



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**RICHARD E. CONSTABLE, III**  
*Commissioner*

**FINAL DECISION**

**September 24, 2013 Government Records Council Meeting**

Jesse Wolosky  
Complainant

Complaint No. 2010-308

v.

Township of Randolph (Morris)  
Custodian of Record

At the September 24, 2103 public meeting, the Government Records Council (“Council”) considered the September 19, 2013 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that because the Complainant’s Counsel notified the GRC and the Office of Administrative Law in writing on September 18, 2013, that the complaint is withdrawn, the complaint should be dismissed.

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 24th Day of September, 2013

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: September 26, 2013**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
September 24, 2013 Council Meeting**

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

**GRC Complaint No. 2010-308**

v.

**Township of Randolph (Morris)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Copies of:

1. The bidder sheets for those who successfully purchased a Tax Sale Certificate in the 2010 tax sale.
2. The front page of each Tax Sale Certificate sold at the 2010 tax sale in numeric order.<sup>3</sup>

**Custodian of Records:** Donna M. Brady<sup>4</sup>

**Request Received by Custodian:** October 22, 2010

**Response Made by Custodian:** October 27, 2010<sup>5</sup>

**GRC Complaint Received:** November 17, 2010

**Background**

September 25, 2012 Council meeting:

At its September 25, 2012 public meeting, the Government Records Council (“Council”) considered the September 18, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Because the Custodian disclosed to the Complainant all records ordered for disclosure pursuant to the Order and provided certified confirmation of compliance to the Executive Director within the time period provided for compliance with said Order, the Custodian fully complied with the Council’s August 28, 2012 Interim Order.

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

<sup>2</sup> Represented by John Miller, Esq., The Buzak Law Group (Montville, NJ).

<sup>3</sup> There were other records requested that are not relevant to this complaint.

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

<sup>5</sup> The Custodian simultaneously sent three (3) separate e-mails to the Complainant on October 27, 2010, corresponding to the Complainant’s three enumerated request items.

2. Although the Custodian denied access to the mailing address, telephone number and fax number of the bank in request item number 1 and the mailing address and fax number for an individual in request item number 2, and although the Custodian failed to redact the records in a visually obvious manner, the Custodian did fully comply in a timely manner with the terms of the Council's August 28, 2012 Interim Order. Moreover, the evidence of record does not indicate that the Custodian's violations of OPRA 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.
  
3. Pursuant to Teeters, *supra*, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, after the complaint was filed the Custodian corrected errors she made by redacting too much information and disclosed corrected copies of the records to the Complainant on April 13, 2011. Moreover, the Custodian complied with the Council's August 28, 2012 Interim Order by certifying that she disclosed the records responsive to request item number 1 and request item number 2 of the Complainant's OPRA request with each lawful redaction made in a visually obvious manner. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ... justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

#### Procedural History:

On September 26, 2012, the Council distributed its Interim Order to all parties. On April 24, 2013, this complaint was transmitted to the Office of Administrative Law ("OAL"). On September 18, 2013, the Complainant's Counsel notified the GRC and OAL in writing that the complaint is withdrawn.

### **Analysis**

No analysis required.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends that because the Complainant's Counsel notified the GRC and the Office of Administrative Law in writing on September 18, 2013, that the complaint is withdrawn, the complaint should be dismissed.

Prepared By: John E. Stewart, Esq.

Approved By: Brandon D. Minde, Esq.  
Executive Director

September 19, 2013



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

September 25, 2012 Government Records Council Meeting

Jesse Wolosky  
Complainant

Complaint No. 2010-308

v.

Township of Randolph (Morris)  
Custodian of Record

At the September 25, 2012 public meeting, the Government Records Council (“Council”) considered the September 18, 2012 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian disclosed to the Complainant all records ordered for disclosure pursuant to the Order and provided certified confirmation of compliance to the Executive Director within the time period provided for compliance with said Order, the Custodian fully complied with the Council’s August 28, 2012 Interim Order.
2. Although the Custodian denied access to the mailing address, telephone number and fax number of the bank in request item number 1 and the mailing address and fax number for an individual in request item number 2, and although the Custodian failed to redact the records in a visually obvious manner, the Custodian did fully comply in a timely manner with the terms of the Council’s August 28, 2012 Interim Order. Moreover, the evidence of record does not indicate that the Custodian’s violations of OPRA 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.
3. Pursuant to Teeters, *supra*, the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, after the complaint was filed the Custodian corrected errors she made by redacting too much information and disclosed corrected copies of the records to the Complainant on April 13, 2011. Moreover, the Custodian complied with the



Council's August 28, 2012 Interim Order by certifying that she disclosed the records responsive to request item number 1 and request item number 2 of the Complainant's OPRA request with each lawful redaction made in a visually obvious manner. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, supra, and Mason, supra. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ... justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

Interim Order Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of September, 2012

Robin Berg Tabakin, 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: September 26, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
September 25, 2012 Council Meeting**

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

**GRC Complaint No. 2010-308**

v.

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

**Records Relevant to Complaint:** Copies of:

1. The bidder sheets for those who successfully purchased a Tax Sale Certificate in the 2010 tax sale.
2. The front page of each Tax Sale Certificate sold at the 2010 tax sale in numeric order.<sup>3</sup>

**Request Made:** October 22, 2010

**Response Made:** October 27, 2010<sup>4</sup>

**Custodian:** Donna M. Brady<sup>5</sup>

**GRC Complaint Filed:** November 17, 2010<sup>6</sup>

**Background**

**August 28, 2012**

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 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, found that:

1. The method of deletion by whiting out certain information used to redact the mailing address, telephone number and fax number for the bank, the mailing address and fax number for the individual, and everything below the date and signature lines of the Tax Sale Bidder Information Sheets in request item number 1, and the bank’s address and the individual’s address in request item number 2 did not allow the Complainant to clearly identify the specific location and the amount of

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

<sup>2</sup> Represented by John Miller, Esq., The Buzak Law Group (Montville, NJ).

<sup>3</sup> There were other records requested that are not relevant to this complaint.

<sup>4</sup> The Custodian simultaneously sent three (3) separate e-mails to the Complainant on October 27, 2010, corresponding to the Complainant’s three enumerated request items.

<sup>5</sup> Ms. Brady is the Deputy Township Clerk and the Custodian.

<sup>6</sup> The GRC received the Denial of Access Complaint on said date.

redactions made. Therefore, the Custodian's method of redaction is not "...a visually obvious method that shows the requestor the specific location of any redacted material in the record" and is thus not appropriate under OPRA pursuant to Wolosky v. Andover Regional School District (Sussex), GRC Complaint No. 2009-94 (April 2010) and N.J.S.A. 47:1A-5.g.

2. 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 a specific legal basis for the redactions made to the records responsive to request item number 1 and the records responsive to request item number 2 constitutes an unlawful denial of access.
3. The Custodian shall disclose to the Complainant the records responsive to request item number 1 and request item number 2 and each redaction of information shall be made to the records in a visually obvious manner.
4. **The Custodian shall comply with paragraph #3 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director.**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

#### **August 29, 2012**

Council's Interim Order ("Order") distributed to the parties.<sup>7</sup>

#### **September 6, 2012**

Letter from the Custodian's Counsel to the GRC. The Custodian's Counsel forwards to the GRC the Custodian's certification dated September 5, 2012. The Custodian certifies that pursuant to the terms of the Order she disclosed to the Complainant the records responsive to request item numbers 1 and 2, which are the bidder sheets for those who successfully purchased a Tax Sale Certificate in the 2010 tax

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<sup>7</sup> UPS Next Day Air® Proof of Delivery revealed that the Order was delivered to the Custodian on August 30, 2012 at 10:24 a.m.



sale with the telephone number and the federal tax identification numbers redacted in a visually obvious manner and the unredacted front page of each Tax Sale Certificate sold at the 2010 tax sale in numeric order, respectively. The Custodian also certifies that she included a detailed document index explaining the lawful basis for each redaction.

### Analysis

#### **Whether the Custodian has complied with the Council's Interim Order dated August 28, 2012?**

At its August 28, 2012 public meeting, the Council ordered the Custodian to disclose within five (5) business days from receipt of the Council's Interim Order the records responsive to request item number 1 and request item number 2 of the Complainant's OPRA request with each redaction of information made to the records in a visually obvious manner, together with a detailed document index explaining the lawful basis for each redaction. The Council further ordered the Custodian to simultaneously provide certified confirmation of compliance in accordance with N.J. Court Rule 1:4-4 to the Executive Director.

On September 6, 2012, the Custodian provided certified confirmation that she provided the following records to the Complainant:

- The bidder sheets for those who successfully purchased a Tax Sale Certificate in the 2010 tax sale with the telephone number and the federal tax identification numbers redacted in a visually obvious manner.
- The unredacted front page of each Tax Sale Certificate sold at the 2010 tax sale in numeric order.

Therefore, because the Custodian disclosed to the Complainant all records ordered for disclosure pursuant to the Order and provided certified confirmation of compliance to the Executive Director within the time period provided for compliance with said Order, the Custodian fully complied with the Council's August 28, 2012 Interim Order.

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

OPRA states that:

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

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

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

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, although the Custodian denied access to the mailing address, telephone number and fax number of the bank in request item number 1 and the mailing address and fax number for an individual in request item number 2, and although the Custodian failed to redact the records in a visually obvious manner, the Custodian did fully comply in a timely manner with the terms of the Council’s August 28, 2012 Interim Order. Moreover, the evidence of record does not indicate that the Custodian’s violations of OPRA 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.

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

OPRA provides that:

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

- institute a proceeding to challenge the custodian's decision by filing an action in Superior Court...; or
- in lieu of filing an action in Superior Court, file a complaint with the Government Records Council...

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

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

In Teeters, the complainant appealed from a final decision of the Government Records Council which denied an award for attorney’s fees incurred in seeking access to certain public records via two complaints she filed under the 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), *cert. 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)."

The Complainant's Counsel filed this complaint on November 17, 2010 requesting the following:

1. Disclosure of copies of request item numbers 1 and 2 redacted in a visually obvious manner.
2. An explanation of the specific legal basis for each redaction made to the records.
3. Disclosure of the addresses of all tax lien purchasers or bidders, all telephone numbers and fax numbers of corporations identified in the tax sale documents, and all other information to which there is not a reasonable expectation of privacy.
4. A determination that the Complainant is a prevailing party entitled to reasonable attorney's fees pursuant to N.J.S.A. 47:1A-6.

The Custodian certified in her SOI dated April 13, 2011, that she erroneously redacted too much information from the requested records before disclosing them to the Complainant and, to correct the errors she made by redacting too much information, she disclosed corrected copies of the records to the Complainant on April 13, 2011. Further, the Council in its August 28, 2012 Interim Order directed the Custodian to disclose the records responsive to request item number 1 and request item number 2 of the Complainant's OPRA request, to provide the lawful basis for each redaction, and to make each redaction in a visually obvious manner. The Custodian submitted certified confirmation of compliance on September 6, 2012, certifying that she disclosed the records responsive to request item number 1 and request item number 2 of the Complainant's OPRA request with each lawful redaction made in a visually obvious manner. Therefore, the Complainant is a prevailing party entitled to an award of reasonable attorney's fees.

Pursuant to Teeters, *supra*, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, after the complaint was filed the Custodian corrected errors she made by redacting too much information and disclosed corrected copies of the records to the Complainant on April 13, 2011. Moreover, the Custodian complied with the Council's August 28, 2012 Interim Order by certifying that she disclosed the records responsive to request item number 1 and request item number 2 of the Complainant's OPRA request with each lawful redaction made in a visually obvious manner. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual circumstances ... justify[ing] an upward adjustment of the lodestar[;]" this matter was not one of significant public importance, was not an issue of first impression before the Council, and the risk of failure was not high because the issues herein involved matters of settled law.

## Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian disclosed to the Complainant all records ordered for disclosure pursuant to the Order and provided certified confirmation of compliance to the Executive Director within the time period provided for compliance with said Order, the Custodian fully complied with the Council's August 28, 2012 Interim Order.
2. Although the Custodian denied access to the mailing address, telephone number and fax number of the bank in request item number 1 and the mailing address and fax number for an individual in request item number 2, and although the Custodian failed to redact the records in a visually obvious manner, the Custodian did fully comply in a timely manner with the terms of the Council's August 28, 2012 Interim Order. Moreover, the evidence of record does not indicate that the Custodian's violations of OPRA 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.
3. Pursuant to Teeters, *supra*, the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, after the complaint was filed the Custodian corrected errors she made by redacting too much information and disclosed corrected copies of the records to the Complainant on April 13, 2011. Moreover, the Custodian complied with the Council's August 28, 2012 Interim Order by certifying that she disclosed the records responsive to request item number 1 and request item number 2 of the Complainant's OPRA request with each lawful redaction made in a visually obvious manner. Further, the relief ultimately achieved had a basis in law. Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee pursuant to N.J.S.A. 47:1A-6, Teeters, *supra*, and Mason, *supra*. Thus, this complaint should be referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Based on the New Jersey Supreme Court's decision in New Jerseyans for a Death Penalty Moratorium v. NJ Department of Corrections, 185 N.J. 137, 156-158 (2005) and the Council's decisions in Wolosky v. Township of Sparta (Sussex), GRC Complaint Nos. 2008-219 and 2008-277 (November 2011), an enhancement of the lodestar fee is not appropriate in this matter because the facts of this complaint do not rise to a level of "unusual

circumstances ... justify[ing] an upward adjustment of the lodestar[;]”  
this matter was not one of significant public importance, was not an  
issue of first impression before the Council, and the risk of failure was  
not high because the issues herein involved matters of settled law.

Prepared By: John E. Stewart, Esq.

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

September 18, 2012





State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

August 28, 2012 Government Records Council Meeting

Jesse Wolosky  
Complainant

Complaint No. 2010-308

v.

Township of Randolph (Morris)  
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 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. The method of deletion by whiting out certain information used to redact the mailing address, telephone number and fax number for the bank, the mailing address and fax number for the individual, and everything below the date and signature lines of the Tax Sale Bidder Information Sheets in request item number 1, and the bank’s address and the individual’s address in request item number 2 did not allow the Complainant to clearly identify the specific location and the amount of redactions made. Therefore, the Custodian’s method of redaction is not “...a visually obvious method that shows the requestor the specific location of any redacted material in the record” and is thus not appropriate under OPRA pursuant to Wolosky v. Andover Regional School District (Sussex), GRC Complaint No. 2009-94 (April 2010) and N.J.S.A. 47:1A-5.g.
2. 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 a specific legal basis for the redactions made to the records responsive to request item number 1 and the records responsive to request item number 2 constitutes an unlawful denial of access.
3. The Custodian shall disclose to the Complainant the records responsive to request item number 1 and request item number 2 and each redaction of information shall be made to the records in a visually obvious manner.
4. **The Custodian shall comply with paragraph #3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining**

**the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**

5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
6. 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 28<sup>th</sup> Day of August, 2012

Robin Berg Tabakin, 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: August 29, 2012**

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

<sup>2</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
August 28, 2012 Council Meeting**

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

**GRC Complaint No. 2010-308**

v.

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

**Records Relevant to Complaint:** Copies of:

1. The bidder sheets for those who successfully purchased a Tax Sale Certificate in the 2010 tax sale.
2. The front page of each Tax Sale Certificate sold at the 2010 tax sale in numeric order.<sup>3</sup>

**Request Made:** October 22, 2010

**Response Made:** October 27, 2010<sup>4</sup>

**Custodian:** Donna M. Brady<sup>5</sup>

**GRC Complaint Filed:** November 17, 2010<sup>6</sup>

**Background**

**October 22, 2010**

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this Complaint listed above in an e-mail referencing OPRA. The Complainant indicates that the preferred method of delivery is electronically via e-mail in separately labeled .PDF format files for each item of the request.

**October 22, 2010**

E-mail from the Custodian to the Complainant. The Custodian informs the Complainant that his request has been received by the municipality and that it is being processed.

**October 27, 2010**

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the third (3<sup>rd</sup>) business day following

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

<sup>2</sup> Represented by John Miller, Esq., The Buzak Law Group (Montville, NJ).

<sup>3</sup> There were other records requested that are not relevant to this complaint.

<sup>4</sup> The Custodian simultaneously sent three (3) separate e-mails to the Complainant on October 27, 2010, corresponding to the Complainant's three enumerated request items.

<sup>5</sup> Ms. Brady is the Deputy Township Clerk and the Custodian.

<sup>6</sup> The GRC received the Denial of Access Complaint on said date.

receipt of such request. The Custodian identifies each item requested by the Complainant by item number and states that said item is attached.

**November 17, 2010**

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

- Complainant’s OPRA request dated October 22, 2010
- E-mail from the Custodian to the Complainant dated October 22, 2010
- Custodian’s response to the OPRA request dated October 27, 2010

The Complainant’s Counsel states that the Complainant filed his OPRA request on October 22, 2010 and the Custodian responded to the request by disclosing copies of the requested records on October 27, 2010. Counsel states that although the requested records were disclosed, the records responsive to request item number 1 had the address, telephone number, fax number and tax identification number of incorporated U.S. Bank TLSG redacted, as well as the address and social security or tax identification number of a bidder. Counsel also states that the records responsive to request item number 2 had the addresses of the purchasers of unpaid tax liens redacted. Counsel states that other information could have been redacted from the requested records but because the Custodian did not redact the records in a manner that is visually obvious or provide a reason for making the redactions it is impossible to tell.

Counsel acknowledges that OPRA allows the Custodian to redact certain information; however, he argues that the redactions must be made in a visually obvious manner. Counsel cites to Wolosky v. Andover Regional School District, GRC Complaint No. 2009-94 (April 2010) in support of his argument. Counsel also states that pursuant to Renna v. Union County Improvement Authority, GRC Complaint No. 2008-86 (March 2009) and N.J.S.A. 47:1A-5.g, the Custodian was required to provide a specific reason for each redaction in writing which she failed to do in the instant complaint.

Counsel further argues that, although it is impossible for him to know everything that was redacted from the requested records, he believes after examining the redacted records that the mailing addresses of both an incorporated bank and an individual bidder or purchaser (“individual”) have been redacted as well as the bank’s telephone and fax numbers. Counsel states that there is no reason to redact a corporation’s address, telephone number, and fax number because personal privacy interests do not extend to corporations. Counsel further states that the Custodian should not have redacted the individual’s address. Counsel points out that as the purchaser of a tax lien, the individual has no reasonable expectation of privacy in the address as it appears on the requested Tax Sale Bidder Sheets and Certificates of Sale. Counsel further notes that the Certificates of Sale, in order to be redeemed, must be recorded by the individual. Counsel states that the Complainant does not dispute the redaction of social security and taxpayer identification numbers.

The Complainant requests that the Council Order the Custodian to:

- Disclose copies of request item numbers 1 and 2 redacted in a visually obvious manner.
- Provide a specific legal basis for each redaction.
- Disclose the addresses of all tax lien purchasers or bidders, all telephone numbers and fax numbers of corporations identified in the tax sale documents, and all other information to which there is not a reasonable expectation of privacy.
- Find that the Complainant is the prevailing party and award him reasonable attorney fees pursuant to Teeters v. DYFS, 387 N.J. Super. 423 (App. Div. 2006) and N.J.S.A. 47:1A-6.

The Complainant does not agree to mediate this complaint.

#### **April 6, 2011**

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

#### **April 13, 2011**

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated October 22, 2010
- Memorandum from the Custodian to numerous Randolph Township Departments dated October 22, 2010
- Custodian’s response to the OPRA request dated October 27, 2010
- UPS Next Day Air® shipping receipt from the GRC to the Custodian dated April 6, 2011
- Copy of request item number 1 in unredacted form except for the bidder’s telephone number and federal tax identification or social security number<sup>7</sup>
- Copy of request item number 2 in unredacted form<sup>8</sup>

The Custodian certifies that her search for the requested records involved circulating a memorandum to numerous Township Departments asking those Departments to review the Complainant’s OPRA request and deliver to the Custodian’s office within five (5) days any records that are responsive to the request. The Custodian also certifies that the records that may have been responsive to the request must be retained permanently in accordance with the Records Destruction Schedule established and approved by Records Management Services.

The Custodian certifies that the GRC in its April 6, 2011 letter forwarding the Denial of Access Complaint to her stated that it was being sent via e-mail. The Custodian further certifies that she did not receive the letter via e-mail on April 6, 2011, but instead she received it on April 7, 2011, via UPS Next Day Air®. The Custodian certifies that she has attached the UPS receipt as proof that the Denial of Access Complaint was sent via UPS Next Day Air®.<sup>9</sup>

<sup>7</sup> This item is marked as “Exhibit B.”

<sup>8</sup> This item is marked as “Exhibit B.”

<sup>9</sup> On April 6, 2011, the GRC prepared the cover letter forwarding the request for the Statement of Information which contained the Denial of Access Complaint; however, the PDF containing the referenced documents was too large to be sent as an attachment to the e-mail. Therefore, the GRC sent the documents

The Custodian certifies that she received the Complainant's OPRA request on October 22, 2012 and responded to the request on October 27, 2010 by disclosing the requested records. The Custodian also certifies that she redacted from request item number 1 the mailing address, telephone number, fax number, and social security or federal tax identification number for the bank and tax sale certificate bidder. The Custodian also certifies that she redacted from request item number 2 the buyers' addresses. The Custodian certifies that, contrary to the Complainant's assertions, she did make all redactions in a visually obvious method because upon reading the responsive records, it is obvious that certain redactions were made and the redactions were apparent to the Complainant because he correctly identified all of the redactions that she made.

The Custodian certifies that in request item number 1, redactions of the mailing address, telephone number and fax number for the bank and the redactions of the mailing address and fax number for the individual were not necessary. The Custodian certifies that making such redactions was an error on her part. The Custodian further certifies that the redaction of the buyers' addresses from request item number 2 was also an error. The Custodian states that to correct the errors she made by redacting too much information she is disclosing as Exhibit B the records responsive to request items numbered 1 and 2 without redactions, except for all social security or federal tax identification numbers and the telephone number for the individual.<sup>10</sup> The Custodian certifies that she redacted the individual's telephone number because it is not known to the Custodian whether the telephone number is unlisted, and unlisted telephone numbers are exempt from disclosure pursuant to N.J.S.A. 47:1A-1. and N.J.S.A. 47:1A-1.1.<sup>11</sup>

The Custodian certifies that the Complainant is not entitled to attorney fees because he does not meet the standard of a "prevailing party" pursuant to N.J.S.A. 47:1A-6. and New Jersey case law. The Custodian certifies that she admitted that the redactions of the mailing address, telephone number and fax number for the bank and the redactions of the mailing address and fax number for the individual were made in error and were subsequently corrected and disclosed with her SOI. Further, the Custodian cites to Burnett v. County of Bergen, 402 N.J. Super. 319 (App. Div. 2008) and certifies that in Burnett, the court denied a claim for attorney's fees for redaction of social security numbers. The Custodian certifies that in the instant complaint, the claim for attorney's fees resulting from the redaction of addresses and telephone numbers should also be denied.

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via UPS Next Day Air®. The UPS package was sent on April 6, 2011 for delivery on April 7, 2011. The GRC noted on the shipping form which the Custodian attached to her SOI "complaint too large to scan" to indicate that the complaint was too large to be delivered via e-mail as a scanned PDF.

<sup>10</sup> The Custodian certified that she disclosed the records to both the Complainant and the Complainant's Counsel on April 13, 2011 as an attachment to the SOI marked "Exhibit B."

<sup>11</sup> In the SOI the Custodian advances a lengthy argument defending her reason for denying access to the bidder's telephone number; however, the argument was unnecessary because the Complainant did not assert that the bidder's telephone number should be disclosed. The Complainant argued that the bank's address and telephone number should be disclosed; however, with respect to the bidder the Complainant argued only that the address should be disclosed.

**April 23, 2012**

E-mail from the GRC to the Complainant's Counsel. The GRC asks Counsel if any of the requested records have been disclosed to the Complainant since he filed his complaint.

**April 23, 2012**

E-mail from the Complainant's Counsel to the GRC. Counsel states that neither he nor the Complainant has received any of the requested records since filing the complaint.

**Analysis**

**Whether the Custodian, by redacting certain information, 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.

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.

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 government record shall not include...that portion of any document which discloses the *social security number, credit card number, unlisted*

*telephone number or driver license number of any person...*” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA states 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 also states 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.

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.

There is no dispute between the parties that the Custodian received the Complainant’s OPRA request on October 22, 2012 and responded to said request on October 27, 2010 by disclosing the requested records. The issue here is whether the Custodian denied the Complainant access to the requested records by unlawfully redacting certain information that should have been disclosed, making the redactions in a manner that was not visually obvious, and failing to provide a specific legal basis for each redaction.

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). Accordingly, the Custodian has a duty to redact from the requested records certain information prior to disclosure if such information would violate the citizen's reasonable expectation of privacy.

Here, the Custodian certified that she redacted certain information from the requested records but she candidly certified that she made several errors redacting the information. The Custodian certified that she made errors in request item number 1 by redacting the mailing address, telephone number and fax number for the bank and the mailing address and fax number for the individual. The Custodian also certified that in request item number 2 she erroneously redacted the bank's address and the individual's address. The Custodian certified that, to correct the errors she made by redacting too much information, she prepared the records responsive to request items numbered 1 and 2 without redactions except for the social security or federal tax numbers of the individual and bank and the telephone number for the individual. The Custodian certified that she marked these records as Exhibit B and disclosed them to the Complainant on April 13, 2011.<sup>12</sup>

In opposition, the Complainant stated that the manner in which the Custodian made the redactions does not allow the redactions to be visually obvious.<sup>13</sup> For that reason, the Complainant stated that it is impossible to determine the extent of the redactions. The Complainant stated, however, that he was able to determine that some information which should not have been redacted was redacted from request item number 1 and request item number 2. Specifically, the Complainant disputed redaction of the corporate bank's address, telephone number, and fax number because the Complainant asserted that personal privacy interests do not extend to corporations. The Complainant also disputed redaction of the bidder's and purchaser's addresses because he asserted that as the purchaser of a tax lien the bidder/purchaser has no reasonable expectation of privacy in the address as it appears on the requested Tax Sale Bidder Sheets and Certificates of Sale.

The Custodian, in disputing the Complainant's argument, certified that all redactions made to the requested records were made in a visually obvious method because when one reads the response documents it is obvious certain redactions were made.<sup>14</sup> Further, the Custodian certified that "...the Complainant correctly identified all of the redactions made and stated as such in the [complaint]." (Emphasis in original.) The Custodian certified that, although she failed to provide the reasons for the redactions when she disclosed the records to the Complainant on October 27, 2010, she subsequently provided the reasons for the redactions in her SOI.

The Custodian's certification is not accurate. Upon comparing the Tax Sale Bidder Information Sheets that were originally disclosed with the same records that were

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<sup>12</sup> These records were disclosed as an attachment to the SOI, upon which the Complainant and the Complainant's Counsel were copied.

<sup>13</sup> Although the parties do not describe the method of redaction, it appears from an examination of the disclosed records attached to both the complaint and the SOI that the Custodian used correction fluid or correction tape to white-out the deleted information.

<sup>14</sup> By this, the Custodian is referring to redacted responses which follow prompts seeking specific information.

subsequently disclosed as Exhibit B, it is clear that when first disclosed, everything below the date and signature lines, which constitutes fully one-quarter to one-third of the page, was redacted. These portions of the requested records, which were completely redacted, contained important information including, on one of the records, the tax collector's date stamp. As such, it was not visually obvious that any content was redacted below the date and signature lines on these records. Moreover, even when a response to a prompt seeking specific information is redacted, it may not be visually obvious that something was redacted if it was whited-out because the person who made the record may have just failed to respond to that particular prompt. Thus, the reader cannot be reasonably certain that part of a record was redacted unless a portion of the record is visibly obliterated or a redaction index accompanies the record at the time of disclosure.

In Wolosky v. Andover Regional School District (Sussex), GRC Complaint No. 2009-94 (April 2010), 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 the instant complaint, the Custodian used a method of redaction in which the Custodian whited out the information that the Custodian did not want to disclose. 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 location and volume of the material underlying the redactions made was not visually obvious to the Complainant. This is quite apparent in the redactions made to the bottom of the Tax Sale Bidder Information Sheets where the method of deletion used did not allow the Complainant to identify the specific location and the amount of redactions made.

Accordingly, the method of deletion by whiting out certain information used to redact the mailing address, telephone number and fax number for the bank, the mailing address and fax number for the individual, and everything below the date and signature lines of the Tax Sale Bidder Information Sheets in request item number 1, and the bank's address and the individual's address in request item number 2 did not allow the Complainant to clearly identify the specific location and the amount of redactions made. Therefore, the Custodian's method of redaction is not "...a visually obvious method that shows the requestor the specific location of any redacted material in the record" and is thus not appropriate under OPRA pursuant to Wolosky, supra, and N.J.S.A. 47:1A-5.g.

Furthermore, the Custodian failed to provide the Complainant with a specific legal basis for each redaction. 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 "...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. As such, 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.

Accordingly, pursuant to N.J.S.A. 47:1A-5.g. and consistent with the GRC's ruling in Morris, supra, the Custodian's failure to provide a specific legal basis for the redactions made to the records responsive to request item number 1 and the records responsive to request item number 2 constitutes an unlawful denial of access.

The Custodian certifies that she subsequently provided within her SOI the reasons for the redactions made to the requested records. This is not accurate. In her SOI the Custodian provided the legal reason for the redaction of the individual's telephone number by citing N.J.S.A. 47:1A-5.1. and N.J.S.A. 47:1A-1.1. However, the allegation in the complaint is that the Custodian did not give the legal basis for redacting the mailing address, telephone number and fax number for the bank and the mailing address and fax number for the individual. Moreover, the Complainant alleged that other information may have been redacted that was unknown to the Complainant because the Custodian did not use a visually obvious method of redaction and did not provide a specific legal basis for each redaction.<sup>15</sup> If the Custodian had prepared a complete document index pursuant to the New Jersey Superior Court's decision in Paff v. NJ

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<sup>15</sup> The extent of such "unknown redacted information" became apparent when the requested records that were disclosed on October 27, 2010 were compared to the records disclosed on April 13, 2011 marked as the Custodian's Exhibit B and it was noted that the Custodian had redacted everything below the date and signature lines of the Tax Sale Bidder Information Sheets in request item number 2.

Department of Labor, 392 N.J. Super. 334 (App. Div. 2007), she would have found it necessary to focus her attention on each redaction and provide a legal reason for making the redaction. This exercise may have prevented the Custodian from making so many redaction errors prior to disclosing the requested records to the Complainant on October 27, 2010.

The Custodian certified that in order to correct the records disclosed with too much information redacted, she disclosed to the Complainant on April 13, 2011, the records responsive to request items numbered 1 and 2 with only the social security numbers, federal tax identification numbers, and the individual's telephone number redacted. The Custodian certified that the records were disclosed to the Complainant as an attachment to the SOI.<sup>16</sup> The Complainant's Counsel stated on April 23, 2012, however, that the Custodian did not disclose any records since filing the complaint.

Accordingly, the Custodian shall disclose to the Complainant the records responsive to request item number 1 and request item number 2 and each redaction of information shall be made in a visually obvious manner.

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

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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

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. The method of deletion by whiting out certain information used to redact the mailing address, telephone number and fax number for the bank, the mailing address and fax number for the individual, and everything below the date and signature lines of the Tax Sale Bidder Information Sheets in request item number 1, and the bank's address and the individual's address in request item number 2 did not allow the Complainant to clearly identify the specific location and the amount of redactions made. Therefore, the Custodian's method of redaction is not "...a visually obvious method that shows the requestor the specific

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<sup>16</sup> Disclosing requested records via an attachment to an SOI is not a proper means of disclosure. The SOI provides that "[t]he signed Statement of Information must be returned to [the] Government Records Council" and that only a copy must be provided to the Complainant. OPRA requires the Custodian to disclose records to the requestor directly, not indirectly. See N.J.S.A. 47:1A-5.

location of any redacted material in the record” and is thus not appropriate under OPRA pursuant to Wolosky v. Andover Regional School District (Sussex), GRC Complaint No. 2009-94 (April 2010) and N.J.S.A. 47:1A-5.g.

2. 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 a specific legal basis for the redactions made to the records responsive to request item number 1 and the records responsive to request item number 2 constitutes an unlawful denial of access.
3. The Custodian shall disclose to the Complainant the records responsive to request item number 1 and request item number 2 and each redaction of information shall be made to the records in a visually obvious manner.
4. **The Custodian shall comply with paragraph #3 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>17</sup> to the Executive Director.<sup>18</sup>**
5. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.
6. 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: Karyn Gordon, Esq.  
Acting Executive Director

August 21, 2012

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<sup>17</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>18</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.