



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

FINAL DECISION

June 26, 2012 Government Records Council Meeting

Jesse Wolosky  
Complainant

Complaint No. 2010-221

v.

Township of Harding (Morris)  
Custodian of Record

At the June 26, 2012 public meeting, the Government Records Council (“Council”) considered the June 19, 2012 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 evidence of record indicates that the Complainant’s need for access to the Clerk’s home address contained on the requested financial disclosure form, resume, and payroll record does not outweigh the Clerk’s interest in privacy of the home address contained on such records, the Custodian did not unlawfully deny the Complainant access to the Clerk’s home address information pursuant to N.J.S.A. 47:1A-1. See Feasel v. City of Trenton (Mercer), GRC Complaint No. 2008-103 (April 2009).
2. The Custodian has met her burden of proof pursuant to N.J.S.A. 47:1A-6 that she did not unlawfully deny access to net income information because the Complainant’s OPRA request sought gross, not net, income information and because the competent, credible evidence of record indicates that the payroll records provided to the Complainant do not contain net income information; thus, no redactions of net income information could be made to such payroll records. This element of the Complainant’s Denial of Access Complaint is therefore without reasonable factual basis to pursue. N.J.S.A. 47:1A-7.e.
3. The method of “whiting out” and deletion used to redact the address information from the requested financial disclosure statement, resume, and payroll records did not allow the Complainant to clearly identify the specific location and the amount of redactions made. Therefore, the Custodian’s method of “whiting out” the requested minutes is not “a visually obvious method that shows ... the specific location of any redacted material in the record” and is thus not appropriate under OPRA. N.J.S.A. 47:1A-5.g.
4. Pursuant to N.J.S.A. 47:1A-5.g. and consistent with the GRC’s ruling in Morris v. Trenton Police Department (Mercer), GRC Complaint No. 2007-160



(May 2008), the Custodian's failure to provide reasons for the redactions made to the requested financial disclosure statement, resume, and payroll record constitutes an unlawful denial of access.

5. In the matter before the Council, the Custodian failed to make visually obvious redactions as prescribed in N.J.S.A. 47:1A-5.g. and failed to provide the reasons for the redactions pursuant to N.J.S.A. 47:1A-5.g. However, the Custodian lawfully redacted the Clerk's home address from the requested financial disclosure statement, resume, and payroll record yet still provided the Complainant with unredacted copies of the requested records on August 19, 2010. The evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was 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.
6. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Complainant failed to demonstrate that the Custodian's denial of access to the Clerk's home address information was unlawful, as the Custodian's need to preserve the Clerk's privacy interest in her home address information outweighed the Complainant's asserted need for access. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra.

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

Final Decision Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of June, 2012

Steven F. Ritardi, Esq., Acting Chair  
Government Records Council

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

Denise Parkinson Vetti, Secretary  
Government Records Council

**Decision Distribution Date: June 27, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
June 26, 2012 Council Meeting**

**Jesse Wolosky<sup>1</sup>  
Complainant**

**GRC Complaint No. 2010-221**

v.

**Township of Harding (Morris)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copies of:<sup>3</sup>

1. The actual existing official payroll record showing the 2009 year end actual gross income earned and other data for the Municipal Clerk or their last pay stub for 2009.
2. The Municipal Clerk's resume on file with the municipality.
3. The Municipal Clerk's current financial disclosure statement.

**Request Made:** August 9, 2010

**Response Made:** August 16, 2010

**Custodian:** Amanda G. Macchia<sup>4</sup>

**GRC Complaint Filed:** August 20, 2010<sup>5</sup>

**Background**

**August 9, 2010**

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 indicates that the preferred method of delivery is electronically via e-mail in .PDF format.

**August 16, 2010**

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fifth (5<sup>th</sup>) business day following receipt of such request. The Custodian states that records responsive to the Complainant's request for payroll records (request Item No. 1) and the Clerk's resume (request Item No. 2) are attached. The Custodian states that the record responsive to the Complainant's request for the Clerk's financial disclosure statement (request Item No. 3) is also attached.

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<sup>1</sup> Represented by Walter M. Luers, Esq., of Law Office of Walter M. Luers (Clinton, NJ).

<sup>2</sup> Represented by Laura J. Lande, Esq., of Woolson, Sutphen, Anderson, PC (Somerville, NJ).

<sup>3</sup> Additional records were requested that are not at issue in this Complaint.

<sup>4</sup> Ms. Macchia is the Deputy Township Clerk and the Custodian.

<sup>5</sup> The GRC received the Denial of Access Complaint on said date.

## **August 18, 2010**

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

- Complainant’s OPRA request dated August 9, 2010
- Custodian’s response to the OPRA request dated August 16, 2010

Complainant’s Counsel states that the Custodian redacted the records provided without making the redactions visually obvious and provided no reasons for the redactions, redacted the Municipal Clerk’s address from her financial disclosure statement in violation of Walsh v. Township of Middletown, GRC Complaint No. 2008-266 (November 2009), and did not disclose the Municipal Clerk’s net pay in violation of N.J.S.A. 47:1A-10 and Pierone v. County of Warren, GRC Complaint No. 2008-195 (November 2009).

Counsel states that in Walsh, the GRC held that home addresses contained in financial disclosure statements must be provided to the public. Counsel states that the GRC cited several authorities that have held that financial disclosure statements are public records. Counsel states that there is no difference between the facts of Walsh and this case and the GRC should order the Custodian to provide a copy of the financial disclosure statement that contains the Municipal Clerk’s home address.

In addition, Counsel maintains that in Pierone, the GRC held that a public employee's payroll record included their gross and net pay. Counsel states that the County wanted to withhold employees’ net pay and the GRC disagreed, holding that net pay was included in the definition of a "payroll record." N.J.S.A. 47:1A-10 (stating that "payroll records" are "government records"). Counsel asserts that gross and net pay should be disclosed in this matter.

Counsel asserts that none of the redactions made by the Custodian were identified with dark or black marks as required by Wolosky v. Andover Regional School District, GRC Complaint No. 2009-94 (April 2010). Counsel states that in that case, the GRC held that a custodian who did not make the “specific locations” of the redactions “visually obvious” had violated OPRA. Counsel states that in the instant matter, the Custodian has not made the redactions “visually obvious” and the Custodian has not provided any reasons for the redactions made to the records provided. Counsel argues that when a custodian redacts a document, specific reasons must be given for those redactions. See Renna v. Union County Improvement Authority, GRC Complaint No. 2008-86 (March 2009) and N.J.S.A. 47:1A-5.g. In addition, Counsel asserts that the Municipal Clerk’s home address was unlawfully redacted from the requested resume and payroll record.

Counsel states that according to Executive Order 26 (Gov. McGreevey, 2002) (“EO 26”), resumes of successful applicants for public employment must be disclosed. Counsel asserts that OPRA does not specifically exempt home addresses from disclosure and further asserts that the home address of the Clerk should be disclosed on both the requested payroll record and the requested resume. Counsel states that there is no reason for redacting a home address from a payroll record.

Counsel requests that the GRC order the Custodian to provide a copy of the financial disclosure statement that includes the Clerk's home address; order the Custodian to provide a copy of the payroll record that includes gross and net annual pay for the year ending 2009 and the Clerk's home address. Counsel further requests that the GRC order the Custodian to provide an unredacted copy of the Clerk's resume; order the Custodian to provide the specific legal basis for each of her redactions and find that the Custodian is the prevailing party pursuant to N.J.S.A. 47:1A-6 and award him a reasonable attorneys' fee.

The Complainant does not agree to mediate this Complaint.

### **August 19, 2010**

Letter from the Municipal Clerk, Gale McKane ("Clerk"), to the GRC with the following attachments:

- Clerk's resume
- Clerk's financial disclosure statement<sup>6</sup>

The Clerk states that the date of this letter is the eighth (8<sup>th</sup>) business day since the Complainant sent his OPRA request to the Custodian. The Clerk states that the Custodian was on vacation the day the Complainant's OPRA request was received and did not return to the office until the next day, August 10, 2010, and further states that an out of office e-mail was sent to the Complainant on August 9, 2010.

The Clerk asserts that the Custodian responded to the Complainant's request on August 16, 2010, the fifth (5<sup>th</sup>) business day following receipt of the Complainant's request. The Clerk asserts that if the Complainant was genuinely dissatisfied with the response to this request, he could have requested that the Custodian supplement the response within the seven (7) business day response timeframe prescribed in OPRA. The Clerk states that she provided the additional information requested once she received the Complainant's Denial of Access Complaint, as this was the first indication that the Complainant was dissatisfied with the Township of Harding's ("Township") August 16, 2010 response.

The Clerk further states that Item No. 1 of the Complainant's OPRA request seeks "[a] copy of the actual existing official payroll record showing the 2009 year end actual gross income earned and other data for the Municipal Clerk or their last pay stub for 2009" and never specifically requested "net income." The Clerk maintains that the Complainant was not provided with her net income because he did not specifically ask for it and the requested year-end payroll record does not contain net income information.

In addition, the Clerk asserts that the Complainant's argument that the Custodian's redactions were not visually obvious is invalid because the title of each redacted item is visible and, accordingly, the material following such title is obviously redacted. The Clerk requests that the GRC consider the Complainant's voluminous request and the minimal nature of the violations the Complainant alleges. The Clerk

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<sup>6</sup> Additional documentation not at issue in the instant Complaint was also attached.  
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argues that OPRA is not intended to be used as a game of “gotcha” where a requestor demands a substantial amount of information and fishes for technical violations of the law. The Clerk asserts that the Township has satisfied the spirit of OPRA and that the awarding of attorney’s fees to the Complainant would represent an abuse of the law.

**September 8, 2010**

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

**September 14, 2010**

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated August 9, 2010
- Custodian’s response to the OPRA request dated August 16, 2010
- Resolution TC 09-119 containing the Clerk’s salary
- Resume of the Clerk
- Financial disclosure statement of the Clerk <sup>7</sup>

The Custodian certifies that the requested “copy of the actual existing official payroll record showing the 2009 year end actual gross income earned and other data for the Municipal Clerk or their last pay stub for 2009” has a retention schedule of six (6) years and that the Clerk’s date of birth, social security number (“SSN”), home address, and payroll deduction information have been redacted.

The Custodian further certifies that the requested copy of the Clerk’s resume has a six (6) year retention requirement following the termination of the employment of the applicable employee. The Custodian certifies that the Clerk’s address was redacted from the resume.

The Custodian certifies that the requested financial disclosure statement of the Municipal Clerk has a six (6) year retention schedule and that the Clerk’s home address and personal property ownership information has been redacted. The Custodian certifies that all of the responsive records were provided to the Complainant on August 16, 2010. The Custodian certifies that the Complainant did not notify the Township of his dissatisfaction with the Township’s response to his OPRA request until the seventh (7<sup>th</sup>) business day after he submitted his OPRA request.

The Custodian argues that custodians are required only to provide the requested record in the manner in which it is maintained by the municipality. The Custodian certifies that the Township provided a year-end payroll report which did not include net income. The Custodian certifies that if the Complainant had specifically requested net income, the Township would have provided a record containing that information. The Custodian maintains that since the Complainant did not request the information, the Township should not be penalized for failure to provide same. The Custodian states that while the Township maintains that it is a breach of a reasonable expectation of privacy to disclose the Clerk’s home address, the Custodian has removed the redaction of said home address. The Custodian certifies that on August 19, 2011 she supplied the Complainant

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<sup>7</sup> Additional documentation not at issue in the instant Complaint was also attached to the SOI.  
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with unredacted versions of the financial disclosure statement, resume, and payroll records in accordance with Walsh v. Township of Middletown, GRC Complaint No. 2008-266 (November 2009).

The Custodian notes that in Wolosky v. Andover Regional School District, GRC Complaint No. 2009-94 (April 2010), the GRC held that the “specific locations” of the redactions should be “visually obvious.” The Custodian argues that the method of redaction used in the original response is adequate because the title of each redacted item is left visible (*i.e.*, “SSN”, “Address”, etc.), resulting in visually obvious redactions. The Custodian argues that this requirement is not found in OPRA but in the Handbook for Records Custodians. The Custodian maintains that assuming that if this is a violation of OPRA, it is of such a technical nature that it amounts to a violation of form over substance for which the Township should not be penalized.

The Custodian certifies that in this case, the Township has promptly responded to all of the Complainant’s requests and that his allegations of a denial of access are more in the nature of technicalities than substantive violations of the law. The Custodian argues that OPRA was intended to provide the public with a process to obtain public documents in a timely fashion. The Custodian contends that the Complainant is using OPRA as a game of “gotcha” where the Complainant demands a substantial amount of information and tests whether the public entity satisfies every technical requirement in anticipation of punishing the Custodian for any possible violations. The Custodian further certifies that the Township has satisfied the spirit of OPRA and argues that the awarding of attorney’s fees to the Complainant’s Counsel would represent an abuse of the law.

#### **November 30, 2011**

E-mail from the GRC to the Complainant. The GRC requests the completion of a common law balancing test to assess the privacy interests in the instant complaint. Accordingly, the GRC asks the Complainant:

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

#### **November 30, 2011**

E-mail from the GRC to the Custodian. The GRC requests the completion of a common law balancing test to assess the privacy interests in the instant complaint. Accordingly, the GRC asks the Custodian:

1. The type of record requested.
2. The information the requested records do or might contain.
3. The potential harm in any subsequent non-consensual disclosure of the requested records.
4. The injury from disclosure to the relationship in which the requested record was generated.
5. The adequacy of safeguards to prevent unauthorized disclosure.



6. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access?

**December 6, 2011**

Letter from the Custodian to the GRC attaching a completed balancing test questionnaire as follows:

1. **The type of records requested.**

The information requested was a resume of the Township Clerk.

2. **The information the requested records do or might contain.**

At issue in this matter is the redaction of the Township Clerk's home address from the resume which was provided within the time period required under the OPRA.

3. **The potential harm in any subsequent non-consensual disclosure of the requested records.**

This matter involves the redaction of an employee's home address that does not relate to the day-to-day business operation of the Township. The Township asserts that the disclosure of this information is a breach of the employee's reasonable expectation of privacy that should be afforded to municipal employees. The potential harm is the privacy intrusion and the feeling of being personally targeted that an employee may experience. Notwithstanding, the Custodian here provided the unredacted home address upon receipt of the Denial of Access Complaint.

4. **The injury from disclosure to the relationship in which the requested records was generated.**

A person's privacy records extend to the non-disclosure of a home address. That the person in question is a public employee should not alter this analysis, where the home address has no bearing upon the functioning of the public agency.

Numerous GRC decisions have supported the redaction of home addresses. In Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004), redaction of a home address from copies of moving violations issued by a police officer and officer's training records and records of complaints or internal reprimands was found to be appropriate. In Bernstein v. Borough of Park Ridge, GRC Complaint No. 2005-99 (July 2005), the names and addresses of dog license owners was found to be appropriate "due to potential for unsolicited contact, intrusion, or potential harm of unsolicited contact." Lastly, in Faulkner v. Rutgers, GRC Complaint No. 2007-149 (May 2008), the GRC found that denied access to names and addresses of Rutgers University football and basketball season ticket holders based on the citizen's reasonable expectation of privacy, was not unlawful.

**5. The adequacy of safeguards to prevent unauthorized disclosure.**

Information was provided but redacted per Feasel (on behalf of Plumbers & Pipefitters Local 9) v. City of Trenton, GRC Complaint No. 2008-103 (April 2009), which provided that:

“...the GRC has consistently held that home addresses are appropriately redacted from government records pursuant to N.J.S.A. 47:1A-1, which 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.” *Id.*

Although the redacted address in question is that of the Township Clerk – a government employee – the safeguard of redacting this home address was adequate to protect the privacy of the Clerk without compromising the requestor’s right to the record requested under OPRA.

**6. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access?**

The Custodian’s redactions do not contradict an express statutory mandate, articulated public policy or other recognized public interest militating towards access. OPRA does not expressly require that a public employee’s home address be provided in connection with a request. To the contrary, as cited above, the articulated public policy within the State as upheld by prior GRC decisions is protective of an individual’s reasonable expectation of privacy in his or her home address. In this matter, there is no rational reason that a home address which has no bearing upon the functioning of the municipality need be disclosed.

**December 9, 2011**

Letter from the Complainant to the GRC attaching a completed balancing test questionnaire. The Complainant’s responses are detailed below.

**1. Why do you need the requested record or information?**

To confirm the Clerk’s home address. This information is relevant to determine the potential for conflicts of interest in the Clerk’s work. Also, this information is relevant because it will be compared to the information filed by the Custodian in her financial disclosure statement. This information is important to determine whether the Custodian is receiving preferential treatment.

**2. How important is the requested record or information to you?**

Very important, because openness and transparency are critical to a functioning democracy.

3. **Do you plan to redistribute the requested record or information?**

No.

4. **Will you use the requested record or information for unsolicited contact of the individuals named in the government record(s)?**

No.

**Analysis**

**Whether the Custodian’s redaction of the Clerk’s home address from the requested financial disclosure statement, resume, and payroll record was unlawful?**

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.

However, 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.

The legislative findings and declarations of OPRA state:

“[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; and nothing contained in [OPRA], shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency.” N.J.S.A. 47:1A-1.

In the matter before the Council, the Complainant disputed the redactions made to the financial disclosure statement provided to him in response to his OPRA request Item No. 3. The Complainant argued that omission of such information violates the Council’s decision in Walsh v. Township of Middletown (Monmouth), GRC Complaint No. 2008-266 (November 2009).

In addition, the Complainant requested the resume and 2009 year end payroll record of the Clerk of the Township. The Custodian initially provided the Complainant with a copy of such records which had the Clerk’s home address redacted. The Complainant argued in the Denial of Access Complaint that OPRA does not specifically exempt home addresses from disclosure and further asserted that the Clerk’s home address on the requested resume and payroll record should be disclosed to him. The Custodian argued in the SOI that disclosure of the Clerk’s unredacted resume and payroll record would infringe upon the Clerk’s reasonable expectation of privacy.

In Walsh, the Complainant sought a financial disclosure statement and disputed the Custodian’s redaction of her address and all real property owned. The Council held that pursuant to N.J.S.A. 40A:9-22.6(c)(the “Local Government Ethics Law”), financial disclosure statements are public records that are required to be filed annually by local government officers. The Local Government Ethics Law prescribes that the financial disclosure statements contain 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). Absent a sufficient showing of privacy concerns, the Custodian was found to have failed to bear her burden of proof that said redactions were authorized by law. N.J.S.A. 47:1A-6.

N.J.S.A. 47:1A-1 states in pertinent 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 New Jersey Supreme Court has stated that the privacy provision set forth at N.J.S.A. 47:1A-1 “is neither a preface nor a preamble.” Rather, “the very language expressed in the privacy clause reveals its substantive nature; it does not offer reasons why OPRA was adopted, as preambles typically do; instead, it focuses on the law’s implementation ... Specifically, it imposes an obligation on public agencies to protect against disclosure of personal information which would run contrary to reasonable privacy interests.” Burnett v. County of Bergen, 198 N.J. 408, 423 (2009) (upholding the redaction of social security numbers from otherwise public land title records).

Review of N.J.S.A. 40A:9-22.6(c), the Local Government Ethics Law, and Attorney General Opinion 91-0114 (DeTufo, September, 1991), reveals that the scope of

these legal authorities is limited to addressing the narrow issue of whether financial disclosure statements, in general, are public records. N.J.S.A. 40A:9-22.6(c) states, in its entirety, that “[a]ll financial disclosure statements filed shall be public records.” Nowhere else in the statute is a requirement for *disclosure* of a public official’s home address, except in the general category of all real property owned by the official in the state, pursuant to N.J.S.A. 40A:9-22.6(a)(5). In addition, Attorney General Opinion 91-0114 serves to address the narrow question of whether financial disclosure statements are public records under the old Right-to-Know law, only going insofar as stating that the statements “should be” disseminated to citizens, without questioning the need for access.

Unlike OPRA, these legal authorities do not provide an express mandate for the safeguarding of personal information in the context of public records requests. In contrast, the Supreme Court has recognized that inherent in OPRA is a privacy clause that imposes “an obligation on public agencies to protect against disclosure of personal information which would run contrary to reasonable privacy interests.” Burnett v. County of Bergen, 198 N.J. 408, 423 (2009). Furthermore, the fact that this mandate is contained in the implementing language of OPRA, rather than in its preamble, is direct evidence of the legislative intent that a public agency have discretion in deciding whether to release or withhold personal information contained in public documents. *Ibid.* Agencies have judicial guidance on how to weigh competing public and private interests by applying a multi-factor test to determine if disclosure of personal information contained in a public record would violate an individual’s reasonable expectation of privacy. Doe v. Poritz, 142 N.J. 1, 82-86 (1995); Burnett, *supra*, 198 N.J. at 427.

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

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

The foregoing criteria was applied accordingly by the Court in exercising its discretion as to whether the privacy interests of the individuals named in the summonses

are outweighed by any factors militating in favor of disclosure of the addresses. New Jersey courts have previously held that a citizen has a reasonable expectation of privacy in his or her home address. In Gannett New Jersey Partners LP v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005), a news organization sought grand jury subpoenas served by a federal grand jury on the Office of the Governor and certain documents responsive to those subpoenas. *Id.* at 213. In rendering its decision, the Court emphasized that the custodian and the court must delve into state and federal statutes and regulations to determine if the information is considered confidential and whether access to the information is inimical to the public interest or the individual interests of the persons about whom information is sought, particularly when those entities or individuals have not received notice of the request and are unable to express their privacy concerns. *Id.* at 213-14.

The Court specifically rejected the news organization's request for a county freeholder's computer index of addresses and telephone numbers, stating that public officials have a right of confidentiality regarding individuals with whom they have spoken. *Id.* at 217. In doing so, the Court noted that the New Jersey Supreme Court's decision in North Jersey Newspapers Co. v. Passaic County Bd. of Chosen Freeholders, 127 N.J. 9 (1992), was dispositive, inasmuch as the New Jersey Supreme Court had found that the identities and telephone numbers of persons who call and are called by public officials are protected by an expectation of privacy. *Id.*, citing North Jersey Newspapers, 127 N.J. at 16-18.

Moreover, the GRC has consistently held that home addresses are appropriately redacted from government records pursuant to N.J.S.A. 47:1A-1, which 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. See Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004) (home address was appropriately redacted from copies of moving violations issued by a police officer as well as copies of that officer's training records and records of complaints or internal reprimands); Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004) (name, home address and telephone number appropriately redacted from a noise complaint filed with the Police Department due to potential harm of unsolicited contact); Avin v. Borough of Oradell, GRC Complaint No. 2004-176 (March 2005) (homeowners' names and addresses appropriately redacted from list of homeowners who applied for a fire or burglar alarm permit); Bernstein v. Borough of Park Ridge, GRC Complaint No. 2005-99 (July 2005) (names and addresses of dog license owners appropriately redacted due to potential for unsolicited contact, intrusion or potential harm that may result); Paff v. Warren County Office of the Prosecutor, GRC Complaint No. 2007-167 (February 2008) (name and address of a crime victim appropriately redacted due to privacy concerns). See also, Faulkner v. Rutgers University, GRC Complaint No. 2007-149 (May 2008) (custodian did not unlawfully deny the complainant access to names and addresses of Rutgers University football and basketball season ticket holders based on the citizen's reasonable expectation of privacy in that information).

Additionally, in Feasel v. City of Trenton (Mercer), GRC Complaint No. 2008-103 (April 2009), the Council addressed the disclosability under OPRA of names and

addresses contained in payroll records. The complainant, a Union representative, sought disclosure of certified payroll records from Marshall Industries of Trenton for the work they performed for the City of Trenton between June, 2005 and August, 2007. The complainant asserted that because Local 9 and the Construction Trades Council, labor organizations with which the complainant was affiliated, had the statutory right to enforce violations of the New Jersey Prevailing Wage Act, and a statutory right to gain access to certified payroll records, they had an interest in detecting violations under the Act pursuant to OPRA requests. The Council engaged in the Poritz balancing test and determined that the complainant's need for access did not outweigh the custodian's need to safeguard the requested personal information contained in the certified payroll records. The Council noted that the release of the employee names and addresses may result in unsolicited contact between the complainant and the individuals whose names and addresses are being requested. Therefore, the Council determined that the custodian did not unlawfully deny the Complainant access to the names and addresses contained in the requested certified payroll records pursuant to N.J.S.A. 47:1A-1.

In the instant matter the Custodian maintained that the disclosure of the home address on the Clerk's financial disclosure statement, resume and payroll record could result in unsolicited contact and constitutes an intrusion upon her reasonable expectation of privacy which is the Council's duty to safeguard. In contrast, the Complainant alleged that access to the Clerk's home address information is needed in order to determine potential conflicts of interest, possible preferential treatment, and to see if the address contained in her resume is consistent with that information on the Clerk's financial disclosure statement. The Complainant also argued that this information is critical for openness and transparency in a functional democracy.

As the Council noted in Feasel, *supra*, the potential harm that could result from the disclosure of names and home addresses of workers includes "misappropriation by marketers, creditors, solicitors and commercial advertisers, eroding the employees' expectation of privacy[.]" Sheet Metal Workers Int'l Ass'n, Local Union No. 19 v. United States Dep't of Veteran's Affairs, 135 F. 3d 891 (3d Cir. 1998), as well as harassment by various entities. John Does & PKF-Mark III, Inc. v. City of Trenton Dep't of Pub. Works - Water Div., 565 F. Supp. 2d 560, 562, 564, 567- 68, 570-71 (D.N.J. 2008). As the Court noted in PKF, once the personal information at issue is released, there is nothing to stop others from obtaining it to harass the affected employees. PKF, *supra*, 565 F. Supp.2d at 571.

The Council notes that this matter is distinguishable from the Appellate Division's decision to disclose names and home addresses of dog owners Atlantic County Society for the Prevention of Cruelty to Animals (ACSPCA) v. City of Absecon, (2009 WL 1562967 (N.J. Super. A.D.)). In ACSPCA, the Plaintiff requested a list of all licensed dog owners in the city. The Plaintiff stated that it sought the information "to assist in its animal cruelty enforcement efforts ... [and] to solicit charitable contributions from the public." *Id.* at 1. The Appellate Division noted that the Plaintiff was charged with "enforcing all laws and ordinances enacted for the protection of animals and to promote the interests of and protect and care for animals within the State." *Id.* at 1. The Appellate Division also conducted the privacy balancing test as in the present complaint

and determined that the facts of the case favored disclosure of the names and addresses of individuals who possessed dog licenses.

The Appellate Division's decision in ACSPCA, *supra*, is distinguishable from the present complaint. As noted by the Court, the ACSPCA has express statutory authority to assist in animal cruelty enforcement efforts. In the instant complaint, the Complainant is not endowed with any statutory authority to investigate or enforce the law that would outweigh the Clerk's privacy interest in her home address.

Thus, in accordance with the express mandate of OPRA and the foregoing case law, the Council will conduct a balancing test pursuant to Doe v. Poritz, *supra*, to determine whether the privacy interest in protecting home address information listed on financial disclosure statements, notwithstanding the requirement of N.J.S.A. 40A:9-22.6(a)(5), outweighs the public interest in disclosure.

Having established that the enforcement of OPRA permits a custodian and this Council to balance a complainant's need for access with a custodian's duty to safeguard the privacy and safety of citizens and their information, the Complainant's arguments that he needs access to the Clerk's address information to discern if there are conflicts of interest, preferential treatment, and inconsistencies in information are not persuasive. The Complainant's desire for transparency does not entitle him to unfettered access to all of the personal information of public officials as the Council is not of the mind that release of the Clerk's home address information to the Complainant has a legitimate public interest. Furthermore, the Custodian's fear that the release of the home address information to the Complainant will lead to harassment is a valid and legitimate concern. Absent the Custodian's redaction of the Clerk's home address information, there would be insufficient safeguards to protect the Clerk's privacy interest in her home address and its misuse by those who may be reasonably foreseen to abuse such information. Accordingly, the evidence of record does not establish that the Complainant's need for access to the Clerk's home address on the requested financial disclosure form, resume and payroll record outweighs the Clerk's privacy interest in such information.

Therefore, because the evidence of record indicates that the Complainant's need for access to the Clerk's home address contained on the requested financial disclosure form, resume, and payroll record does not outweigh the Clerk's interest in privacy of the home address contained on such records, the Custodian did not unlawfully deny the Complainant access to the Clerk's home address information pursuant to N.J.S.A. 47:1A-1. *See Feasel v. City of Trenton (Mercer)*, GRC Complaint No. 2008-103 (April 2009).

**Whether the Custodian unlawfully denied access to net income information from the requested 2009 year end payroll record?**

The Complainant asserts that the Custodian unlawfully redacted net income information from the requested "payroll record showing the actual gross income earned and other data for the Municipal Clerk or their last pay stub for 2009." In support of this argument, the Complainant cites the GRC's decision in Pierone v. County of Warren, GRC Complaint No. 2008-195 (November 2009) (holding that net income information contained in payroll records is disclosable).



In Pierone, the Complainant requested payroll check registry data from the County of Warren. The GRC held that the Custodian's *purposeful omission* of the net payment information that was *a part* of the requested check registry data was a violation of OPRA. The Council held that the custodian failed to provide a lawful basis for the denial of access to the net payments *contained* on the payroll check register and that the Custodian failed to bear his burden of proving a lawful denial of access pursuant to N.J.S.A. 47:1A-6.

However, Pierone is distinguishable from the matter before the Council. In the instant matter, the Custodian certified in her SOI that the year-end payroll report provided by the Township *does not include net income*; and accordingly, net income was not redacted from this record. Moreover, a review of the Complainant's OPRA request reveals that the request sought gross, not net, income information. Furthermore, the competent, credible evidence of record indicates that the payroll records provided to the Complainant do not contain net income information; thus, no redactions of net income information could be made to such payroll records. This element of the Complainant's Denial of Access Complaint is therefore without reasonable factual basis to pursue. N.J.S.A. 47:1A-7.e.

Accordingly, the Custodian has met her burden of proof pursuant to N.J.S.A. 47:1A-6 that she did not unlawfully deny access to net income information because the Complainant's OPRA request sought gross, not net, income information and because the competent, credible evidence of record indicates that the payroll records provided to the Complainant do not contain net income information; thus, no redactions of net income information could be made to such payroll records. This element of the Complainant's Denial of Access Complaint is therefore without reasonable factual basis to pursue. N.J.S.A. 47:1A-7.e.

**Whether the method used to redact material from the requested records and the Custodian's failure to provide a reason for the redactions was lawful?**

OPRA states that:

*"[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy therefore. If 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.

In addition to the information redacted from the requested records, the Complainant asserted that the Custodian's method of redacting the Clerk's address from the requested financial disclosure statement, resume, and payroll records is unlawful. Complainant's Counsel argued that the Custodian did not make the redactions "visually obvious" and the Custodian did not give any reasons for her redactions. Counsel further

argued that when a custodian redacts a document, specific reasons must be given for those redactions pursuant to Renna v. Union County Improvement Authority, GRC Complaint No. 2008-86 (March 2009); N.J.S.A. 47:1A-5.g. However, the Custodian argued that the method of redaction used in the original response<sup>8</sup> was adequate because the title of each redacted item was left visible (*i.e.*, “SSN”, “Address”, etc.), and the material which followed such title was excised, resulting in visually obvious redactions.

The GRC previously discussed what constitutes an appropriate redaction in Wolosky v. Andover Regional School District (Sussex), GRC Complaint No. 2009-94 (April 2010). In that complaint, the Custodian provided access to executive session minutes containing the statement “[t]his matter remains confidential due to advisory, consultative, and deliberative (“ACD”) materials not subject to public disclosure,” under the headings for individual subject matters discussed in executive session. The GRC found that it appeared that the Custodian made electronic redactions to the meeting minutes responsive prior to disclosing such minutes to the Complainant. The GRC explained that:

“[i]f a record contains material that must be redacted, such as a social security number or unlisted phone number, *redaction must be accomplished by using a visually obvious method that shows the requestor the specific location of any redacted material in the record.* For example, if redacting a social security number or similar type of small-scale redaction, custodians should:

Make a paper copy of the original record and manually ‘black out’ the information on the copy with a dark colored marker. Then provide a copy of the blacked-out record to the requestor.’ (Emphasis added.) [Handbook for Records Custodians] at page 14.

It appears that the Custodian “electronically” redacted the meeting minutes by deleting this material and inserting the phrase “[t]his matter remains confidential due to [ACD] materials not subject to public disclosure,” as opposed to redacting the information using a “visually obvious method that shows the specific location of any redacted material...” This method does not show the requestor the specific location of the redacted material or the volume of material redacted. Although the Custodian eventually did release the requested records, the specific location of the redactions made was not visually obvious.” *Id.* at page 12-13.

In this matter, the Custodian used a method of redaction in which the Custodian “whited out” the address information from the “address field” of the financial disclosure statement and payroll record while completely omitting it from her resume via electronic deletion. This method does not inform the requestor with any certainty of the specific location of the redacted material or the volume of material redacted; thus, the specific

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<sup>8</sup> The Custodian certified that she provided the Complainant with unredacted versions of all of the requested records on September 14, 2010.

location and volume of the material underlying the redactions made was not visually obvious to the Complainant.

The method of “whiting out” and deletion used to redact the address information from the requested financial disclosure statement, resume, and payroll records did not allow the Complainant to clearly identify the specific location and the amount of redactions made. Therefore, the Custodian’s method of “whiting out” the requested minutes is not “a visually obvious method that shows ... the specific location of any redacted material in the record” and is thus not appropriate under OPRA. N.J.S.A. 47:1A-5.g.

Moreover, the Custodian failed to inform the Complainant about the reasons for the redactions. GRC decisions have consistently reinforced the statutory mandate that custodians provide a legally valid reason for any denial of records. Specifically, in Morris v. Trenton Police Department (Mercer), GRC Complaint No. 2007-160 (May 2008), the custodian denied access to the requested records without providing the specific legal basis for said denial. The Council held that “while the custodian’s denial of the complainant’s request was within the time allowed by N.J.S.A. 47:1A-5.i., the custodian’s failure to supply the requestor with a detailed lawful basis for denial violates N.J.S.A. 47:1A-5.g.” *See also* O’Shea v. Township of West Milford (Passaic), 2008-283. Accordingly, the Custodian’s failure to provide the Complainant with the reasons for the redactions made to the requested financial disclosure statement, resume and payroll record is a violation of OPRA.

Therefore, pursuant to N.J.S.A. 47:1A-5.g. and consistent with the GRC’s ruling in Morris v. Trenton Police Department (Mercer), GRC Complaint No. 2007-160 (May 2008), the Custodian’s failure to provide reasons for the redactions made to the requested financial disclosure statement, resume, and payroll record constitutes an unlawful denial of access.

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

OPRA states that:

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

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

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances,

the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 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)).

In the matter before the Council, the Custodian failed to make visually obvious redactions as prescribed in N.J.S.A. 47:1A-5.g. and failed to provide the reasons for the redactions pursuant to N.J.S.A. 47:1A-5.g. However, the Custodian lawfully redacted the Clerk’s home address from the requested financial disclosure statement, resume, and payroll record yet still provided the Complainant with unredacted copies of the requested records on August 19, 2010. The evidence of record does not indicate that the Custodian’s violations of OPRA had a positive element of conscious wrongdoing or was 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.

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

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. 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)). 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 (7<sup>th</sup> 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. Those changes expand counsel fee awards under OPRA." (Footnote omitted.) 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 the instant matter, the Custodian certified in her Statement of Information that she provided the Complainant with unredacted copies of all of the requested records on August 19, 2011. However, such disclosure was not necessary as the Custodian's original redaction of the Clerk's home address information on the requested financial disclosure statement, resume, and payroll records was lawful. While the Custodian used an unlawful method to redact the Clerk's address from the requested financial disclosure

statement, resume, and payroll record, the denial of access to such information was lawful.

Accordingly, pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Complainant failed to demonstrate that the Custodian's denial of access to the Clerk's home address information was unlawful, as the Custodian's need to preserve the Clerk's privacy interest in her home address information outweighed the Complainant's asserted need for access. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the evidence of record indicates that the Complainant's need for access to the Clerk's home address contained on the requested financial disclosure form, resume, and payroll record does not outweigh the Clerk's interest in privacy of the home address contained on such records, the Custodian did not unlawfully deny the Complainant access to the Clerk's home address information pursuant to N.J.S.A. 47:1A-1. See Feasel v. City of Trenton (Mercer), GRC Complaint No. 2008-103 (April 2009).
2. The Custodian has met her burden of proof pursuant to N.J.S.A. 47:1A-6 that she did not unlawfully deny access to net income information because the Complainant's OPRA request sought gross, not net, income information and because the competent, credible evidence of record indicates that the payroll records provided to the Complainant do not contain net income information; thus, no redactions of net income information could be made to such payroll records. This element of the Complainant's Denial of Access Complaint is therefore without reasonable factual basis to pursue. N.J.S.A. 47:1A-7.e.
3. The method of "whiting out" and deletion used to redact the address information from the requested financial disclosure statement, resume, and payroll records did not allow the Complainant to clearly identify the specific location and the amount of redactions made. Therefore, the Custodian's method of "whiting out" the requested minutes is not "a visually obvious method that shows ... the specific location of any redacted material in the record" and is thus not appropriate under OPRA. N.J.S.A. 47:1A-5.g.



4. Pursuant to N.J.S.A. 47:1A-5.g. and consistent with the GRC's ruling in Morris v. Trenton Police Department (Mercer), GRC Complaint No. 2007-160 (May 2008), the Custodian's failure to provide reasons for the redactions made to the requested financial disclosure statement, resume, and payroll record constitutes an unlawful denial of access.
5. In the matter before the Council, the Custodian failed to make visually obvious redactions as prescribed in N.J.S.A. 47:1A-5.g. and failed to provide the reasons for the redactions pursuant to N.J.S.A. 47:1A-5.g. However, the Custodian lawfully redacted the Clerk's home address from the requested financial disclosure statement, resume, and payroll record yet still provided the Complainant with unredacted copies of the requested records on August 19, 2010. The evidence of record does not indicate that the Custodian's violations of OPRA had a positive element of conscious wrongdoing or was 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.
6. Pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has not achieved the desired result because the complaint did not bring about a change (voluntary or otherwise) in the custodian's conduct. Additionally, pursuant to Mason v. City of Hoboken and City Clerk of the City of Hoboken, 196 N.J. 51 (2008), no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Complainant failed to demonstrate that the Custodian's denial of access to the Clerk's home address information was unlawful, as the Custodian's need to preserve the Clerk's privacy interest in her home address information outweighed the Complainant's asserted need for access. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*.

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