to the records were necessary to protect the identity of a complaining party. The Custodian certifies that she is required pursuant to the Council's decision in Perino v. Borough of Haddon Heights, 2004-128 (November 2004) to balance the interest of the complaining party who requested anonymity against the need for the requestor to learn the name of the citizen who made the complaint. The Custodian further certifies that she made the redactions pursuant to N.J.S.A. 47:1A-1., which provides in relevant part that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." The Custodian also certifies that there is a serious potential for harm by unsolicited contact and

⁸ The Custodian also certified that she provided a written response to the Complainant's OPRA requests on March 10, 2009, March 17, 2009 and March 19, 2009; however, the Custodian's March 17, 2009 and March 19, 2009 correspondence was in reply to a letter from the Custodian's Counsel to the Custodian dated March 16, 2009. There is no evidence of record to support the Custodian's assertion that she sent correspondence to the Complainant dated March 10, 2009.

confrontation between the Complainant and/or his agents or representatives and the citizen if the citizen’s identity is not redacted. The Custodian argues that the Complainant’s stated need for access to the records in unredacted form does not outweigh the complaining citizen’s expectation of privacy.

February 1, 2010

Request for the balancing test questionnaire sent from the GRC to the Complainant and the Custodian.

February 3, 2010

E-mail from the Custodian to the GRC. The Custodian returns the balancing test questionnaire. The Custodian’s responses on the questionnaire are as follows:

Factors for Consideration in Balancing Test	Custodian’s Response
1. The type of record(s) requested.	“The records requested are unredacted copies of e-mails from a private citizen to Sparta Township Officials and e-mails from Sparta Township Officials to the private citizen regarding an alleged zoning violation by the OPRA Complainant where the complaining private citizen had requested anonymity and an unredacted copy of the zoning violation complaint containing the name of the private citizen complainant prepared by a Township Official.”
2. The information the requested records do or might contain.	“The e-mails and the zoning violation complaint contain the name, address, telephone number and e-mail address of a citizen who made a zoning complaint against the OPRA Complainant and who requested anonymity. Further, the information in the e-mail from the private citizen itself, even if the name, address, telephone number and e-mail address were redacted, could potentially identify the citizen who had requested anonymity in making the complaint.”
3. The potential harm in any subsequent non-consensual disclosure of the requested records.	“The potential for harm in any subsequent, non-consensual disclosure of a requested record would be possible unsolicited contact and confrontation between the OPRA Complainant and/or his agents or representatives and the private citizen who had requested anonymity.”
4. The injury from disclosure to the relationship in which the requested record was generated.	“The government records were made in the relationship between a private citizen and the citizen’s local government with the citizen’s expectation of non-disclosure of (his/her) identity, as the citizen had made a complaint about an alleged zoning violation while requesting anonymity. To allow disclosure of the identity of the private citizen would seriously undermine a citizen’s ability to make a complaint to their local government anonymously and would deter other citizens from reporting

	possible violations of law if they knew that their identity would always be made known to the possible violator.”
5. The adequacy of safeguards to prevent unauthorized disclosure.	This question can only be answered in terms of the actions taken to date by the Township. The Township has adequately safeguarded the anonymity of the private citizen making the alleged zoning violation complaint against the OPRA Complainant by refusing to disclose the identity of the private citizen to the OPRA Complainant or any information that might identify the private citizen to the OPRA Complainant, as the private citizen had specifically requested anonymity.
6. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access.	There is no express statutory mandate, articulated public policy or other recognized public interest militating toward access. Rather, the exact opposite is true. <u>N.J.S.A. 47:1A-1</u> . specifically states that “A public agency has a responsibility and an obligation to safeguard from public access a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy.” In the present case, a private citizen made a complaint about an alleged zoning violation by the OPRA Complainant anonymously. The private citizen made the complaint specifically expecting that their identity would not be disclosed to the OPRA Complainant and that their privacy should be preserved. There is a serious potential for harm by unsolicited contact and confrontation between the OPRA Complainant and/or his agents or representatives and the private citizen if the private citizen’s identity is revealed. This public policy was articulated in the GRC decision in <u>Perino v. Borough of Haddon Heights</u> , 2004-128. Lastly, there would be a chilling effect on private citizens’ reporting possible violations of law to their local government to be investigated by the local government if their identities were subject to disclosure to the alleged violator regardless of whether or not they requested anonymity or whether or not the local government took any action against the alleged violator.

February 8, 2010

E-mail from the Complainant’ Counsel to the GRC. The Complainant’s Counsel returns the balancing test questionnaire. The Complainant’s responses on the questionnaire are as follows:

Need for Access Questions	Complainant’s Response
1. Why do you need the requested record(s) or information?	“The [Complainant] needs this information to determine the credibility of the allegations against him and to defend himself against potential charges that may be levied against him. The complaint was also submitted within eight days after [Complainant] asked for the resignation of Sparta’s mayor at the time. Thus, the complaint appears politically motivated.”

<p>2. How important is the requested record(s) or information to you?</p>	<p>“The requested information is very important because it goes to the credibility of [Complainant] and his standing in the community in which he has resided for fifteen years. Individuals should not be allowed to anonymously besmirch the reputation of other members of the community, and then be permitted to hide behind unilateral requests for anonymity—a protection that [Complainant] apparently does not himself enjoy. This complaint caused Sparta to initiate an investigation of [Complainant], requiring him and his attorney to engage in several rounds of correspondence to respond to the investigation. Although to date, formal charges have not been brought against [Complainant], the Township has threatened to do so.”</p> <p>‘The Records Custodian appears to be tripping over herself in an effort to hide the identity of [Complainant’s] accuser. If the accuser wanted to retain his or her anonymity, they could have done so simply by not providing their name when originally making the complaint. Instead, they engaged in multiple calls and emails with Township personnel with their own private agenda, thus abdicating their anonymity.’”</p>
<p>3. Do you plan to redistribute the requested record(s) or information?</p>	<p>“The requested records would be used only to the extent necessary to defend [Complainant] against the charges against him.”</p>
<p>4. Will you use the requested record(s) or information for unsolicited contact of the individuals named in the government record(s)?</p>	<p>“No.”</p>

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions*...a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been

entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy...” (Emphasis added.) N.J.S.A. 47:1A-1.
Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA also provides that:

“A custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium.” N.J.S.A. 47:1A-5.d.

OPRA further 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.” (Emphasis added.) N.J.S.A. 47:1A-5.g.

Additionally, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request...* In the event a Custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ...*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

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

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

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.

Request dated February 23, 2009

The Complainant asserted that he should be able to gain unredacted access to Report No. 392, fully identifying the complaining party because, *inter alia*, "...there is no reasonable expectation of privacy in a person's name when making a zoning complaint." The Complainant also contends that redaction of the complaining party's name from Report No. 392 deprives the Complainant of knowing the witness against him, and that pursuant to the Council's decision in Mourad v. Borough of Saddle River, GRC Complaint No. 2004-30 (May 2004), names and titles of public employees are public records.

The Complainant is characterizing the complaining party as a formal complainant, *i.e.*, one who signed a complaint against him; under such an argument, because a formal complaint would be a public record, the requestor should have unfettered access to said record. Here, however, the complaining party did not take formal action against the Complainant, rather he/she tipped the municipal enforcement officials that there was *an alleged* zoning violation. The complaining party is not "making a zoning complaint," as asserted by the Complainant, but rather is **reporting** an alleged violation to the authorities. This distinction is certainly understood by the Complainant because the Complainant's Counsel stated that "...the Township of Sparta initiated an investigation of Mr. Wolosky..."

The Custodian, citing N.J.S.A. 47:1A-1, asserted that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." Here, the Custodian stated that the person reporting the zoning code violation wanted to remain anonymous and therefore she redacted the person's identifying information from the record.

OPRA does require a public agency to "safeguard from public access a citizen's personal information...when disclosure thereof would violate the citizen's reasonable expectation of privacy..." N.J.S.A. 47:1A-1.

In Merino v. Ho-Ho-Kus, GRC Complaint No. 2003-110 (February 2004), the Council addressed the citizen's reasonable expectation of privacy pursuant to N.J.S.A. 47:1A-1 and found that the New Jersey Superior Court, Appellate Division held that the GRC must enforce OPRA's declaration, in N.J.S.A. 47:1A-1, that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 368-69 (App. Div. 2003). See also National Archives and Records Administration v. Favish, 541 U.S. 157, 124 S.Ct. 1570 (U.S. March 30, 2004) (personal privacy interests are protected under FOIA).

In Wilcox v. Township of West Caldwell, GRC Complaint No. 2004-28 (October 2004), in a fact pattern similar to the instant complaint, a citizen telephoned the municipality reporting information concerning a zoning violation. Municipal officials subsequently initiated an investigation and determined that the OPRA complainant was in

violation of zoning regulations. In response to the complainant's subsequent OPRA request for all records related to the zoning complaint, the custodian disclosed to the complainant a copy of the zoning enforcement report with the complaining citizen's name and address redacted. The custodian argued that the confidentiality provided by the redactions outweighed the complainant's need for access. In support of that argument, the custodian asserted that the municipality relies upon citizens to report zoning violations and that those reports are essential for the municipality to enforce regulations to promote public health, safety, morals, and the general welfare. The complainant thereafter asserted in his Denial of Access Complaint that the citizen should not have an expectation that his/her name and address will not be disclosed after reporting a violation.

The Council applied the balancing test as promulgated in Doe v. Poritz, 142 N.J. 1, (1995), and determined that the name and address of the citizen who brought the zoning violation to the municipality's attention should remain redacted from the requested documentation. The Council concluded that a zoning issue is one of contention. Therefore, it is reasonable to conclude that disclosure of the citizen's name and address could result in unsolicited contact and confrontation between the citizen and the OPRA complainant or his/her agents.

In the instant complaint, as in Wilcox, *supra*, the GRC applied the Supreme Court's balancing test. The Complainant's Counsel, responding to the balancing test questionnaire, stated that the Complainant "...needs [the unredacted] information to determine the credibility of the allegations against him and to defend himself against potential charges that may be levied against him." The Complainant's Counsel admitted, however, that as of February 8, 2010 "...formal charges have not been brought against Mr. Wolosky..." Counsel also stated that "[t]he requested information is very important because it goes to the credibility of Mr. Wolosky and his standing in the community..."

The Custodian in response to the balancing test questions stated that "...[t]he government records were made in the relationship between a private citizen and the citizen's local government with the citizen's expectation of non-disclosure of (his/her) identity...[t]o allow disclosure of the identity of the private citizen would seriously undermine a citizen's ability to make a complaint to their local government anonymously and would deter other citizens from reporting possible violations of law." The Custodian also stated that "[t]he potential for harm in any subsequent, non-consensual disclosure of a requested record would be possible unsolicited contact and confrontation between the OPRA Complainant and/or his agents or representatives and the private citizen who had requested anonymity." The Custodian certified in the SOI that she redacted the records pursuant to N.J.S.A. 47:1A-1.

In balancing the Complainant's need for the redacted information versus the potential harm should the information be released, the Council finds that the potential harm outweighs the Complainant's need for access. A citizen who reports an infraction to the local authorities has a reasonable expectation of privacy that his or her personal information will not be released to the public. N.J.S.A. 47:1A-1 provides that "...a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy..." Should the personal

information become public, citizens may become deterred from reporting infractions, crimes and similar incidents for fear that their personal information will be released to the general public. Further, the Complainant's need for the requested records, *viz.*, to determine the credibility of the allegations against him and to defend himself against potential charges that may be levied against him, does not outweigh the privacy concerns. The reason the Complainant provided for requiring the unredacted information is tenuous, at best, given the fact that a formal complaint was never brought by the complaining party against the Complainant.

The Complainant's Counsel also argued that the complaining party may be a local politician, friend or family member of a local politician or municipal employee or his/her spouse. Counsel cites Mourad, *supra*, as authority for disclosure of the complaining party's name because in Mourad the Council found that names of public employees are public records. However, whether the complaining party is in fact a local politician or municipal employee is pure speculation because there is no evidence in the record to support this claim. Further, the Council's decision in Mourad is immaterial vis-à-vis the facts in the instant complaint because in Mourad, the requestor sought a list of municipal police officers, whereas here the Complainant is seeking disclosure of the name of a citizen who reported an alleged violation to authorities, which citizen may or may not be a municipal employee.

Finally, Counsel argued that "[t]he person who made the initial report could have ensured their anonymity by declining to give their name. Rather they gave their name..." It is true that the complaining party could have reported the violation anonymously; however, he/she cannot be faulted for providing his/her name to the authorities because, by doing so, the authorities had the ability to contact the party should clarification or more information about the alleged violation be needed. The Custodian certified that the complaining party requested anonymity, and it was reasonable for the Custodian to have considered this factor when deciding to protect the party's name from public access.

Accordingly, in response to the Complainant's February 23, 2009 request, the Custodian did not unlawfully deny the Complainant access to the requested record by releasing it with the complaining party's name redacted because, on balance, the potential for harm by disclosing the complaining party's identity outweighs the Complainant's need for access pursuant to N.J.S.A. 47:1A-1. and the Council's decision in Wilcox v. Township of West Caldwell, *supra*.

Request dated March 2, 2009, Item No. 1

Because the Custodian lawfully redacted the complaining party's name from Report No. 392, the Custodian did not unlawfully deny the Complainant access to said report by refusing to disclose the record to the Complainant in unredacted form.

Request dated March 2, 2009, Item No. 2 through 5

The Complainant requested four (4) e-mails that were mentioned in Report No. 392. Items No. 2, No. 3 and No. 4 were dated February 13, 2008, February 29, 2008 and March 1, 2008, respectively. Item No. 5 was an e-mail from Mr. Spekhardt to the

Township Manager that was forwarded to Mr. Troast. The Custodian responded to the Complainant's request by refusing to disclose Items No. 2 through No. 4. The Custodian stated that her reason for not disclosing these items was the same reason the Custodian set forth in her February 26, 2009 response to the Complainant's February 23, 2009 OPRA request. In that response, the Custodian redacted a record because the person reporting a violation which prompted the preparation of the record wanted to remain anonymous. The Custodian cited N.J.S.A. 47:1A-1 and the Council's decision in Perino, supra, as legal authority for making the redaction. With respect to Item No. 5, in her response to the OPRA request, the Custodian informed the Complainant that the e-mail was not retained as a government record.

The Complainant's Counsel sent a letter to the Custodian dated March 16, 2009. In that letter, Counsel demanded that the Custodian disclose to the Complainant Items No. 2 through 4. Counsel also demanded the Custodian comply with the law and retrieve Item No. 5 "regardless of where it is located" so that it could be disclosed to the Complainant. The Custodian replied to the Complainant's Counsel by letter dated March 17, 2009, wherein she stated that persons who make anonymous complaints are entitled to a reasonable expectation of privacy. In that same letter, the Custodian emphasized that her response to the Complainant's March 2, 2009 OPRA request was not that Item No. 5 of the records relevant to the complaint was not a government record because it might be on an off-site or personal e-mail account, but rather that it was never retained, and therefore does not exist as a government record.

OPRA provides that "...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State." N.J.S.A. 47:1A-1. OPRA also provides that "[a] custodian shall permit access to a government record..." N.J.S.A. 47:1A-5.d. There is no dispute between the parties that Item No. 2 through 5 of the Complainant's March 2, 2009 OPRA request are government records; however, the Custodian refused to disclose Item No. 2 through 4 of the records relevant to the complaint and failed to meet her burden of proving that such denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.

Accordingly, because the Custodian responded to the Complainant's OPRA request dated March 2, 2009 by refusing to disclose in redacted or unredacted form Item No. 2, Item No. 3 and Item No. 4, which are e-mails dated February 13, 2008, February 29, 2008 and March 1, 2008, respectively, and because the Custodian failed to prove that the denial of access was authorized by law, the Custodian unlawfully denied the Complainant access to the records and failed to meet her burden of proving that such denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.

With respect to Item No. 5 of the records relevant to the complaint, which is a copy of Mr. Spekhardt's e-mail to the Township Manager that was forwarded to Mr. Troast, the Custodian stated in her response to the Complainant's March 2, 2008 OPRA request that the item did not exist. The Custodian again informed the Complainant by letter dated March 17, 2008 that the record did not exist. Shortly thereafter, the Custodian sent the Complainant's Counsel another letter dated March 19, 2009, wherein she stated that she found Item No. 5 of the records relevant to the complaint and enclosed that record along with all of the other e-mails the Complainant requested; however, the

Custodian stated that she redacted from all the e-mails the name of the complaining party and all information that would identify that person.⁹

The Complainant's Counsel acknowledged that he received as enclosures with the Custodian's March 19, 2009 letter all of the requested e-mails, which constitute Items No. 2 through 5 of the records relevant to the complaint, but he asserts that all of said records are heavily redacted. Further, Counsel alleged that the statutorily mandated seven (7) business day period for the Custodian to respond had expired by the time the Custodian sent him the e-mails.

The evidence of record indicates that the Custodian disclosed redacted Item No. 5 of the Complainant's request on the same date she alleged that it was discovered. The Custodian failed, however, to disclose the redacted copies of Items No. 2 through 4 until the thirteenth (13th) business day following receipt of the Complainant's request.

N.J.S.A. 47:1A-5.g. provides that if a custodian "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.*" (Emphasis added.). N.J.S.A. 47:1A-5.i. sets the maximum time for permitting such access to the remainder of the record as no later than seven (7) business days from receipt of the request.

Therefore, because the Custodian failed to provide the Complainant with a lawful basis for the denial of access to the redacted portions of Items No. 2 through 4 in writing within the statutorily mandated seven (7) business days, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.

The Custodian's Counsel asserted that all of the said e-mails are heavily redacted. Counsel further asserted that there is no justification for the Custodian to withhold from disclosure entire paragraphs of the records because it is highly unlikely that all of the redacted information would necessarily identify the complaining party.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC¹⁰ in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The court stated that:

"OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers."

⁹ Once the Custodian disclosed Item No. 5 of the records relevant to the complaint, which is the redacted copy of Mr. Spekhardt's e-mail to the Township Manager that was forwarded to Mr. Troast, the date of the e-mail was revealed to be January 5, 2008.

¹⁰ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).

The court also stated that:

“[t]he statute also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7f. This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.”

Further, the court stated that:

“[w]e hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7f, which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.”

Therefore, pursuant to Paff, *supra*, the GRC must conduct an *in camera* review of Items No. 2 through No. 5, which are the e-mails referenced in Report No. 392 dated January 5, 2008, February 13, 2008, February 29, 2008 and March 1, 2008 and are the same four (4) e-mails that were disclosed to the Complainant in redacted form in the Custodian’s letter to Complainant’s Counsel dated March 19, 2009, to determine the validity of the assertion by the Custodian that the redacted segments contain information that could potentially identify the person reporting the zoning code violation which prompted the preparation of Report No. 392.

Whether the Custodian’s denial of access to the requested records 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’s denial of access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

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

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian’s compliance with the Council’s Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. In response to the Complainant's February 23, 2009 request, the Custodian did not unlawfully deny the Complainant access to the requested record by releasing it with the complaining party's name redacted because, on balance, the potential for harm by disclosing the complaining party's identity outweighs the Complainant's need for access pursuant to N.J.S.A. 47:1A-1, and the Council's decision in Wilcox v. Township of West Caldwell, GRC Complaint No. 2004-28 (October 2004).
2. Because the Custodian lawfully redacted the complaining party's name from Report No. 392, the Custodian did not unlawfully deny the Complainant access to said report by refusing to disclose the record in to the Complainant in unredacted form.
3. Because the Custodian responded to the Complainant's OPRA request dated March 2, 2009 by refusing to disclose in redacted or unredacted form Item No. 2, Item No. 3 and Item No. 4, which are e-mails dated February 13, 2008, February 29, 2008 and March 1, 2008, respectively, and because the Custodian failed to prove that the denial of access was authorized by law, the Custodian unlawfully denied the Complainant access to the records and failed to meet her burden of proving that such denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6.
4. Because the Custodian failed to provide the Complainant with a lawful basis for the denial of access to the redacted portions of Items No. 2 through 4 in writing within the statutorily mandated seven (7) business days, the Custodian violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i.
5. Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of Items No. 2 through No. 5, which are the e-mails referenced in Report No. 392 dated January 5, 2008, February 13, 2008, February 29, 2008 and March 1, 2008 and are the same four (4) e-mails that were disclosed to the Complainant in redacted form in the Custodian's letter to Complainant's Counsel dated March 19, 2009, to determine the validity of the assertion by the Custodian that the redacted segments contain information that could potentially identify the person reporting the zoning code violation which prompted the preparation of Report No. 392.
6. **The Custodian must deliver¹¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records described in paragraph 5**

¹¹ The *in camera* documents may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

above, a document or redaction index¹², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹³ that the documents provided are the documents requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

7. The Council defers analysis of whether the Custodian's denial of access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
8. 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: John E. Stewart, Esq.

Approved By: Catherine Starghill, Esq.
Executive Director

October 19, 2010

¹² The document or redaction index should identify the document and/or each redaction asserted and the lawful basis for the denial.

¹³ "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."