



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

Haley Behre
(On behalf of The Coast Star)
Complainant

Complaint No. 2013-85

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 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**

Haley Behre¹
(On behalf of The Coast Star)
Complainant

GRC Complaint No. 2013-85

v.

Borough of Belmar (Monmouth)²
Custodial Agency

Records Relevant to Complaint: Copy of a list of each family that received money from the grant program and how much they received.³

Custodian of Records: April Claudio

Request Received by Custodian: February 26, 2013

Response Made by Custodian: February 27, 2013

GRC Complaint Signed by Complainant: March 12, 2013

Background⁴

At its 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, found that:

1. The Custodian has failed to bear her burden of proving that disclosure of the grant recipient list would violate the reasonable expectation of privacy provision. N.J.S.A. 47:1A-6. The Custodian shall disclose the responsive grant recipient list.
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 1:4-4,⁵ to the Executive Director.⁶**

¹ No legal representation listed on record.

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

³ There were other records requested that are not relevant to 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.

⁵ "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."

3. 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. The GRC received no response to the Interim Order. 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, Custodian submitted certified confirmation of compliance affirming 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 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 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.

⁶ Satisfactory compliance requires that the Custodian deliver the record 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.

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 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 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: Samuel A. Rosado, Esq.
Staff Attorney

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

Haley Behre
(On behalf of The Coast Star)
Complainant

Complaint No. 2013-85

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 grant recipient list would violate the reasonable expectation of privacy provision. N.J.S.A. 47:1A-6. The Custodian shall disclose the responsive grant recipient list.
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. 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.

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 record 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.

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**

**Haley Behre (on behalf of The Coast Star)¹
Complainant**

GRC Complaint No. 2013-85

v.

**Borough of Belmar²
Custodial Agency**

Records Relevant to Complaint: Copies of a list of each family that received money from the grant program and how much they received.³

Custodian of Record: April Claudio

Request Received by Custodian: February 26, 2013

Response Made by Custodian: February 27, 2013

GRC Complaint Received: March 12, 2013

Background⁴

Request and Response:

On February 26, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 27, 2013, one (1) business day later, the Custodian responded, in writing denying the Complainant access to the list on the basis that citizen’s personal information is exempt from release under OPRA pursuant to N.J.S.A. 47:1A-1.

Denial of Access Complaint:

On, March 13, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that the requested records should have been made available to the public with redactions of only some personal information, such as Social Security numbers or income listings, as necessary under OPRA. Specifically, the Complainant is seeking the names, addresses, and the amount of money received for each person or business.

¹ No legal representation listed on record.

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

³ The Complainant requested additional records that are not 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.

Statement of Information:

On April 2, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that during Hurricane Sandy, the Borough of Belmar (“Borough”) established a relief fund in which citizens could donate and aid local families. The Custodian certifies that the fund was established with the assurance to those families applying for and receiving aid that they would remain anonymous, and the Custodian believes that those families would not have participated in the fund if they knew that their personal information could be made public.

Therefore, the Custodian denied the Complainant’s request under N.J.S.A. 47:1A-1, which states: “[A] public agency has a responsibility and an obligation to safeguard from public access a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy.”

The Custodian cites Burnett v. Cnty. of Bergen, 198 N.J. 408 (2009), where the Court held that OPRA’s privacy provision is “neither a preface, nor a preamble.” The Court recognized that the privacy provision was a substantive part of the law in which it tasked the agency/custodian with the obligation to protect the public against disclosure of personal information.

Additional Submissions:

On October 8, 2013, the GRC requested both parties fill out a balancing test questionnaire. On October 9, 2013, the Custodian submitted her questionnaire with the following responses:

1. The type of record requested.

Response: A list of each family that received money from the grant program and how much they received.

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

Response: Names, addresses, dollar amount given, what bills will be paid with the money given.

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

Response: Release of the names and addresses of those who required public assistance under an assumption of privacy would unduly violate the confidentiality of the program and subject the recipients to the fact of their needing assistance being known to the larger public via local sharing and media distribution. The Custodian’s offices have received numerous appeals from recipients via letters, calls, emails and walk-ins. They have appealed to us to maintain their privacy. Many of them have stated they would never

have come forward for aid had they know 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 and an application process. 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 solely by the Director on a computer that is stationed in a locked office. The monetary amounts on the spreadsheet were reconciled by the Business Administrator via viewing of the spreadsheet with the names and addresses redacted in an effort 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 October 25, 2013, the Complainant submitted her questionnaire with the following responses:

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

Response: The requested records are public information and it is my right under the law to review and have copies of these records.

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

Response: Receipt of this information is extremely important to me and the general public. The Borough has no legal right to withhold this public information. The Borough solicited funds from the general public and accepted funds from other non-profit organizations – such as the Robin Hood Foundation – and acted as the treasurer of those funds, distributing same to the general public based on its funding guidelines. It has a requirement as a public entity to disclose where it distributed those funds.

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

Response: At this time I do not have any plan of publishing or redistributing the requested information. However, as public information, I reserve the right to do so in the future.

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

Response: No.

Analysis⁵

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 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 held 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. Cnty. 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 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 Borough's asserted need to protect the privacy of individuals against the Complainant's asserted need to access the requested records.

⁵ 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.

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 found 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. Cnty. 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 List Be Disclosed in Its 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 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. The Complainant sought a list of recipients from the Borough's grant program.

The type of information at issue is names and addresses of recipients participating in the Borough's grant program in the aftermath of Hurricane Sandy, as well as how much each participant received.

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 Complainant asserted that he did not plan on redistributing any information but reserves the right to do so in the future.

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 accepted donations from the general public and charities for the express purpose of providing grants to aid in hurricane recovery. 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 grants were fairly distributed.

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. As previously stated, the Complainant asserted that she did not intend to redistribute the list, but reserves the right to do so in the future.

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.

iv. *Burnett Factor Six*

The sixth Burnett factor addresses the degree of need for access to the names and addresses. The Complainant asserts that she and the general public have a right under the law to view the information. The Complainant asserts that not only did the Borough solicit and accept funds for this program, but also acted as the treasurer of the funds, deciding who would receive aid and how much they would receive.

The degree of need weighs in favor of access here because the Complainant is a member of the press. An inherent duty of the press is to ensure that the Borough is legally performing their functions and held accountable to its citizens. For this reason, the Complainant 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.

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 recipient list at issue here. The statutes to which the Custodian cites refer to persons seeking or participating in more permanent assistance programs. 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 grant 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 grants from the Borough have limited privacy interest in the face of the public's right to ensure that grants were justly and fairly distributed.

Therefore, the Custodian has failed to bear her burden of proving that disclosure of the grant recipient list would violate the reasonable expectation of privacy provision. N.J.S.A. 47:1A-6. The Custodian shall disclose the responsive grant recipient list.

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 grant recipient list would violate the reasonable expectation of privacy provision. N.J.S.A. 47:1A-6. The Custodian shall disclose the responsive grant recipient list.
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 1:4-4,⁶ to the Executive Director.⁷**
3. 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: Samuel A. Rosado, Esq.
Staff Attorney

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

December 10, 2013

⁶ "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."

⁷ Satisfactory compliance requires that the Custodian deliver the record 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.