



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**

**April 30, 2013 Government Records Council Meeting**

Ken Schilling  
Complainant

Complaint No. 2011-294

v.

Township of Little Egg Harbor (Ocean)  
Custodian of Record

At the April 30, 2013 public meeting, the Government Records Council (“Council”) considered the April 23, 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 this complaint be dismissed because the Complainant’s Counsel withdrew this complaint on behalf of the Complainant in a letter to the GRC dated April 19, 2013. Therefore, no further adjudication is required.

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

Final Decision Rendered by the  
Government Records Council  
On The 30<sup>th</sup> Day of April, 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: May 2, 2013**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
April 30, 2013 Council Meeting**

**Ken Schilling<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-294**

v.

**Township of Little Egg Harbor (Ocean)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** All health insurance policies presently in effect, including names of persons insured and cost of insurance.

**Request Made:** May 26, 2011<sup>3</sup>

**Response Made:** May 31, 2011

**GRC Complaint Filed:** September 15, 2011<sup>4</sup>

**Background**

At its March 22, 2013 public meeting, the Council considered the March 15, 2013 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 on March 5, 2013, disclosed to the Complainant a copy of the Township's budget, which shows the amount the Township spends on health benefits and the amount the Township spends on life insurance plans as directed in the Council's Order and submitted to the GRC certified confirmation of compliance, the Custodian complied in a timely manner with the Council's February 26, 2013 Interim Order.
2. The Council determined that the Custodian's cited exemptions did not apply to the sum total amount of money the Township spends to provide its employees with health benefits and life insurance. See *N.J.A.C. 17:9-1.2, Brown v. Ocean City Board of Education (Cape May)*, GRC Complaint No. 2011-271 (December 2012). The Council therefore ordered the Custodian to disclose these amounts to the

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<sup>1</sup> Represented by Christopher D'Amore, Esq., Alterman & Associates, LLC (Marlton, NJ).

<sup>2</sup> Diana McCracken, Township Clerk, Custodian. Represented by Robin LaBue, Esq., Gilmore & Monahan, PC (Toms River, NJ).

<sup>3</sup> Although the Complainant's Denial of Access Complaint asserted that additional OPRA requests were at issue, the Complainant listed only the May 26, 2011 OPRA request for health insurance records as being at issue. Thus, the Council will only address this request.

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

Complainant. The Custodian thereafter complied in a timely manner with the terms of the Council's Order. Moreover, the Custodian did not unlawfully deny access to the requested health insurance information. 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 v. DYFS, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to Mason, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian provided responsive records pursuant to the Council's Order. 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.

On March 25, 2013, the Council distributed its Interim Order to all parties. On April 9, 2013, the Custodian's Counsel filed a request for reconsideration. On April 19, 2013, the Complainant's Counsel sent a letter to the GRC withdrawing this complaint on behalf of the Complainant.

### **Analysis**

No analysis required.<sup>5</sup>

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that this complaint be dismissed because the Complainant's Counsel withdrew this complaint on behalf of the Complainant in a letter to the GRC dated April 19, 2013. Therefore, no further adjudication is required.

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<sup>5</sup> The GRC declines to rule on the Custodian Counsel's request for reconsideration because the Complainant withdrew this complaint.

Prepared By: Frank F. Caruso  
Senior Case Manager

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

April 23, 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

March 22, 2013 Government Records Council Meeting

Ken Schilling  
Complainant

Complaint No. 2011-294

v.

Township of Little Egg Harbor (Ocean)  
Custodian of Record

At the March 22, 2013 public meeting, the Government Records Council (“Council”) considered the March 15, 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:

1. Because the Custodian on March 5, 2013, disclosed to the Complainant a copy of the Township’s budget, which shows the amount the Township spends on health benefits and the amount the Township spends on life insurance plans as directed in the Council’s Order and submitted to the GRC certified confirmation of compliance, the Custodian complied in a timely manner with the Council’s February 26, 2013 Interim Order.
2. The Council determined that the Custodian’s cited exemptions did not apply to the sum total amount of money the Township spends to provide its employees with health benefits and life insurance. See *N.J.A.C. 17:9-1.2, Brown v. Ocean City Board of Education (Cape May)*, GRC Complaint No. 2011-271 (December 2012). The Council therefore ordered the Custodian to disclose these amounts to the Complainant. The Custodian thereafter complied in a timely manner with the terms of the Council’s Order. Moreover, the Custodian did not unlawfully deny access to the requested health insurance information. 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 v. DYFS*, 387 N.J. Super. 423 (App. Div. 2006), the Complainant has achieved “the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian’s conduct.” *Id.* at 432. Additionally, pursuant to *Mason, supra*, a factual causal nexus exists between the Complainant’s filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian provided responsive records pursuant to the Council’s Order. 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 22<sup>nd</sup> Day of March, 2013

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

Robin Berg Tabakin, Esq., Chair  
Government Records Council

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

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
March 22, 2013 Council Meeting**

**Ken Schilling<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-294**

v.

**Township of Little Egg Harbor (Ocean)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** All health insurance policies presently in effect, including names of persons insured and cost of insurance.

**Request Made:** May 26, 2011<sup>3</sup>

**Response Made:** May 31, 2011

**GRC Complaint Filed:** September 15, 2011<sup>4</sup>

**Background**

At its February 26, 2013 public meeting, the Council considered the February 19, 2013 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 Complainant has requested individual employee health benefit information that is exempt from disclosure pursuant to the Privacy Rule of Health Insurance Portability and Accountability Act of 1996, 45 C.F.R. 160.103, *N.J.A.C.* 17:9-1.2, and N.J.S.A. 47:1A-9, the Council finds that the Custodian has not unlawfully denied access to the requested health insurance information. *See Michelson v. Wyatt*, 379 N.J. Super. 611 (App. Div. 2005).
2. While *N.J.A.C.* 17:9-1.2 makes confidential “all matters related to the coverage of individual participants and their families, mailing addresses of active and retired participants and individual files related to claims,” the sum total amount of money the Board spends to provide its employees with health benefits is not exempt from

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<sup>1</sup> Represented by Christopher D’Amore, Esq., Alterman & Associates (Marlton, NJ).

<sup>2</sup> Diana McCracken, Clerk, Custodian of Records. Represented by Robin LaBue, Esq., Gilmore & Monahan, P.C. (Toms River, NJ).

<sup>3</sup> Although the Complainant’s Denial of Access Complaint asserted that additional OPRA requests were at issue, the Complainant listed only the May 26, 2011 OPRA request for health insurance records as being at issue. Thus, the Council will only address this request.

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

disclosure. Nor is the disclosure of such a sum prohibited by the Privacy Rule of Health Insurance Portability and Accountability Act of 1996, 42 U.S.C.A. Section 1301 and OPRA. *See, e.g., Brown v. Ocean City Board of Education (Cape May)*, GRC Complaint No. 2011-271 (December 2012). In the absence of such exemptions, the Custodian must disclose the amount of money the Board spends to provide its employees with health benefits and the costs the Board contributes towards its employee's life insurance plans.

3. **The Custodian shall comply with Item No. 2 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 1:4-4.6 to the Executive Director.**
4. 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.

The Council distributed its Interim Order to all parties on February 26, 2013. On March 5, 2013 the Custodian responded to the Council's Interim Order. The Custodian certified that she provided to the Complainant a copy of the Township's budget, which shows the amount the Township spends on health benefits and the amount the Township spends on life insurance plans, in compliance with the GRC's Interim Order, on this date.

### Analysis

#### Compliance

The Council's February 26, 2013 Interim Order required the Custodian, within five (5) business days from receipt of said Order, to provide to the Complainant the amount of money the Board spends to provide employees with health benefits and the cost the board contributes towards it employees life insurance plans. On March 5, 2013, the fourth (4<sup>th</sup>) business day following the Custodian's receipt of the Council's Interim Order, the Custodian disclosed to the Complainant a copy of the Township's budget, which shows the amount the Township spends on health benefits and the amount the Township spends on life insurance plans. On the same day, the Custodian submitted certified confirmation of compliance to the GRC setting forth the actions she took in compliance with the provisions of said Order.

Accordingly, because the Custodian on March 5, 2013, disclosed to the Complainant a copy of the Township's budget, which shows the amount the Township spends on health benefits and the amount the Township spends on life insurance plans as directed in the Council's Order and submitted to the GRC certified confirmation of compliance, the Custodian complied in a timely manner with the Council's February 26, 2013 Interim Order.



## **Knowing & Willful**

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)).

The Custodian certified in the Statement of Information that she denied the Complainant access to the requested record because she lawfully denied the Complainant’s request for the cost of healthcare benefits supplied to each employee by the Township because this information is protected by the OPRA exemptions for personnel information and information that is a confidential communication between a municipality and its insurance carrier. The Custodian asserted that under both Federal and State law, the individual cost for the provision of health insurance is considered confidential and may not be disclosed, as the HIPAA privacy rule and N.J.S.A. 47:1A-1.1, -9 and -10 protect individual health insurance coverage costs from disclosure under OPRA.

However, the Council determined that the Custodian’s cited exemptions did not apply to the sum total amount of money the Township spends to provide its employees with health benefits and life insurance. See *N.J.A.C. 17:9-1.2*, Brown v. Ocean City Board of Education (Cape May), GRC Complaint No. 2011-271 (December 2012). The Council therefore ordered the Custodian to disclose these amounts to the Complainant. The Custodian thereafter complied in a timely manner with the terms of the Council’s Order. Moreover, the Custodian did not unlawfully deny access to the requested health insurance information. 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.

## **Prevailing Party 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 Mason, the plaintiff submitted an OPRA request on February 9, 2004. Hoboken responded on February 20, eight (8) business days later, or one day beyond the statutory limit. *Id.* at 79. As a result, the Court shifted the burden to Hoboken to prove that the plaintiff's lawsuit, filed on March 4, was not the catalyst behind the City's voluntary disclosure. *Id.* Because Hoboken’s February 20 response included a copy of a memo dated February 19 -- the seventh business day -- which advised that one of the requested records should be available on February 27 and the other one week later, the Court determined that the plaintiff’s lawsuit was not the catalyst for the release of the records and found that she was not entitled to an award of prevailing party attorney fees. *Id.* at 80.

The GRC ordered the Custodian to disclose records pursuant to its February 26, 2013 Order, which the current Custodian did on March 5, 2013. Thus, 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, the Custodian provided responsive records pursuant to the Council’s Order. 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 on March 5, 2013, disclosed to the Complainant a copy of the Township's budget, which shows the amount the Township spends on health benefits and the amount the Township spends on life insurance plans as directed in the Council's Order and submitted to the GRC certified confirmation of compliance, the Custodian complied in a timely manner with the Council's February 26, 2013 Interim Order.
2. The Council determined that the Custodian's cited exemptions did not apply to the sum total amount of money the Township spends to provide its employees with health benefits and life insurance. See *N.J.A.C. 17:9-1.2*, *Brown v. Ocean City Board of Education (Cape May)*, GRC Complaint No. 2011-271 (December 2012). The Council therefore ordered the Custodian to disclose these amounts to the Complainant. The Custodian thereafter complied in a timely manner with the terms of the Council's Order. Moreover, the Custodian did not unlawfully deny access to the requested health insurance information. 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 v. DYFS*, 387 *N.J. Super.* 423 (App. Div. 2006), the Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." *Id.* at 432. Additionally, pursuant to *Mason*, *supra*, a factual causal nexus exists between the Complainant's filing of a Denial of Access Complaint and the relief ultimately achieved. Specifically, the Custodian provided responsive records pursuant to the Council's Order. 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 and  
Approved By: Karyn Gordon, Esq.  
Acting Executive Director

March 15, 2013



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
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CHRIS CHRISTIE  
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Commissioner

INTERIM ORDER

February 26, 2013 Government Records Council Meeting

Ken Schilling  
Complainant

Complaint No. 2011-294

v.

Township of Little Egg Harbor (Ocean)  
Custodian of Record

At the February 26, 2013 public meeting, the Government Records Council (“Council”) considered the February 19, 2013 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 Complainant has requested individual employee health benefit information that is exempt from disclosure pursuant to the Privacy Rule of Health Insurance Portability and Accountability Act of 1996, 45 C.F.R. 160.103, *N.J.A.C.* 17:9-1.2, and N.J.S.A. 47:1A-9, the Council finds that the Custodian has not unlawfully denied access to the requested health insurance information. *See Michelson v. Wyatt*, 379 N.J. Super. 611 (App. Div. 2005).
2. While *N.J.A.C.* 17:9-1.2 makes confidential “all matters related to the coverage of individual participants and their families, mailing addresses of active and retired participants and individual files related to claims,” the sum total amount of money the Board spends to provide its employees with health benefits is not exempt from disclosure. Nor is the disclosure of such a sum prohibited by the Privacy Rule of Health Insurance Portability and Accountability Act of 1996, 42 U.S.C.A. Section 1301 and OPRA. *See, e.g., Brown v. Ocean City Board of Education (Cape May)*, GRC Complaint No. 2011-271 (December 2012). In the absence of such exemptions, the Custodian must disclose the amount of money the Board spends to provide its employees with health benefits and the costs the Board contributes towards its employee’s life insurance plans.
3. **The Custodian shall comply with Item No. 2 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 1:4-4.6 to the Executive Director.**



4. 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.

Interim Order Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of February, 2013

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

Robin Berg Tabakin, Esq., Chair  
Government Records Council

**Decision Distribution Date: February 27, 2013**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
February 26, 2013 Council Meeting**

**Ken Schilling<sup>1</sup>  
Complainant**

**GRC Complaint No. 2011-294**

v.

**Township of Little Egg Harbor (Ocean)<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** All health insurance policies presently in effect, including names of persons insured and cost of insurance.

**Request Made:** May 26, 2011<sup>3</sup>

**Response Made:** May 31, 2011

**GRC Complaint Filed:** September 15, 2011<sup>4</sup>

**Background<sup>5</sup>**

The Complainant submitted an OPRA request on May 26, 2011 seeking the records listed above. The Custodian responded to the request on May 31, 2011 providing a list of employees with coverage type and a breakdown of the insurance cost per plan.

The Complainant filed the Denial of Access Complaint on September 15, 2011, asserting that he was denied access to the records requested.

The Custodian filed her Statement of Information (“SOI”) on January 24, 2012. The Custodian asserted in pertinent part that she responded to the Complainant’s OPRA request on May 31, 2011 and provided a list of employees with the type of health insurance coverage and a breakdown of the insurance cost per plan. The Custodian asserts that she denied the Complainant access to the cost of insurance broken down for individual officers and employees because such information is confidential and protected by the Health Insurance Portability and Accountability Act (“HIPAA”), applicable to OPRA through N.J.S.A. 47:1A-9(a). The Custodian argues that

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<sup>1</sup> Represented by Christopher D’Amore, Esq., Alterman & Associates (Marlton, NJ).

<sup>2</sup> Diana McCracken, Clerk, Custodian of Records. Represented by Robin LaBue, Esq., Gilmore & Monahan, P.C. (Toms River, NJ).

<sup>3</sup> Although the Complainant’s Denial of Access Complaint asserted that additional OPRA requests were at issue, the Complainant listed only the May 26, 2011 OPRA request for health insurance records as being at issue. Thus, the Council will only address this request.

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

<sup>5</sup> The parties may have submitted additional correspondence, or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.



HIPAA includes the federal privacy rule that protects “all individually identifiable health information” from disclosure by covered entities, and that covered entities include individual and group health plans that provide or pay the cost of medical care. The Custodian asserts that the Township is a covered entity under HIPAA. The Custodian argues that the cost of providing insurance to an individual under the health plan relates to “the past, present or future payment for the provision of health care to an individual” and is protected by the privacy rule set forth at 45 C.F.R. 160.103 as individually identifiable health information. The Custodian cites to Fox v. Township of Parsippany-Troy Hills, GRC Complaint No. 2005-109 (December 2005), in which the Council determined that provision of costs of individual health insurance would require the Township to disclose exact costs of insurance benefits for individuals, contrary to the federal privacy rule.

The Custodian also argues that the Complainant was provided a list of employees and the scope of insurance coverage elected, which is consistent with the Superior Court of New Jersey, Appellate Division’s decision in Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005). The Custodian asserts she lawfully denied the Complainant’s request for the cost of healthcare benefits supplied to each employee by the Township because this information is protected by the OPRA exemptions for personnel information and information that is a confidential communication between a municipality and its insurance carrier. The Custodian asserts that under both Federal and State law, the individual cost for the provision of health insurance is considered confidential and may not be disclosed, as the HIPAA privacy rule and N.J.S.A. 47:1A-1.1, -9 and -10 protect individual health insurance coverage costs from disclosure under OPRA.

### Analysis<sup>6</sup>

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

The Complainant seeks health insurance policies for all Township employees, including names of insureds and the costs thereof. 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.

OPRA states that:

“[t]he provisions of [OPRA] shall not abrogate any exemption of a public record...from public access made pursuant to [OPRA]...regulation promulgated under the authority of any statute...” N.J.S.A. 47:1A-9(a).

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<sup>6</sup> There may be other OPRA issues in this matter; however, the Council’s analysis is based solely on the claims made in the Complainant’s Denial of Access Complaint.

In accordance with the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), the New Jersey Administrative Code regarding the State Health Benefits Program states in part that:

“...records considered confidential include all matters related to the coverage of individual participants and their families, mailing addresses of active and retired participants and individual files related to claims.” (Emphasis added.) *N.J.A.C.* 17:9-1.2.

Furthermore, Executive Order 26 (Gov. McGreevey, 2002)(“EO 26”) also declares information regarding an individual's health history is not a government record subject to public access. EO 26 provides that “[i]nformation relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation” of an individual will not be considered a government record. *Id.* at par. 4(b)(1) (2002).

HIPAA, 45 C.F.R. 160.103, provides that the Privacy Rule protects all individually identifiable health information held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper, or oral. The Privacy Rule calls this information “protected health information (PHI).”

In denying the Complainant access to the requested health insurance policies, names of insureds and costs thereof, the Custodian asserted that the health insurance policies are not disclosable under OPRA pursuant to HIPAA. The Custodian argued that the Complainant was provided a list of employees and the scope of insurance coverage elected, which is consistent with the Superior Court of New Jersey, Appellate Division’s, decision in Michelson v. Wyatt, 379 N.J. Super. 611 (App. Div. 2005). The Custodian asserts that the Complainant’s request for the cost of healthcare benefits supplied to each employee by the Township was lawfully denied because this information is protected by the OPRA exemptions for personnel information and information that is a confidential communication between a municipality and its insurance carrier. The Custodian asserts that under both Federal and State law, the individual cost for the provision of health insurance is considered confidential and may not be disclosed, as the HIPAA privacy rule and N.J.S.A. 47:1A-1.1, -9 and -10 protect individual health insurance coverage costs from disclosure under OPRA.

In Beaver v. Township of Middletown, GRC Complaint No. 2005-243 (August 2006), the custodian denied access to records responsive to the complainant’s requests for the type of health coverage being provided to certain employees of the Township’s Sewerage Authority as information exempt under OPRA, *i.e.*, communication with the health benefit provider. The custodian subsequently certified in the SOI that the records responsive, which included monthly invoices received by the Township from State Health Benefits Plan, were exempt under OPRA pursuant to N.J.S.A. 47:1A-1.1, N.J.S.A. 47:1A-9, *N.J.A.C.* 17:9-1.2 and HIPAA. The GRC analyzed how the custodian’s asserted exemptions applied to the records responsive within the scope of OPRA and determined that the nature of the complainant’s requests extended into privacy information that was protected by the HIPAA Privacy Rule, and by extension *N.J.A.C.* 17:9-1.2 and N.J.S.A. 47:1A-9. Accordingly, the Council found that the custodian lawfully denied the complainant’s request.

As in Beaver, the Complainant in the instant matter seeks the health insurance policies of all Township employees. There is no way that the billing information of these employees could be disclosed without infringing upon the privacy and confidentiality protections required by HIPAA. Moreover, the existing exclusionary rule prescribed in *N.J.A.C. 17:9-1.2* and further effectuated by N.J.S.A. 47:1A-9 requires that the requested information be deemed non-disclosable upon its face. Therefore, because the Complainant has requested individual employee health benefits information that is exempt from disclosure pursuant to the Privacy Rule of HIPAA, *N.J.A.C. 17:9-1.2*, and N.J.S.A. 47:1A-9, the Council finds that the Custodian has not unlawfully denied access to the requested health insurance information. *See Michelson v. Wyatt*, 379 N.J. Super. 611 (App. Div. 2005).

However, while *N.J.A.C. 17:9-1.2* makes confidential “all matters related to the coverage of individual participants and their families, mailing addresses of active and retired participants and individual files related to claims,” the sum total amount of money the Township spends to provide its employees with health benefits is not exempt from disclosure. Nor is the disclosure of such a sum prohibited by HIPAA and OPRA. *See, e.g., Brown v. Ocean City Board of Education (Cape May)*, GRC Complaint No. 2011-271 (December 2012). The Custodian must therefore disclose the amount of money the Township spends to provide its employees with health benefits.

**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.

**Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant has requested individual employee health benefit information that is exempt from disclosure pursuant to the Privacy Rule of Health Insurance Portability and Accountability Act of 1996, 45 C.F.R. 160.103, *N.J.A.C. 17:9-1.2*, and N.J.S.A. 47:1A-9, the Council finds that the Custodian has not unlawfully denied access to the requested health insurance information. *See Michelson v. Wyatt*, 379 N.J. Super. 611 (App. Div. 2005).
2. While *N.J.A.C. 17:9-1.2* makes confidential “all matters related to the coverage of individual participants and their families, mailing addresses of active and retired participants and individual files related to claims,” the sum total amount of money the Board spends to provide its employees with health benefits is not exempt from disclosure. Nor is the disclosure of such a sum prohibited by the Privacy Rule of Health Insurance Portability and Accountability Act of 1996, 42 U.S.C.A. Section 1301 and OPRA. *See, e.g., Brown v. Ocean City Board of Education (Cape May)*, GRC Complaint No. 2011-271 (December 2012). In

the absence of such exemptions, the Custodian must disclose the amount of money the Board spends to provide its employees with health benefits and the costs the Board contributes towards its employee's life insurance plans.

3. **The Custodian shall comply with Item No. 2 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 1:4-4.6 to the Executive Director.**
4. 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.

Prepared and

Approved By: Karyn Gordon, Esq.  
Acting Executive Director

February 19, 2013