



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

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TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

FINAL DECISION

December 18, 2012 Government Records Council Meeting

Frank O'Shea, Esq.  
(on behalf of Ellen O'Shea)  
Complainant

Complaint No. 2011-178

v.  
Township of South Brunswick (Middlesex)  
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council ("Council") considered the October 23, 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 establishes that the requested audiotope contains the identification of the individual who reported a noise complaint about a barking dog at 10:00 p.m. at 144 Providence Boulevard, Kendall Park, New Jersey on or about March 15, 2011, and because the evidence of record further establishes that the risk of unsolicited contact by the Complainant to the individual identified in the requested audiotope is high, the Custodian has borne her burden of proof under N.J.S.A. 47:1A-6 that disclosure of the requested audiotope would violate the citizen's reasonable expectation of privacy pursuant to N.J.S.A. 47:1A-1. See Merino v. Borough of Ho-Ho-Kus (Bergen), GRC Complaint 2003-110 (February 2004) and Perino v. Borough of Haddon Heights (Camden), GRC Complaint No. 2004-128 (November 2004).
2. 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 because no relief was ordered by the Council. Specifically, the Custodian lawfully denied access to the requested audiotope because the release of the audiotope would violate the citizen's reasonable expectation of privacy and could result in unsolicited contact and confrontation between the citizen and the Complainant. 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 18<sup>th</sup> Day of December, 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: December 20, 2012**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 18, 2012 Council Meeting**

**Frank O'Shea, Esq.**  
**(on behalf of Ellen O'Shea)<sup>1</sup>**  
**Complainant**

**GRC Complaint No. 2011-178**

v.

**Township of South Brunswick (Middlesex)<sup>2</sup>**  
**Custodian of Records**

**Records Relevant to Complaint:** Audiotape of a telephone call and follow up by a citizen to the South Brunswick Police Department ("Police Department") and the Police Dispatcher regarding a noise complaint about a barking dog at 10:00 p.m. at 144 Providence Boulevard, Kendall Park, New Jersey on or about March 15, 2011.<sup>3</sup>

**Request Made:** March 29, 2011

**Response Made:** April 26, 2011

**Custodian:** Barbara Nyitrai

**GRC Complaint Filed:** May 19, 2011<sup>4</sup>

**Background**

**March 29, 2011**

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

**April 26, 2011**

Custodian's response to the OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the seventh (7<sup>th</sup>) business day following receipt of such request.<sup>5</sup> The Custodian states that access to the requested audiotape is denied because pursuant to N.J.S.A. 47:1A-1 because "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." Serrano v. South Brunswick Township, 358 N.J. Super. 352 (App. Div. 2003).

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<sup>1</sup> The Complainant is an attorney representing Ms. Ellen O'Shea.

<sup>2</sup> Represented by Donald Sears, Esq., (South Brunswick, NJ).

<sup>3</sup> The Complainant requests additional records not relevant to the adjudication of this complaint. The address listed in the Complainant's OPRA request is the Complainant's home address.

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

<sup>5</sup> The Custodian certifies in the SOI that she received the Complainant's OPRA request on April 14, 2011  
Frank O'Shea, Esq. (on behalf of Ellen O'Shea) v. Township of South Brunswick (Middlesex), 2011-178 – Findings and Recommendations of the Executive Director

**May 19, 2011**

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

- Complainant’s OPRA request dated March 29, 2011
- Letter from the Custodian to the Complainant dated April 26, 2011.

The Complainant states that the Custodian received his OPRA request on April 14, 2011. The Complainant also states that the Custodian denied him access to the requested audiotape on April 26, 2011 based on the potential harm of contact between a citizen and the Complainant. The Complainant states that the Court in Serrano, supra, required the custodian to disclose tapes. The Complainant also states that Serrano also discusses expectation of privacy. The Complainant argues that an expectation of privacy does not exist when the citizen is a witness to an incident and voluntarily calls the police to file a complaint.

The Complainant does not agree to mediate this complaint.

**May 24, 2011**

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

**June 1, 2011<sup>6</sup>**

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated March 29, 2011
- Letter from the Custodian to the Complainant dated April 26, 2011.

The Custodian certifies that she received the Complainant’s OPRA request on April 14, 2011. The Custodian certifies that her search for the requested audiotape included forwarding the Complainant’s OPRA request to the Police Department where the Police Department located the audiotape responsive to the request. The Custodian also certifies that although no audiotapes were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services, there is a thirty-one (31) day retention for these audiotapes.

The Custodian argues that pursuant to N.J.S.A. 47:1A-1, “a public agency has a responsibility and an obligation to safeguard from public access a citizens’ personal information with which it has been entrusted when disclosure would violate the citizen’s reasonable expectation of privacy.” The Custodian states that the citizen who telephoned the Police Department to file a noise complaint requested that they remain anonymous. The Custodian also states that the citizen only provided personal information when told by the Police Dispatcher that they would remain anonymous. The Custodian certifies that the audiotape reveals the name of the individual who made the noise complaint. The Custodian argues that individual’s voice may be known to the Complainant who is also the owner of the property for which the noise complaint was made. The Custodian also argues that even with redacting the citizen’s name, that individual’s voice may still

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<sup>6</sup> The Custodian submitted additional documentation not relevant to the adjudication of this complaint. Frank O’Shea, Esq. (on behalf of Ellen O’Shea) v. Township of South Brunswick (Middlesex), 2011-178 – Findings and Recommendations of the Executive Director 2

expose their identity and thereby violate their reasonable expectation of privacy. The Custodian certifies that during a telephone conversation with the Complainant, the Complainant stated that if he did not receive the audiotape he would contact all twelve (12) of his neighbors to find out who filed the noise complaint with the Police Department.

### Analysis

#### **Whether the Custodian unlawfully denied access to the requested audiotape?**

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions*...a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would *violate the citizen's reasonable expectation of privacy*.” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

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

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

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

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In the instant complaint, the Complainant requested an audiotape of a telephone call and follow up by a citizen to the Police Department regarding a noise complaint about a barking dog. The Custodian timely responded to the Complainant denying access to the requested audiotape in writing stating pursuant to N.J.S.A. 47:1A-1 because “a public agency has a responsibility and an obligation to safeguard from public access a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy.”

In Merino v. Borough of Ho-Ho-Kus (Bergen), GRC Complaint 2003-110 (February 2004), the Council first addressed the citizen's reasonable expectation of privacy pursuant to N.J.S.A. 47:1A-1 and found that the New Jersey Superior Court, Appellate Division, held that the GRC must enforce OPRA's declaration in N.J.S.A. 47:1A-1, that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 368-69 (App. Div. 2003). *See also* National Archives and Records Administration v. Favish, 541 U.S. 157, 124 S.Ct. 1570 (U.S. March 30, 2004) (personal privacy interests are protected under FOIA).

Further in Perino v. Borough of Haddon Heights (Camden), GRC Complaint No. 2004-128 (November 2004), the complainant requested a police call sheet dated May 23, 2004 regarding a noise complaint at the complainant's residence. The custodian asserted in the SOI that this record could be released only after the name, address and telephone number of the individual who made the noise complaint was redacted. The Council held that the individual's name, address and phone number should remain redacted. The Council also held "...disclosure of the citizen's name, address and phone number could result in unsolicited contact and confrontation between the citizen and the complainant."

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* Avin v. Borough of Oradell (Bergen), 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 (Bergen), 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).

In the matter before the Council, the Complainant filed an OPRA request seeking an audiotape of a telephone call and follow up by a citizen to the Police Department regarding a noise complaint about a barking dog at 10:00 p.m. at 144 Providence Boulevard, Kendall Park, New Jersey on or about March 15, 2011. The Complainant asserted in his Denial of Access Complaint that the expectation of privacy set forth in N.J.S.A. 47:1A-1 does not exist when the citizen is a witness to an incident and voluntarily calls the police to file a complaint.

Conversely, the Custodian certified in the SOI that the audiotape reveals the name of the individual who made the noise complaint. The Custodian also certified in the SOI

that the caller only identified himself when assured that he or she would remain anonymous. The Custodian argued in the SOI that the individual's voice may be known to the Complainant, who is also the owner of the property for which the noise complaint was made. The Custodian also certified in the SOI that during a telephone conversation with the Complainant, the Complainant stated that if he did not receive the audiotape, he would contact all twelve (12) of his neighbors to find out who filed the noise complaint with the Police Department. The Complainant has submitted no evidence to refute the Custodian's certification in this regard.

As in Perino, *supra*, the Complainant herein requested records pertaining to a complaint filed against himself, specifically requesting records showing the identity of the individual who filed the complaint. The Custodian certified that the caller only identified himself after assurance that he or she would remain anonymous. The Custodian further certified that the Complainant expressed the intention of contacting all of his neighbors to ascertain who filed the noise complaint against him. The Complainant has not submitted any evidence to refute the Custodian's certification, but has asserted that the expectation of privacy does not exist when the citizen is a witness to an incident and voluntarily calls the police to file a complaint.

The evidence of record therefore indicates that the requested audiotape contains the identity of the individual who reported a noise complaint about a barking dog at 10:00 p.m. at 144 Providence Boulevard, Kendall Park, New Jersey on or about March 15, 2011. The evidence of record also establishes that the risk of unsolicited contact by the Complainant to the individual identified in the requested audiotape is high. Moreover, the Complainant's assertion that the expectation of privacy does not exist when the citizen is a witness to an incident and voluntarily calls the police to file a complaint is not supported by Perino, *supra*.

Because the evidence of record establishes that the requested audiotape contains the identification of the individual who reported a noise complaint about a barking dog at 10:00 p.m. at 144 Providence Boulevard, Kendall Park, New Jersey on or about March 15, 2011, and because the evidence of record further establishes that the risk of unsolicited contact by the Complainant to the individual identified in the requested audiotape is high, the Custodian has borne her burden of proof under N.J.S.A. 47:1A-6 that disclosure of the requested audiotape would violate the citizen's reasonable expectation of privacy pursuant to N.J.S.A. 47:1A-1. See Merino, *supra*, and Perino, *supra*. The Custodian did not, therefore, unlawfully deny the Complainant access to the requested audiotape.

**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.*

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 Supreme 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.

However, the Court noted in Mason, supra, that 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 accepted the application of the catalyst theory within the context of OPRA, stating that:

“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 at 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 complaint, as in Mason, the Complainant's Denial of Access Complaint was not the catalyst for the release of the requested records, because the Custodian bore her burden of proof under N.J.S.A. 47:1A-6 that disclosure of the requested audiotape would violate the citizen's reasonable expectation of privacy pursuant to N.J.S.A. 47:1A-1. The Custodian did not, therefore, unlawfully deny the Complainant access to the requested audiotape.

Pursuant to Teeters, *supra*, 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, *supra*, no factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved because no relief was ordered by the Council. Specifically, the Custodian lawfully denied access to the requested audiotape because the release of the audiotape would violate the citizen's reasonable expectation of privacy and could result in unsolicited contact and confrontation between the citizen and the Complainant. 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 establishes that the requested audiotape contains the identification of the individual who reported a noise complaint about a barking dog at 10:00 p.m. at 144 Providence Boulevard, Kendall Park, New Jersey on or about March 15, 2011, and because the evidence of record further establishes that the risk of unsolicited contact by the Complainant to the individual identified in the requested audiotape is high, the Custodian has borne her burden of proof under N.J.S.A. 47:1A-6 that disclosure of the requested audiotape would violate the citizen's reasonable expectation of privacy pursuant to N.J.S.A. 47:1A-1. *See* Merino v. Borough of Ho-Ho-Kus (Bergen), GRC Complaint 2003-110 (February 2004) and Perino v. Borough of Haddon Heights (Camden), GRC Complaint No. 2004-128 (November 2004).

2. 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 because no relief was ordered by the Council. Specifically, the Custodian lawfully denied access to the requested audiotape because the release of the audiotape would violate the citizen's reasonable expectation of privacy and could result in unsolicited contact and confrontation between the citizen and the Complainant. 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*.

Prepared By: Harlynn A. Lack, Esq.  
Case Manager

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

October 23, 2012<sup>7</sup>

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<sup>7</sup> This complaint was prepared and scheduled for adjudication at the Council's October 30, 2012 meeting; however, said meeting was cancelled due to Hurricane Sandy. Additionally, the Council's November 27, 2012 was cancelled due to lack of quorum.  
Frank O'Shea, Esq. (on behalf of Ellen O'Shea) v. Township of South Brunswick (Middlesex), 2011-178 – Findings and Recommendations of the Executive Director