



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

January 28, 2014 Government Records Council Meeting

James F. Bean, Jr.
Complainant

Complaint No. 2013-39

v.

Borough of Belmar (Monmouth)
Custodian of Record

At the January 28, 2014 public meeting, the Government Records Council (“Council”) considered the January 21, 2014 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. The Custodian failed to fully comply with the Council’s December 20, 2013 Interim Order because although she provided the Complainant those records ordered to be disclosed, she failed to submit certified confirmation of compliance to the Executive Director in a timely manner.
2. Although the Custodian unlawfully denied access to the responsive aid recipient list and record or records containing donor information and the Custodian failed to fully comply with the terms of the Council’s December 20, 2013 Interim Order, the Custodian did provide the responsive records to the Complainant within the time frame to comply with said Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

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 28th Day of January, 2014

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: January 30, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
January 28, 2014 Council Meeting**

**James F. Bean, Jr.¹
Complainant**

GRC Complaint No. 2013-39

v.

**Borough of Belmar (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. Names and addresses of persons who donated gift cards, including specific values of donated gift cards and name brand on each card.
2. The up-to-date list of disbursed gift cards containing the name and address of each individual who received a gift card from the Borough of Belmar (“Borough”), along with the date card was dispersed, the amount, and the name brand of each card.
3. The determining criteria plan used in deciding eligibility of an individual to receive gift cards from the Borough (past, present and future plan).³

Custodian of Record: April Claudio
Request Received by Custodian: December 20, 2012
Response Made by Custodian: December 31, 2012
GRC Complaint Received: February 4, 2013

Background

December 20, 2013 Council Meeting:

At its December 20, 2013 public meeting, the Council considered the December 10, 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. The Custodian has failed to bear her burden of proving that disclosure of the recipient list, and donor list if applicable, would violate the reasonable expectation of privacy provision. N.J.S.A. 47:1A-6. The Custodian shall disclose the responsive aid recipient list; the record or records containing donor information should be disclosed if responsive records exist.

¹ No legal representation listed on record.

² Represented by Michael R. DuPont, Esq., of McKenna, DuPont, Higgins & Stone, P.C. (Red Bank, NJ).

³ The Complainant requested additional records that are not at issue in this complaint.

2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, 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 1:4-4,⁴ to the Executive Director.⁵**
3. Although the Complainant claimed that the list of criteria he received from the Custodian was incomplete or did not match comments made by the Borough to local newspapers, such is an issue of content. However, the Council has no authority over the content of the record provided. N.J.S.A. 47:1A-7(b); Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005). *See also* Valdes v. Township of Belleville (Essex), GRC Complaint No. 2010-258 (March 2012).
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.

Procedural History:

On December 23, 2013, the Council distributed its Interim Order to all parties. On January 16, 2014, the Custodian e-mailed the GRC noting that she provided the Complainant the responsive records on December 31, 2013. On January 17, 2014, the GRC advised the Custodian that in order to comply with the Council's Order, she must submit certified confirmation of compliance in accordance with conclusion No. 2. On the same day, the Custodian responded to the Council's Order certifying that on December 31, 2013, she disclosed to the Complainant via e-mail the records ordered to be provided.

Analysis

Compliance

At its December 20, 2013 meeting, the Council ordered the Custodian to disclose to the Complainant the responsive aid recipient list, the record or records containing donor information and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On December 23, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian's response was due by close of business on December 31, 2013.

On January 16, 2014, eleven (11) business days after the expiration of the time frame to comply, the Custodian e-mailed the GRC noting that she provided to the Complainant those

⁴ "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."

⁵ Satisfactory compliance requires that the Custodian deliver the records 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.

records required to be disclosed on December 31, 2013. Additionally, the Custodian did not provide certified confirmation of compliance until January 17, 2014.

Therefore, the Custodian failed to fully comply with the Council's December 20, 2013 Interim Order because although she provided the Complainant those records ordered to be disclosed, she failed to submit certified confirmation of compliance to the Executive Director in a timely manner.

Knowing & Willful

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 “... [i]f 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 (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); 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)).

Although the Custodian unlawfully denied access to the responsive aid recipient list and record or records containing donor information and the Custodian failed to fully comply with the terms of the Council's December 20, 2013 Interim Order, the Custodian did provide the responsive records to the Complainant within the time frame to comply with said Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian failed to fully comply with the Council's December 20, 2013 Interim Order because although she provided the Complainant those records ordered to be disclosed, she failed to submit certified confirmation of compliance to the Executive Director in a timely manner.
2. Although the Custodian unlawfully denied access to the responsive aid recipient list and record or records containing donor information and the Custodian failed to fully comply with the terms of the Council's December 20, 2013 Interim Order, the Custodian did provide the responsive records to the Complainant within the time frame to comply with said Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, 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.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Dawn R. SanFilippo, Esq.
Senior Counsel

January 21, 2014



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

December 20, 2013 Government Records Council Meeting

James F. Bean, Jr.
Complainant

Complaint No. 2013-39

v.

Borough of Belmar (Monmouth)
Custodian of Record

At the December 20, 2013 public meeting, the Government Records Council (“Council”) considered the December 10, 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. The Custodian has failed to bear her burden of proving that disclosure of the recipient list, and donor list if applicable, would violate the reasonable expectation of privacy provision. N.J.S.A. 47:1A-6. The Custodian shall disclose the responsive aid recipient list; the record or records containing donor information should be disclosed if responsive records exist.
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council’s Interim Order with appropriate redactions, if any, 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 1:4-4,¹ to the Executive Director.²**
3. Although the Complainant claimed that the list of criteria he received from the Custodian was incomplete or did not match comments made by the Borough to local newspapers, such is an issue of content. However, the Council has no authority over the content of the record provided. N.J.S.A. 47:1A-7(b); Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005). *See also* Valdes v. Township of Belleville (Essex), GRC Complaint No. 2010-258 (March 2012).

¹ "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."

² Satisfactory compliance requires that the Custodian deliver the records 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.

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 20th Day of December, 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: December 23, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 20, 2013 Council Meeting**

**James F. Bean, Jr.¹
Complainant**

GRC Complaint No. 2013-39

v.

**Borough of Belmar (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Copies of:

1. Names and addresses of persons who donated gift cards, including specific values of donated gift cards and name brand on each card.
2. The up-to-date list of disbursed gift cards containing the name and address of each individual who received a gift card from the Borough of Belmar (“Borough”), along with the date card was dispersed, the amount, and the name brand of each card.
3. The determining criteria plan used in deciding eligibility of an individual to receive gift cards from the Borough (past, present and future plan).³

Custodian of Record: April Claudio
Request Received by Custodian: December 20, 2012
Response Made by Custodian: December 31, 2012
GRC Complaint Received: February 4, 2013

Background⁴

Request and Response:

On December 20, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 31, 2012, the Custodian responded in writing confirming that she extended the time frame to respond until January 8, 2013, which the Complainant confirmed. On January 8, 2013, the Custodian responded denying access to item Nos. 1 and 2 under N.J.S.A. 47:1A-1 and further provided a November 13, 2012 memorandum from the Director of Social Services to the Business Administrator in response to item No. 3.

¹ No legal representation listed on record.

² Represented by Michael R. DuPont, Esq., of McKenna, DuPont, Higgins & Stone, P.C. (Red Bank, NJ).

³ The Complainant requested additional records that are not at issue in this complaint.

⁴ 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.

Denial of Access Complaint:

On February 4, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant disputes the Custodian’s denial of access to request item Nos. 1 and 2. The Complainant further contends that the record provided in response to item No. 3 was incomplete as it did not contain certain criteria, such as the number of household members, mentioned in a January 17, 2013 newspaper article.

The Complainant requests that the information responsive to item Nos. 1 and 2 be disclosed and expresses concern that the memorandum provided in response to item No. 3 is incomplete or incorrect and that he should be provided with accurate criteria.

Statement of Information:⁵

On April 26, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s OPRA request on December 20, 2012. The Custodian certifies that she denied access to the names and addresses of those donating cards and the list of names and addresses of the recipients based on privacy interest. N.J.S.A. 47:1A-1.

The Custodian attached to the SOI an April 2, 2013 letter from the Business Administrator to the GRC to supplement her denial of access. The letter provides that in the wake of Hurricane Sandy, the Borough established an account to receive donations sent to aid hurricane victims. The Borough Administrator further stated that the Borough established, by Council Resolution, a dedication by rider to govern the funds. The Borough Administrator stated that families participating in the aid program did so with the assumption of privacy. The Business Administrator stated that aid recipients have expressed their need for confidentiality and many have advised that they would not have participated if they knew there was a chance that their identities could be disclosed to the public.

Additional Submissions:

On August 26, 2013, the GRC requested both parties fill out a balance test questionnaire. On August 28, 2013, the Custodian submitted her questionnaire with the following responses:

1. The type of record requested.

Response: Names and addresses of donors/recipients in gift card program.

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

Response: Names, addresses, telephone number, dollar amount given, date of disbursement.

⁵ On February 26, 2013, this complaint was referred to mediation. On March 19, 2013, the complaint was referred back to the GRC for adjudication.

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

Response: Disclosure of names, addresses and telephone numbers of those requiring public assistance under the assumption of privacy would unduly violate the confidentiality of the program and subject recipients to public knowledge of their need. The Borough has received numerous appeals from aid recipients via calls, e-mails and in-person visits requesting that privacy be maintained. Many have stated they would not have accepted assistance if they knew there was a possibility their information would be made public.

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

Response: The Social Services Director created a spreadsheet of each individual recipient via a confidential meeting with each individual. Disclosure of the spreadsheet would violate the public's trust in the Director.

5. The adequacy of safeguards to prevent unauthorized disclosure.

Response: The spreadsheet is maintained by the Director on her computer in a locked office. The Business Administrator reconciled the spreadsheet by reviewing a copy redacting names and addresses to maintain confidentiality.

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

Response: N.J.S.A. 47:1A-1; New Jersey Department of Human Services Work First NJ Manual, Section 10:90-7.7(a) and (c) – Confidential Nature of Information; N.J.A.C. 13:44G-12.3 and 12.4 – Confidentiality and Release of Client Records.

On September 9, 2013, the Complainant submitted his questionnaire with the following responses:

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

Response: As a councilman for the Borough, the Complainant wishes to ensure that all proper procedures and laws were followed. Constituents receiving no funding want to ensure that the process was fair and legal. Once the Borough agreed to distribute the money as charity, it waived its right to privacy because by its nature, a municipality's financial records are public records.

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

Response: The list is very important because it is the Complainant's duty as a public official to review records and report his findings to constituents. He would be negating his responsibility to constituents if his findings are not supported.

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

Response: The Complainant does not intend to share the information unless he finds a gross negligence of financial mismanagement.

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

Response: No.

Analysis⁶

Unlawful Denial of Access

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 request item Nos. 1 and 2:

OPRA provides that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy..." N.J.S.A. 47:1A-1. As privacy interests are at issue here, the GRC asked both the Complainant and the Custodian to respond to balancing test questions so the Council could employ the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995). The Supreme Court has explained that N.J.S.A. 47:1A-1's safeguard against disclosure of personal information is substantive and requires "a balancing test that weighs both the public's strong interest in disclosure with the need to safeguard from public access personal information that would violate a reasonable expectation of privacy." Burnett v. County of Bergen, 198 N.J. 408, 422-23, 427 (2009).

When "balanc[ing] OPRA's interests in privacy and access" courts consider the following factors:

- (1) the type of record requested;
- (2) the information it does or might contain;
- (3) the potential for harm in any subsequent nonconsensual disclosure;
- (4) the injury from disclosure to the relationship in which the record was generated;
- (5) the

⁶ 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.

adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

Id. at 427 (*quoting Doe v. Poritz*, 142 N.J. 1, 88 (1995)).

This test will enable the Council to weigh the Township’s asserted need to protect the privacy of individuals against the Complainant’s asserted need to access the requested records.

A. *Courts Have Required that Certain Personal Information Be Redacted From Records Released In Response to an OPRA Request Where OPRA’s Interest in Privacy Outweighs the Interest in Access.*

In Burnett, a commercial business requested approximately eight million pages of land title records extending over a twenty-two year period; the records contained names, addresses, social security numbers, and signatures of numerous individuals. Burnett, 198 N.J. at 418. After balancing the seven factors, the Court “[found] that the twin aims of public access and protection of personal information weigh in favor of redacting [social security numbers] from the requested records before releasing them” because “[i]n that way, disclosure would not violate the reasonable expectation of privacy citizens have in their personal information.” Id. at 437. The Court emphasized that the “balance [was] heavily influenced by concerns about the bulk sale and disclosure of a large amount of social security numbers—which [the commercial business] admittedly does not need, and which are not an essential part of the records sought.” Id. at 414. Moreover, “the requested records [were] not related to OPRA’s core concern of transparency in government.” Ibid.

Similarly, the Appellate Division has concluded that the identity of an individual who attempted suicide by jumping off a bridge should not be disclosed in an OPRA request seeking police and fire department reports about the incident under Burnett. *See also Alfano v. Margate City*, Docket No. A-3797-11 (App. Div. September 25, 2012)(slip op. at 1-2, 8-10), <http://njlaw.rutgers.edu/collections/courts/>.

B. *Courts Have Not Required Redaction of Certain Personal Information From Records Released In Response to an OPRA Request Where OPRA’s Interest in Access Outweighs the Interest in Privacy.*

In contrast, the Appellate Division has affirmed a trial court’s determination that the identity of a person who called 911 complaining about illegal parking blocking his driveway should not be redacted when the owner of the car filed an OPRA request seeking a copy of the 911 call under Burnett. Ponce v. Town of W. New York, Docket No. A-3475-10 (App. Div. February 27, 2013)(slip op. at 3-4, 10), <http://njlaw.rutgers.edu/collections/courts/>. The trial judge explained that:

The type of information requested by [the car owner] is not particularly sensitive or confidential. When the caller made a complaint [to] the police department that someone was blocking

his or her driveway he or she could reasonably expect that his name may be revealed in connection with the complaint. There has not been evidence presented to suggest that revealing the caller's identity or the call itself would result in any serious harm or confrontation between the caller and the - - [sic] and the [car owner]. It may in fact be helpful for the [car owner] to know the information in order to challenge his parking violation. [Id. at 7-8.]

The Appellate Division emphasized that the City's arguments against disclosure of the caller's identity were "predicated on the notion that if [the car owner] learns the identity of his accuser he will retaliate in some fashion, thus discouraging the average person from reporting incidents to the police via the 911 emergency system." Id. at 9. However, the City "[had] not presented any evidence of past hostility between these two individuals" and the court emphasized that "[a]bsent compelling reasons, which are conspicuously absent in this record, few can argue that in a free society an accused is not entitled to know the identity of his accuser." Id. at 9-10. Therefore, the court concluded that "[n]one of the concerns in favor of confidentiality articulated by the Court in Burnett, 198 N.J. at 427, [were] applicable" and affirmed the trial court's decision ordering disclosure of the caller's identity. Ponce, A-3475-10 at 10.

Similarly, the Appellate Division has concluded that addresses should not be redacted from a mailing list of self-identified "senior citizens" compiled by a county to contact those individuals through a newsletter. Renna v. County of Union, Docket No. A-1811-10 (App. Div. February 17, 2012) (slip op. at 1, 11-12), <http://njlaw.rutgers.edu/collections/courts/>. A website operator filed an OPRA request seeking access to that mailing list so that she could disseminate information in furtherance of non-profit activities related to monitoring county government. Id. at 2. The court applied the Burnett factors. Id. at 11. The first two factors weighed in favor of disclosure, because "the intent and spirit of OPRA are to maximize public awareness of governmental matters" and "the interest in the dissemination of information, even that unrelated to senior matters, outweighs a perceived notion of expectation of privacy." Id. at 12.

C. *Application of the Burnett Factors to Balance OPRA's Interests in Privacy and Access in the Present Matter Dictates that the Responsive Lists Be Disclosed in Their Totality.*

The present matter requires application of the Burnett factors to balance OPRA's dual interests in privacy and access as applied to the release of names and addresses of persons donating and receiving aid from the Borough.

i. *Burnett* Factors One and Two

The first and second Burnett factors require consideration of the records requested, and the type of information contained therein, respectively. Regarding the type of records requested, the Complainant did not identify a specific record that may contain the names and addresses of donors. This issue is problematic as OPRA "... is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records 'readily accessible for inspection, copying, or

examination.’ *N.J.S.A. 47:1A-1.*” MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005)(emphasis added). However, the Complainant did seek a list of aid recipients and the Custodian confirmed that a record existed. It is not clear whether the Borough also maintains a similar donor list containing the same personal information.

The type of information at issue is names and addresses of donors and recipients participating in the Borough’s gift card program in the aftermath of Hurricane Sandy.

ii. *Burnett Factors Three and Four*

The third and fourth Burnett factors address the potential for harm in subsequent nonconsensual disclosure of the names and addresses, and the injury from disclosure to the relationship in which the names and addresses were generated, respectively.

The Custodian asserted that disclosure of recipient information would violate the assumption of privacy of the program and subject recipients to public knowledge of their need. The Custodian noted that the Borough has received multiple requests from recipients to maintain their privacy. The Custodian did not provide an argument for donor information. The Complainant asserted that he did not plan on redistributing any information unless he finds gross negligence in the distribution of aid.

The GRC is not convinced that significant concerns about the potential harm from disclosure of the recipient names and addresses disclosed exist here. The Borough knowingly created the gift card program and accepted donations from the general public for the express purpose of providing same to aid in hurricane recovery. The cards provided to recipients included eateries, bars, salons and hardware stores and were mostly nominally valued. Further, there is no evidence to support the claim that the recipients’ information should be shielded simply because they sought relief from the Borough in a time of need following a natural disaster. Thus, the potential for harm and injury of disclosing the recipient list in its entirety is limited and would allow the Complainant to determine whether the cards were fairly distributed.

Regarding donor information, there is no evidence of significant harm in disclosure of persons providing aid to members of the community in times of need following a natural disaster.

iii. *Burnett Factor Five*

The fifth Burnett factor requires consideration of the adequacy of safeguards to prevent unauthorized disclosure of the names and addresses. The Custodian stated that the recipient spreadsheet created by the Social Services Director is on her computer in a locked office. The Custodian stated that the Borough went so far as to only allow the Business Administrator to reconcile the spreadsheet by reviewing a redacted copy of the list. The Custodian did not provide an argument for the donor list. As previously stated, the Complainant asserted that he did not intend to redistribute the list unless he found mismanagement.

However, there are no reasonable safeguards in place to protect from unauthorized dissemination of aid recipient information. Once the list has been disclosed, the Complainant may consider any anomaly in the spreadsheet as mismanagement and disclose all information.

Regarding the donor information, reasonable safeguards are likely not at issue. There is no evidence to suggest that this information necessarily needs safeguarding and thus disclosure would not impose any significant risks.

iv. *Burnett Factor Six*

The sixth Burnett factor addresses the degree of need for access to the names and addresses. The Complainant asserted that his need for the information is high because, as a public official for the Borough, he has a duty to ensure that proper procedure and laws were followed and that disbursement of the funds was legal and fair. The Complainant asserted that he would review the lists and report his findings to constituents. The Complainant asserted that he would be negating his responsibility if his findings were not supported by the evidence contained in the records.

The degree of need weighs in favor of access here because the Complainant is an elected official in the Borough. An inherent duty as councilman is to ensure that the Borough is legally performing their functions. For this reason, his position carries more weight in needing access to the records than a regular citizen requestor. The GRC's position here is similar to the need weighed by the Appellate Division in Atl. County SPCA v. City of Absecon, 2009 N.J. Super. Unpub. LEXIS 1370 (Jun 5, 2009). There, the ASPCA appealed a lower court's decision dismissing the ASPCA's complaint seeking a list of licensed dog owners. The Court, in reversing the trial court's decision, noted that it agreed that the ASPCA's interest in abiding by statute as well as for fundraising purposes was "... wholesome ..." Id. at 20. However, the GRC notes that this factor was part of the Appellate Division's overall decision to disclose the responsive information and not the sole reason for ordering disclosure.

Regarding the responsive donor information and recipient dispersal information, the degree of need is also in favor of access. As previously discussed, there are few inherent privacy interests in disclosing names and addresses of persons aiding citizens of the State at such a difficult time. Further, disclosure of dispersal information contains no personal identifiers.

v. *Burnett Factor Seven*

The seventh Burnett factor requires consideration as to whether an express statutory mandate, articulated public policy, or other recognized public interest militating toward access to the names and addresses exists. The Custodian asserted that N.J.S.A. 47:1A-1.1 protects a citizen's reasonable expectation of privacy. The Custodian further asserted that New Jersey Department of Human Services Work First NJ Manual, Section 10:90-7.7(a) and (c) – Confidential Nature of Information, and N.J.A.C. 13:44G-12.3 and 12.4 apply here. A review of this material indicates that 10:90-7.7 refers to confidentiality of aid recipient information under Work First NJ, while the cited regulation applies to social workers keeping client information confidential.

Even though neither is applicable to the program run by the Borough, the statutes show the State's recognition of importance of confidentiality for citizens using State aid services. However, this position cannot be similarly applied to the donor and recipient lists at issue here. The statutes to which the Custodian cites refer to persons seeking or participating in more permanent assistance programs. The situations in which those statutes would apply rise well above disbursing nominally valued gift cards for local establishments as temporary aid. Further, there is no evidence on record supporting that a citizen's reasonable expectation of privacy applies to every situation in which a person seeks aid from local, county, state or federal government.

vi. *Balancing of the Burnett Factors*

On balancing the Burnett factors, OPRA's dual object to provide both public access and protection of personal information weigh in favor of disclosing the gift card recipient names and addresses to the Complainant. Most notably, while the GRC is sympathetic to those affected by such a significant weather event, the persons accepting the gift cards of nominal value have limited privacy interest in the face of the public's right to ensure that the gift cards were justly and fairly distributed. Additionally, the responsive donor information may be disclosable. There is no evidence in the record that donor information, whether personal citizens, businesses, organizations, etc., are subject to the same type of privacy as aid recipients.

The Council has recognized that although a request on its face may be invalid, a custodian nonetheless was provided with enough information to identify responsive records. *See Bond v. Borough of Washington (Warren)*, GRC Complaint No. 2009-324 (Final Decision dated March 29, 2011). Here, the Complainant did not identify a record in relation to the donors; rather, he sought access to information. However, the Custodian exempted access to said information and further did not identify any record or records that exist containing the requisite information. Thus, in light of the Complainant's failure to request a record and the Custodian's failure to definitively identify a record, it is not clear whether a donor list exists. If a responsive donor list exists, containing the requested information, same should be disclosed.

Therefore, the Custodian has failed to bear her burden of proving that disclosure of the recipient list, and donor list if applicable, would violate the reasonable expectation of privacy provision. N.J.S.A. 47:1A-6. The Custodian shall disclose the responsive aid recipient list; the record or records containing donor information should be disclosed if responsive records exist.

OPRA request item No. 3:

OPRA delineates the Council's powers and duties. N.J.S.A. 47:1A-7(b). Such powers and duties do not include authority over the content of a record. Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005)(holding that the Council "does not oversee the content of documentation" but "does oversee the disclosure and non-disclosure of documents.")

Although the Complainant claimed that the list of criteria he received from the Custodian was incomplete or did not match comments made by the Borough to local newspapers, such is an issue of content. However, the Council has no authority over the content of the record provided. N.J.S.A. 47:1A-7(b); Kwanzaa, GRC 2004-167. See also Valdes v. Township of Belleville (Essex), GRC Complaint No. 2010-258 (March 2012).

Knowing & Willful

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. The Custodian has failed to bear her burden of proving that disclosure of the recipient list, and donor list if applicable, would violate the reasonable expectation of privacy provision. N.J.S.A. 47:1A-6. The Custodian shall disclose the responsive aid recipient list; the record or records containing donor information should be disclosed if responsive records exist.
2. **The Custodian shall comply with item No. 1 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, if any, 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 1:4-4,⁷ to the Executive Director.⁸**
3. Although the Complainant claimed that the list of criteria he received from the Custodian was incomplete or did not match comments made by the Borough to local newspapers, such is an issue of content. However, the Council has no authority over the content of the record provided. N.J.S.A. 47:1A-7(b); Kwanzaa v. Department of Corrections, GRC Complaint No. 2004-167 (March 2005). See also Valdes v. Township of Belleville (Essex), GRC Complaint No. 2010-258 (March 2012).
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 By: Frank F. Caruso
Senior Case Manager
December 10, 2013

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

⁷ "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."

⁸ Satisfactory compliance requires that the Custodian deliver the records 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.

