



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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FINAL DECISION

May 28, 2008 Government Records Council Meeting

Andrew Faulkner
Complainant

Complaint No. 2007-149

v.

Rutgers University
Custodian of Record

At the May 28, 2008 public meeting, the Government Records Council (“Council”) considered the May 21, 2008 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. By a majority vote, the Council adopted the entirety of said findings and recommendations. The Council, therefore, finds that similar to the Council’s decision in Avin v. Borough of Ramsey, GRC Complaint No. 2004-181 (March 2005), the evidence of record shows that the Complainant’s responses to the balancing test exemplifying his need for access do not outweigh the Custodian’s responses to the balancing test exemplifying the need to safeguard the requested season ticket holders’ personal information on the lists. The release of the requested lists of names and addresses may result in unsolicited contact between the Complainant and the individuals whose names and addresses are being requested. Therefore, the Custodian did not unlawfully deny the Complainant access to the requested season ticket holders’ lists pursuant to N.J.S.A. 47:1A-1, which states that a public agency has a responsibility and an obligation to safeguard from public access a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy.

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 May, 2008

Robin Berg Tabakin, Chairman
Government Records Council

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

David Fleisher, Secretary
Government Records Council

Decision Distribution Date: June 5, 2008

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 28, 2008 Council Meeting**

**Andrew B. Faulkner¹
Complainant**

GRC Complaint No. 2007-149

v.

**Rutgers University of New Jersey²
Custodian of Records**

Records Relevant to Complaint:

1. The names and addresses of every 2006 season ticket holder for Rutgers University football games
2. The names and addresses of every 2006 season ticket holder for Rutgers University men's basketball games

Request Made: June 20, 2007³

Response Made: June 21, 2007

Custodian: Leslie Fehrenbach/Debra Norman

GRC Complaint Filed: July 2, 2007

Background

June 20, 2007

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

June 21, 2007

Custodian's Response to the OPRA request.⁴ The Custodian responds in writing to the Complainant's OPRA request on the first (1st) business day following receipt of such request. The Custodian states that access to the requested record is denied because OPRA states that a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy. The Custodian also states that releasing the names and addresses of the season ticket holders would violate their expectation of privacy.

¹ The Complainant is listed on record as representing himself.

² Represented by John J. Peirano, Esq. (Morristown, NJ).

³ The Complainant originally requested the records through a letter under the Freedom of Information Act (FOIA) on June 19, 2007 and an employee in the Custodian's office, Debra Norman, instructed him to fill out the official OPRA request form on June 20, 2007.

⁴ The Custodian's response to the Complainant's OPRA request is signed by Debra Norman, Senior Executive Associate, in the office of the Custodian.

July 2, 2007

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:⁵

- Complainant’s OPRA request dated June 20, 2007
- Letter from the Custodian to the Complainant dated June 21, 2007

The Complainant asserts that he faxed his OPRA request form to the University on June 20, 2007. The Complainant also asserts that in a letter dated June 28, 2007, the Custodian denied his request because releasing the names and addresses of the season ticket holders would violate their expectation of privacy.

The Complainant contends that based upon his review of prior GRC decisions, the standard used in determining privacy issues comes from the Supreme Court’s decision in Doe v. Poritz, 142 N.J. 1, 82 (1995) in which the Court held that the individual’s privacy interest must be balanced against the interest in disclosure. The Complainant also contends that in applying this balance test to his request, it is his belief that the GRC will find that the public’s interest in disclosure outweighs the privacy interests in the names and home addresses of the University’s season ticket holders.⁶

July 12, 2007

Offer of Mediation sent to both parties. The Complainant agreed to mediate this complaint.

July 18, 2007

The Custodian agreed to mediate this complaint.

December 6, 2007

The complaint was referred back from Mediation for adjudication.

December 11, 2007

Request for the Statement of Information sent to the Custodian.

December 19, 2007

Custodian’s Statement of Information (“SOI”) with the following attachments:⁷

- Complainant’s OPRA request dated June 20, 2007
- Letter from the Custodian to the Complainant dated June 21, 2007
- A Public Guide to OPRA

The Custodian certifies that the Complainant’s OPRA request was received in her office on June 20, 2007. The Custodian also certifies that on June 21, 2007, the Complainant’s OPRA request was denied pursuant to OPRA’s directive that public

⁵ Other documents were attached that are not relevant to the adjudication of this complaint.

⁶ The Complainant includes responses to questions he perceives relevant for the balancing test; the actual balancing test questions will be addressed on the date on which the GRC requests such information.

⁷ The Custodian also included correspondence that took place during the Mediation process which is not considered for the adjudication of this complaint.

entities must safeguard from public access a citizen's personal information with which they have been entrusted.

The Custodian contends that the University maintains the requested lists in a database that was initially created and maintained by the Athletic Department Ticket Office which is password protected and each employee within the ticket office is required to execute and comply with a confidentiality agreement prohibiting disclosure of confidential information including the requested lists. The Custodian also contends that no other employees of the University have access to the database except the Rutgers University Foundation, which utilizes the database for fundraising purposes for the University. The Custodian further contends that even the entity for which the University has partnered to market University athletics does not have access to, and has never been provided, the list requested by the Complainant.

The Custodian asserts that as the Complainant addressed in his Denial of Access Complaint, the disclosure of an individual's home address implicates privacy interests pursuant to Doe v. Poritz, 142 N.J. 1, 82 (1995). The Custodian states that whether the privacy interest of a name and home address outweighs the public's interest in disclosure is an issue determined on a case by case basis and cites to Merino v. Ho-Ho-Kus, GRC Complaint No. 2003-110.

Additionally, the Custodian certifies that the requested records are exempt from disclosure as trade secrets and proprietary commercial or financial information obtained from any source pursuant to N.J.S.A. 47:1A-1.1. The Custodian contends that in defining a trade secret, the GRC refers to the Restatement of Torts which provides in pertinent part:

“...a trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it...it may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a *list of customers*...” (Emphasis added).

The Custodian cites Newark Morning Ledger Co. v. New Jersey Sports & Exposition Authority, GRC Complaint No. 2003-43 (April 2004); citing Hammock v. Hoffmann-LaRoche, Inc. v. L. Day, 142 N. J. Super. 356, 384 (1995); Rycoline Products, Inc. v. Walsh, 334 N. J. Super. 62, 72 (App. Div.) cert. denied 168 N.J. 678 (2000). The Custodian also contends that New Jersey customer lists of service businesses have been afforded protection as trade secrets and cites LaMorte Burns & Co., Inc. v. Walters, 167 N. J. Super. 285, 298 (2001). The Custodian further contends that the trade secret and proprietary exemption under OPRA applies to this request and thus the University is not required to disclose the information.

The Custodian asserts that OPRA also exempts from disclosure information which if disclosed would give an advantage to competitors or bidders because they will be able to target individuals who clearly are willing to expend discretionary funds on sporting events.

January 22, 2008

Letter from the GRC to the Complainant and Custodian. The GRC requires answers to specific questions, in which the GRC will use in its balancing analysis of the requestor's need for access versus the privacy interest of the citizens whose personal information is contained in the requested records.

January 23, 2008

Letter from the Complainant to the GRC. The Complainant's response to the GRC's letter is as follows:⁸

Questions	Complainant's Response
Why do you need the requested record or information?	The Complainant's client is conducting a study on the geographic distribution of the University's season ticket holders. It is comparing the geographic distribution of the University's tickets versus other universities throughout the country. For example, it is comparing whether one subdivision of a city has a concentration of Rutgers University season ticket holders versus some other sample university. The study would also show where one subdivision in a city has a higher concentration of Rutgers University fans as opposed to other subdivisions in a city.
How important is the requested record or information to you?	This information is very important. Disclosure of the information requested is the only means for conducting the analysis. The public interest in ascertaining how season tickets are geographically distributed is served by disclosure of this information. Such disclosure would not constitute an unwarranted invasion of privacy. The University is trying to unilaterally prevent the public from monitoring an aspect of the University's public function, i.e., the sale and distribution of season tickets.
Do you plan to redistribute the requested record or information?	No.
Will you use the requested record or information for unsolicited contact of the individuals named on the list?	No.

⁸ The Complainant also refers the GRC to a document which he submitted to the Custodian, but which is not relevant to the adjudication of this complaint.

January 28, 2008

Letter from the Custodian to the GRC. The Custodian's response to the GRC's letter is as follows:

Questions	Custodian's Response
Type of record request:	a) The names and addresses of every 2006 season ticket holder for Rutgers University football games. b) The names and addresses of every 2006 season ticket holder for Rutgers University men's basketball games.
The type of information it does or might contain:	The name and home and/or business address of every 2006 season ticket holder for Rutgers University football and men's basketball games.
The potential for harm in any subsequent nonconsensual disclosure:	Any non-consensual disclosure of this information could result in the unsolicited contact of the individuals on the lists, a privacy interest specifically identified in <u>Doe v. Poritz</u> as one that must be protected. Unsolicited contact would result in damage to the good-will of season ticket holders and damage to the commercial value of these lists that would be incalculable and unrecoverable.
The injury from disclosure to the relationship in which the record was generated:	Individuals and businesses within the area have finite discretionary funds that may be used for entertainment purposes. The University is constantly vying, along with other universities, professional sports teams and other entertainment providers, for these funds. Dissemination of the season ticket-holders' private information would tip the balance in favor of the University's competitors. Regardless of the reason for such dissemination, allowing the release of confidential information previously entrusted with the University would sever long lasting relationships between the University and its season ticket-holders that could not be repaired. Moreover, the public's knowledge of such disclosure could prevent new relationships from forming; significantly, individual's may choose to donate elsewhere if they feared that the University could not protect their personal information.
The adequacy of safeguards to prevent	The University takes extensive measures to

<p>unauthorized disclosure:</p>	<p>prevent the unauthorized disclosure of its list of season ticket holders. The University limits access to the University's Athletic Department Ticket Office, who initially created the lists, and the University's Foundation, whose sole function is fundraising on behalf of the University. The lists are maintained in a password-protected database by both the ticket office and the Foundation and all employees with access must first execute a confidentiality agreement prohibiting the disclosure of this confidential information. At this time, the Complainant's request contains no guarantees that the privacy interests of season ticket holders will be protected and, thus, disclosure of these lists could undermine the University's substantial efforts to protect these privacy interests.</p>
<p>Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access:</p>	<p>The University has not identified any express statutory mandate, articulated public policy or other recognized public interest militating toward access to lists of season ticket holders of State Universities. Even if the public has an interest in the research that the Complainant's client purportedly is conducting, the Complainant has not provided any reason why names and specific street addresses are needed to determine the geographic distribution of the University's season ticket-holders. Thus, even if the public had some interest in this proposed research, there is no public interest in disclosure of the requested information to the extent sought by the Complainant.</p>

Analysis

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*”
 (Emphasis added.) N.J.S.A. 47:1A-1.

OPRA also 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.

Additionally, OPRA defines a government record as:

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

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

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

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

On June 20, 2007, the Complainant requested the names and address of every 2006 season ticket holder for Rutgers University’s football and men’s basketball games. The Custodian denied the Complainant’s OPRA request on June 21, 2007, claiming that a public agency has the responsibility and obligation to safeguard from the 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. Since the Complainant requests information that could adversely affect the privacy of the citizens involved, it is necessary to employ the balancing test set forth by the New Jersey Supreme Court and utilized in previous GRC cases.

In Merino v. Ho-Ho-Kus, GRC Complaint 2003-110 (Feb. 18, 2004), the Council addressed the citizen’s reasonable expectation of privacy pursuant to N.J.S.A. 47:1A-1 and found that the New Jersey Supreme Court, Appellate Division held that the GRC must enforce OPRA's declaration, in N.J.S.A. 47:1A-1, that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." Serrano v. South Brunswick Twp., 358 N.J. Super. 352, 368-69 (App. Div. 2003). See also National Archives and Records

Administration v. Favish, 541 U.S. 157, 124 S.Ct. 1570 (U.S. March 30, 2004) (personal privacy interests are protected under FOIA).

The New Jersey Supreme Court has indicated that, as a general matter, the public disclosure of an individual's home address "does implicate privacy interests." Doe v. Poritz, 142 N.J. 1, 82 (1995). The Court specifically noted that such privacy interests are affected where disclosure of a person's address results in unsolicited contact. The Court quoted with approval a federal court decision that indicated that significant privacy concerns are raised where disclosure of the address "can invite unsolicited contact or intrusion based on the additional revealed information." *Id.* (citing Aronson v. Internal Revenue Service, 767 F. Supp. 378, 389 n. 14 (D. Mass. 1991)).

The Supreme Court concluded that the privacy interest in a home address must be balanced against the interest in disclosure. It stated that the following factors should be considered:

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;
7. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access [*Id.* at 87-88].

The foregoing criteria was applied accordingly by the Court in exercising its discretion as to whether the privacy interests of the individuals named in the summonses are outweighed by any factors militating in favor of disclosure of the addresses.

To ascertain the degree of need for access from the Complainant, the GRC asked the Complainant the following questions:

1. Why do you need the requested record or information?
2. How important is the requested record or information to you?
3. Do you plan to redistribute the requested record or information?
4. Will you use the requested record or information?

Questions	Complainant's Response
Why do you need the requested record or information?	The Complainant's client is conducting a study on the geographic distribution of the University's season ticket holders. It is comparing the geographic distribution of the University's tickets versus other University's throughout the country. For example, it is comparing whether one subdivision of a city has a concentration of Rutgers University season ticket holders versus some other sample university. The

	study would also show where one subdivision in a city has a higher concentration of Rutgers University fans as opposed to other subdivisions in a city.
How important is the requested record or information to you?	This information is very important. Disclosure of the information requested is the only means for conducting the analysis. The public interest in ascertaining how season tickets are geographically distributed is served by disclosure of this information. Such disclosure would not constitute an unwarranted invasion of privacy. The University is trying to unilaterally prevent the public from monitoring an aspect of the University's public function, i.e., the sale and distribution of season tickets.
Do you plan to redistribute the requested record or information?	No.
Will you use the requested record or information for unsolicited contact of the individuals named on the list?	No.

Questions	Custodian's Response
Type of record request:	a) The names and addresses of every 2006 season ticket holder for Rutgers University football games. b) The names and addresses of every 2006 season ticket holder for Rutgers University men's basketball games.
The type of information it does or might contain:	The name and home and/or business address of every 2006 season ticket holder for Rutgers University football and men's basketball games.
The potential for harm in any subsequent nonconsensual disclosure:	Any non-consensual disclosure of this information could result in the unsolicited contact of the individuals on the lists, a privacy interest specifically identified in <u>Doe v. Poritz</u> as one that must be protected. Unsolicited contact would result in damage to the good-will of season ticket holders and damage to the commercial value of these lists that would be incalculable and unrecoverable.
The injury from disclosure to the relationship in which the record was generated:	Individuals and businesses within the area have finite discretionary funds that may be used for entertainment purposes. The University is constantly vying, along with

	<p>other universities, professional sports teams and other entertainment providers, for these funds. Dissemination of the season ticket-holders' private information would tip the balance in favor of the University's competitors. Regardless of the reason for such dissemination, allowing the release of confidential information previously entrusted with the University would sever long lasting relationships between the University and its season ticket holders that could not be repaired. Moreover, the public's knowledge of such disclosure could prevent new relationships from forming; significantly, individual's may choose to donate elsewhere if they feared that the University could not protect their personal information.</p>
<p>The adequacy of safeguards to prevent unauthorized disclosure:</p>	<p>The University takes extensive measures to prevent the unauthorized disclosure of its list of season ticket holders. The University limits access to the University's Athletic Department Ticket Office, who initially created the lists, and the University's Foundation, whose sole function is fundraising on behalf of the University. The lists are maintained in a password-protected database by both the ticket office and the Foundation and all employees with access must first execute a confidentiality agreement prohibiting the disclosure of this confidential information. At this time, the Complainant's request contains no guarantees that the privacy interests of season ticket holders will be protected and, thus, disclosure of these lists could undermine the University's substantial efforts to protect these privacy interests.</p>
<p>Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access:</p>	<p>The University has not identified any express statutory mandate, articulated public policy or other recognized public interest militating toward access to lists of season ticket holders of State Universities. Even if the public has an interest in the research that the Complainant's client purportedly is conducting, the Complainant has not provided any reason why names</p>

	<p>and specific street addresses are needed to determine the geographic distribution of the University's season ticket holders. Thus, even if the public had some interest in this proposed research, there is no public interest in disclosure of the requested information to the extent sought by the Complainant.</p>
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In a prior GRC decision, Avin v. Borough of Ramsey, GRC Complaint No. 2004-181 (March 2005), the Council found that the requested records should not be disclosed based on the specific facts of the case. In that case, the Complainant requested a list of all homeowners who took out a fire and/or burglar permit in the last three (3) years. The Council considered the balancing test and found that the potential for harm to both those citizens who have applied for a burglar or fire alarm in the past three (3) years, as well as those who have not, outweighed the requestor's need for access, and that the release of names and home addresses would result in unsolicited contact between the Complainant and the individuals whose names and home addresses are being requested.

In the complaint before the Council, the Complainant details within his balancing test responses that he seeks the requested records for a study on the geographic distribution of the season ticket holders, and the requested information is the only means for conducting the analysis. The Custodian explains that the disclosure of the requested information could result in the unsolicited contact of the individuals on the lists, which the Custodian asserts is a privacy interest specifically identified in Doe v. Poritz, 142 N.J. 1, 82 (1995).

Similar to the Council's decision in Avin, the evidence of record shows that the Complainant's responses to the balancing test exemplifying his need for access does not outweigh the Custodian's responses to the balancing test exemplifying the need to safeguard the requested season ticket holders' personal information on the lists. The release of the requested lists of names and addresses may result in unsolicited contact between the Complainant and the individuals whose names and addresses are being requested. Therefore, the Custodian did not unlawfully deny the Complainant access to the requested season ticket holders' lists pursuant to N.J.S.A. 47:1A-1, which states that a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that, similar to the Council's decision in Avin v. Borough of Ramsey, GRC Complaint No. 2004-181 (March 2005), the evidence of record shows that the Complainant's responses to the balancing test exemplifying his need for access do not outweigh the Custodian's responses to the balancing test exemplifying the need to safeguard the requested season ticket holders' personal information on the lists. The release of the requested lists of names and addresses may result in unsolicited contact between the Complainant and the

individuals whose names and addresses are being requested. Therefore, the Custodian did not unlawfully deny the Complainant access to the requested season ticket holders' lists pursuant to N.J.S.A. 47:1A-1, which states that a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy.

Prepared By:

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Case Manager

Approved By:

Catherine Starghill, Esq.
Executive Director

May 21, 2008