



State of New Jersey
GOVERNMENT RECORDS COUNCIL
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JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

September 30, 2009 Government Records Council Meeting

Dean Feasel
(on behalf of Plumbers & Pipefitters Local 9)
Complainant

Complaint No. 2008-103

v.
City of Trenton (Mercer)
Custodian of Record

At the September 30, 2009 public meeting, the Government Records Council (“Council”) considered the September 23, 2009 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 because the Complainant has failed to establish in his motion for reconsideration of the Council’s April 29, 2009 Findings and Recommendations that 1) the GRC's decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in reaching its decision, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 30th Day of September, 2009

Robin Berg Tabakin, Chair
Government Records Council

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

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: October 7, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
September 30, 2009 Council Meeting**

**Dean Feasel, on behalf of
Plumbers & Pipefitters Local 9¹
Complainant**

GRC Complaint No. 2008-103

v.

**City of Trenton (Mercer)²
Custodian of Records**

Records Relevant to Complaint:

Certified payroll records from Marshall Industries of Trenton for the work they performed for the City of Trenton between June, 2005 and August, 2007.

Request Made: April 3, 2008

Response Made: April 17, 2008

Custodian: Juanita Joyner, Acting City Clerk

GRC Complaint Filed: April 30, 2008³

Background

April 29, 2009

Government Records Council's ("Council") Findings and Recommendations. At its April 29, 2009 public meeting, the Council considered the April 22, 2009 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's April 9, 2008 request for an extension is insufficient under OPRA because the Custodian did not request a specific extension of time on which access to the requested records would be granted or denied. Therefore, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

¹ Represented by Andrew L. Watson, Esq., Pellettieri, Rabstein & Altman (Princeton, NJ).

² Represented by Joseph Alacqua, Esq., (Turnersville, NJ).

³ The GRC received the Denial of Access Complaint on said date.

2. Similar to the U.S. District Court's decision in John Does & PKF-Mark III, Inc. v. City of Trenton Dep't of Pub. Works - Water Div., 565 F. Supp. 2d 560 (D.N.J. 2008), the evidence of record shows that the Complainant's need for access does not outweigh the Custodian's need to safeguard the personal information contained in the requested certified payroll records. The release of the employee 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 names and addresses contained in the requested certified payroll records pursuant to N.J.S.A. 47:1A-1, which states that a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy.
3. Although the Custodian's April 9, 2008 request for an extension failed to specify a time period requested, thus resulting in a deemed denial of the Complainant's OPRA request, a violation of N.J.S.A. 47:1A-5.i. and the Council's decision in Hardwick v. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the Custodian did not unlawfully deny the Complainant access to the names and addresses contained in the requested certified payroll records pursuant to N.J.S.A. 47:1A-1. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's deemed denial of the Complainant's OPRA request appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

May 4, 2009

Council's Findings and Recommendations distributed to the parties.

May 18, 2009

Complainant's request for reconsideration of the Council's April 29, 2009 Findings and Recommendations. The Complainant asserts that the reasons supporting the Council's reconsideration of this matter include mistake, new evidence, and change in circumstances.

In support of the request for reconsideration, the Complainant asserts that the U.S. District Court's opinion in John Does & PKF-Mark III, Inc. v. City of Trenton Dep't of Pub. Works - Water Div., 565 F. Supp. 2d 560 (D.N.J. 2008) has been obviated by the New Jersey Supreme Court in Burnett v. County of Bergen, 198 N.J. 408 (2009).⁴ The Complainant contends that this decision constitutes changed circumstances in the light of which the Council's decision is mistaken.

⁴The New Jersey Supreme Court reached its decision on April 27, 2009.
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The Complainant contends that the Burnett decision makes clear that the names and addresses contained in the certified payroll records at issue in this case would plainly be subject to disclosure. The Complainant further asserts that if the balancing test applied by the Burnett court were undertaken, the weighing of factors favors disclosure over the privacy interest in the names and addresses on the certified payroll records. The Complainant requests that the Council reconsider its final decision and direct the Custodian to release the certified payroll records from Marshall Industries of Trenton for work performed for the City of Trenton between June 2005 and August 2007.

The Complainant argues that the Council erroneously determined that the primary “command” to public agencies is to safeguard personal information rather than to foster broad public access to government records for the protection of the public interest. The Complainant cites to N.J.S.A. 47:1A-1, Times of Trenton Publ’g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005), and Libertarian Party of Cent. New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006) in support of this argument. The Complainant asserts that the Legislature has provided access to government records “for the protection of the public interest,” and any exceptions or limitations on the public’s rights shall be construed in favor of the public’s right of access. The Complainant contends that the GRC instead elevated an exception to the wide release of documents to be the rule and cited first the “command” to public agencies to safeguard personal information. The Complainant argues that this position has been refuted by the New Jersey Supreme Court in the Burnett decision.

The Complainant asserts that the GRC’s findings and recommendations refer to three (3) reasons the Custodian claimed that certified payroll records are exempt from disclosure: 1) the U.S. District court’s decision in PKF, 2) public records exemption per federal law or order and 3) violation of a citizen’s right to privacy. The Complainant contends that the first two of these reasons are mooted by the Burnett decision. The Complainant notes that a decision of the New Jersey Supreme Court is binding on the GRC. The Complainant notes that the U.S. District Court in PKF rendered its decision prior to the issuance of the Burnett decision, and that the Court in Burnett “relegated the PKF decision to nothing more than a passing reference.”

The Complainant also notes that the exemption from disclosure pursuant to federal law or order cannot prevent disclosure in light of Burnett. The Complainant asserts that PKF did not involve the Complainant and is confined to the specific requests made in that case.

The Complainant contends that the GRC did not rely upon the federal law exemption in its April 29, 2009 decision, and, indeed, could not have, because “a prospective federal ruling does not come within the plain language of the statute and such a ruling cannot be grafted onto the statute after the fact.”

The Complainant contends that the GRC’s analysis lacked an application of the balancing test enunciated in Doe v. Poritz, 142 N.J. 1 (1995) to the facts of the Complainant’s case. The Complainant notes that the Burnett decision specifically stated that the Court had no concern for the personal information at issue, including the names and addresses, apart from the social security numbers contained in the requested records.

The Complainant reiterates that the request in Burnett sought eight million pages of land title records of all types, extending over a period of twenty two years, which contained names, addresses, social security numbers and signatures of New Jersey residents. The Complainant states that the Burnett court recognized that the request was exclusively for commercial purposes and that a “commercial business plan[ned] to catalogue and sell information by way of easy to search computerized databases.” The Complainant further states that the Burnett court concerned itself with the disclosure of social security numbers alone.

The Complainant argues that application of the Doe factors dictates that the names and addresses in the certified payroll records should be released. The Complainant notes that the Doe factors include an examination of:

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 interest militating toward access. Citing Doe v. Poritz, *supra*, 142 N.J. at 88.

Type of record and information contained in said record:

The Complainant notes that the Burnett court combined factors No. 1 and No. 2 and recognized that realty records were public records required to be kept and maintained and that the very purpose of keeping and filing those records was to place the world on notice of their contents. The Complainant also notes that the Burnett court stated that individuals such as potential buyers and creditors needed the records to protect their interests. The Complainant asserts that the Burnett court found that these points argued in favor of disclosure and the lack of a privacy interest in the documents. The Complainant further asserts that the court’s only concern implicating privacy concerns was the assemblage of multiple records into composite documents that would be made available in a searchable computer database.

The Complainant argues that the same factors favoring disclosure are clear and the Burnett court’s concerns are non-existent. The Complainant submits certifications from McCarthy and Dill which the Complainant asserts establish that the entire public works process is replete with documents which must be filed and maintained with various government entities: putting the world on notice of the contents of the records is the intent behind maintaining certified payroll records.

The Complainant asserts that contractors are aware that to participate in public works projects, personnel information like names and addresses of employees and company owners must be provided in records. The Complainant asserts that implicit in the Burnett court’s reasoning is that individuals waive their right (or portion thereof) to

information otherwise deemed personal when filing records with public agencies. The Complainant argues that, similar to public and State employees whose information is readily available on the internet, a contractor and its employees have made a conscious decision to work in the public realm and receive public funds raised through tax revenues.

Moreover, the Complainant asserts that without certified payroll records, a member of the public cannot determine that the service received is worth the amount of public monies paid; in this way, certified payroll records protect employees working on a public works project, unsuccessful bidders and the public. The Complainant contends that the State's current economic crisis gives additional credence to the need for the requested records to ensure that public works employees, unsuccessful bidders and the public are not being defrauded.

The Complainant asserts that the Burnett court expressed concerns about the commercial use of the records requested in said case; however, there is no evidence in the instant complaint that the requested records would have been marketed for sale or that such a market exists. Further, the Complainant asserts that it is not clear that without proper training one would know what to do with a certified payroll record. The Complainant contends that it is clear in this complaint that the singular purpose of the certified payroll records is to enforce the law governed by the New Jersey Department of Labor ("DOL").

The Complainant concludes that the first two (2) factors argue in favor of disclosure over purported privacy interest.

Potential for harm and injury from disclosure of records is speculative and unfounded:

The Complainant avers that the Burnett court combined Doe factors No. 3 and No. 4 together; however, Burnett court's analysis of these factors is not helpful in the present case.⁵ The Complainant contends that a single harm of the released requested certified payroll records was the potential for unsolicited contact with any of the listed employees. The Complainant disputes this characterization, contending that the evidence of record in the instant complaint did not suggest that the Complainant or Counsel would make unsolicited contact with any of the employees. The Complainant contends that any alleged harm is purely speculative and unfounded.

Additionally, the Complainant contends that the GRC's application of PKF (where employees asserted that they were harassed) on the instant complaint is fundamentally unfair. The Complainant argues that speculative and unsupported assertions of harm cannot be incorporated into the instant complaint and used to prevent disclosure.

Regarding factor No. 4 of Doe, the Complainant asserts that any injury would be slight and related to the relationship in which the record was generated. The Complainant asserts that although an employee would receive unsolicited contact in the

⁵ The Complainant states that the risk of harm of the disclosure of the realty records requested in Burnett was identity theft.

worst case scenario, there is absolutely no indication that said contact would be physically violent, threatening or would place any employees in danger of identity theft. The Complainant contends that, to the contrary, any unsolicited contact would be related to potential violations of the Prevailing Wage Act.

The Complainant concludes that factors No. 3 and No. 4 favor disclosure of the requested certified payroll records.

Adequacy of safeguards to prevent unauthorized disclosure:

The Complainant argues that the millions of records at issue in Burnett distinguish that case from the complaint currently in front of the GRC. The Complainant asserts that the clear commercial purpose of compiling and selling realty records in Burnett is wholly inapplicable to the Complainant's request for certified payroll records.

The Complainant asserts that the GRC failed to analyze this factor in deciding the instant complaint. Additionally, the Complainant asserts that notice to the contractor or its designated agent is not likely to be feasible because it would alert the entity under investigation about the existence of said investigation. The Complainant asserts that this factor tips either for or against disclosure.

The need for access is substantial:

The Complainant avers that the disclosure of social security numbers in Burnett would not have further the goals of OPRA. The Complainant states that the court referenced that this factor would have weighed differently if the request had been made by an investigative reporter.

The Complainant asserts that he and labor unions in general are acting as investigators. The Complainant avers that the certifications of Mr. Michael P. McCarthy ("Mr. McCarthy") and Mr. Joe Dill ("Mr. Dill") make abundantly clear that DOL is short handed in the enforcement of the Prevailing Wage Act and rely heavily on labor unions for assistance. The Complainant states that Mr. McCarthy certifies that 70% of the complaints for Prevailing Wage Act violations are initiated by labor unions based on certified payroll records. The Complainant asserts, in this regard, that the Complainant and labor unions are acting as de facto investigators and that not allowing disclosure of the names and addresses on the certified payroll records would prevent the Complainant from fulfilling the role of an investigator and would be a substantial disservice to the general public.

The Complainant states that Mr. McCarthy certifies that monies recovered for violations of the Prevailing Wage Act would substantially diminish without the labor unions' expertise and assistance. The Complainant asserts that in the current economic climate, free assistance from the Complainant and labor unions to protect the taxpayers and public funds should not be dismissed. The Complainant contends that a substantial need for disclosure of the names and addresses contained on the certified payroll records exists because the public's knowledge of publically financed jobs will be maximized.

The Complainant asserts that disclosure of the certified payroll records is precisely what the court meant in Burnett when it declared “[w]ith broad public access to information about how state and local governments operate, citizens and the media can play a watchful role in curbing wasteful government spending and guarding against corruption and misconduct.” *Id.* at 414.

The public interest favors public access:

The Complainant reiterates his claim that the requested records containing names and addresses of employees should be provided because of the public interest in protecting the taxpayers and revealing potential violations of the Prevailing Wage Act. The Complainant further reiterates DOL’s reliance on labor unions to assist in enforcing the Prevailing Wage Act.

The Complainant concludes that the citizens of the State of New Jersey deserve to have their public works projects comply with all applicable rules and regulations and the public interest is served by having the Complainant and labor unions provide expertise to help the State recoup penalties for the failure to comply with said rules and regulations.

Finally, the Complainant respectfully requests that the GRC reconsider its May 4, 2009 final decision denying the Complainant’s request for certified payroll records, inclusive of names and addresses, from Marshall Industries of Trenton for work performed for the City of Trenton between June 2005 and August 2007.⁶

May 27, 2009

Certifications of Mr. Michael P. McCarthy and Mr. Joe Dill. The Complainant’s Counsel submits the certifications of Mr. McCarthy and Mr. Dill in support of the motion for reconsideration.

Mr. McCarthy certifies that he was an employee of DOL for approximately 37 years and held various job titles. Mr. McCarthy certifies that he is intimately familiar with the DOL’s operations and investigation, prosecution and enforcement of wage and hour violations. Mr. McCarthy certifies that DOL had approximately twenty (20) investigators assigned to the enforcement of the Prevailing Wage Act and related statutes at the time of his retirement on January 1, 2009.

Mr. McCarthy certifies that an investigator’s job duties and responsibilities are numerous and diverse.⁷ Mr. McCarthy certifies that, over 21 counties, 566 municipalities and approximately 600 school boards, billions of dollars of construction contracts are awarded every year resulting in thousands of job sites across the State. Mr. McCarthy certifies that DOL lacks the staffing and resources to undertake the massive effort of ensuring full compliance with wage and hour requirements. Mr. McCarthy certifies that labor unions have become an invaluable asset to DOL based on the shortage.

⁶ The Complainant also argues that the DAG in the PKF matter failed to disclose that he previously worked in private practice with PKF’s Counsel; however, this argument is not relevant to the reconsideration of the instant complaint.

⁷ Mr. McCarthy lists several responsibilities for the investigator position.

Mr. McCarthy certifies that labor union officials effectively act as additional investigators and provide an expertise that DOL does not possess. Mr. McCarthy certifies that labor union officials are also used as witnesses in administrative hearings concerning violations of the Prevailing Wage Act and other regulations, which is especially true in matters involving falsified public records; specifically, payroll records. Mr. McCarthy certifies that DOL and labor unions primarily rely on certified payroll records to determine whether a violation of the Prevailing Wage Act has occurred. Mr. McCarthy certifies that this record includes all of the information necessary to determine if a potential violation has occurred and allows investigators to reconcile the findings noted during construction site visits.

Mr. McCarthy certifies that redactions of an employee's name and address on the certified payroll record eliminates the information necessary for the general public to determine whether a potential violation of the Prevailing Wage Act or other rules and regulations has occurred. Mr. McCarthy certifies that without the employee names and addresses, it is impossible to compare and reconcile the information collected during other portions of the investigation; therefore, the certified payroll records become meaningless.

Mr. McCarthy certifies that labor unions have assisted in nearly 70% of the 2000 complaints of violations of the Prevailing Wage Act filed per year: all based on information found in the certified payroll records.⁸ Mr. McCarthy certifies that he does not recall any individuals employed on a publically financed project complaining about unsolicited contact from a labor union official. Mr. McCarthy certifies that names, salaries and pensions of public employees are readily available on the internet and that the not disclosing the names of employees that work on publically financed projects would be inconsistent.

Finally, Mr. McCarthy certifies that the redaction of names and addresses on the certified payroll records would eliminate the enforcement of the Prevailing Wage Act by not allowing a reconciliation of investigative material and curtailing the amount of monies recovered for violations of said Act. Mr. McCarthy certifies that the redactions are a disservice to the taxpayers of the State of New Jersey and the employees working on publically financed construction projects.

Mr. Dill certifies that as an "organizer" in the Plumbers and Pipefitters Local 9 ("Local 9"), Mr. Dill is responsible for reviewing certified payroll records for public works projects in the State of New Jersey. Mr. Dill certifies that he is fully familiar with the Local 9's investigations regarding Prevailing Wage Act violations. Mr. Dill certifies that the Local 9 jurisdiction encompasses seven (7) counties and has a membership of approximately 1200 people, who are also taxpayers in New Jersey. Mr. Dill certifies that approximately half of Local 9's jobs are publicly financed projects. Mr. Dill certifies that publically financed projects are subject to a bid process. Mr. Dill certifies that the bid packages submitted by contractors contain language requiring the contractor(s) awarded the project to comply with the Prevailing Wage Act, which mandates that certified

⁸ Mr. McCarthy also notes that the requested records could help unsuccessful bidders evaluate and determine whether the successful bidder has complied with bidding requirements and the Conscientious Contractor Act (N.J.S.A. 34:11-56.47.).

payroll records containing the names and addresses of employees working on projects be submitted to the agency overseeing the project.

Mr. Dill certifies that the intent of the Prevailing Wage Act is to have contractors openly and willingly provide information about their work. Mr. Dill certifies that contractors understand that personal information will be made public and similarly inform their employees that their information will be made public.⁹ Mr. Dill certifies that certified payroll records are extremely important to verifying whether the requirements of the Prevailing Wage Act have been met.

Mr. Dill certifies that Local 9 averages 100 public works jobs being monitored. Mr. Dill certifies that reviewing the certified payroll records allows Local 9, and subsequently, DOL do the following:

1. Determine whether the employee is even working on the site. Through site visits to a project, labor unions know that certain employees are on site. Frequently, employees at the project are not listed on the certified payroll.
2. Verify hours worked by employees on a project. Underreporting of hours is a consistent problem.
3. Verify wages to determine whether the contractors are paying the appropriate rate to various employees from the different trades on the project.
4. Verify overtime, which must be paid in specific ways and rates.
5. Verify classification of employees to determine if the rate paid is applicable to a particular classification.
6. Verify benefits to ensure that such benefits are calculated appropriately.

Mr. Dill certifies that, upon review of the certified payroll records, labor unions compile detailed complaints concerning Prevailing Wage Act violations for publically financed projects.

Mr. Dill certifies that it has been his experience that DOL is understaffed and does not have the resources to police the amount of publicly financed projects in the State; therefore, labor unions share the responsibility. Mr. Dill certifies that investigations of potential Prevailing Wage Act violations would be impossible without certified payroll records. Mr. Dill certifies that assisting in such investigations and enforcement of the Prevailing Wage Act benefits the taxpayers of New Jersey from being defrauded.

Analysis

Whether the Complainant has met the required standard for reconsideration of the Council's April 29, 2009 Findings and Recommendations?

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10)

⁹ Mr. Dill notes that the Local 9 website lists all of Local 9's officers and their respective salaries.
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business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, *Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. *D'Atria, supra*, 242 N.J. Super. at 401. ‘Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.’ *Ibid.*” *In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey*, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of his motion for reconsideration, the Complainant asserts that mistake, new evidence and changed circumstances require the Council’s reconsideration of its April 29, 2009 decision. Specifically, the Complainant contends that the New Jersey Supreme Court’s decision in *Burnett v. County of Bergen*, 198 N.J. 408 (2009) constitutes changed circumstances which obviate the United States District Court’s decision in *John Does & PKF-Mark III, Inc v. City of Trenton Dep’t of Pub. Works - Water Div.*, 565 F. Supp. 2d 560 (D.N.J. 2008); that the GRC’s analysis lacked an application of the balancing test enunciated in *Doe v. Poritz*, 142 N.J. 1 (1995) to the facts of the Complainant’s case; that the potential for harm and injury from disclosure of records is speculative and unfounded and that the need for access is substantial because the Complainant, and labor unions generally, are acting as investigators to enforce the Prevailing Wage Act; and that the public interest is served by having the Complainant and labor unions provide expertise to help the State recoup penalties for the failure to comply with said rules and regulations. In further support of his motion for reconsideration, Complainant submits the certifications of Mr. McCarthy and Mr. Dill to establish that the Department of Labor relies upon labor unions to enforce the Prevailing Wage Act and that redaction of employee names and addresses from the records requested prevents such enforcement.

Complainant’s Counsel’s reliance on *Burnett, supra*, is not only misplaced but ignores basic issues of issue preclusion and judicial comity. *See Watkins v. Resorts Int’l Hotel & Casino*, 124 N.J. 398 (N.J. 1991).

The New Jersey Supreme Court has stated that:

“[i]ssue preclusion requires a similar, yet less demanding, analysis than res judicata or claim preclusion. See Pittman v. LaFontaine, 756 F. Supp. 834, 841 (D.N.J.1991) (stating in comparison to claim preclusion requirements, “[i]ssue preclusion, on the other hand, requires only that an issue of fact or law be determined in a valid proceeding and that final judgment on that issue was necessary to the decision.”). The doctrines of collateral estoppel, issue preclusion, res judicata, and the like serve the important policy goals of “finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness[.]” Hackensack v. Winner, 82 N.J. 1, 32-33, 410 A.2d 1146 (1980). If an issue between the parties was fairly litigated and determined, it should not be relitigated.

Recently, in Hennessey v. Winslow Township, 183 N.J. 593, 875 A.2d 240 (2005), we outlined the requirements to foreclose relitigation of an issue. We explained that “the party asserting the bar” must show that: (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.[Id. at 599, 875 A.2d 240 (quoting In re Estate of Dawson, 136 N.J. 1, 20-21, 641 A.2d 1026 (1994)) (citations omitted).]” First Union Nat. Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 352 (2007).

In First Union Bank, the Court granted a petition for certification filed by appellant mortgagor which challenged the judgment of the Appellate Division affirming a judgment of foreclosure in favor of respondent mortgagee, which was substantially higher than the final judgment previously entered on the note in a Law Division action. The mortgagor consisted of an individual and a marina, but the individual was not a party to the appeal. The mortgagor had obtained a commercial loan, the promissory note for which was secured, in part, by a first mortgage on the marina. The mortgagor defaulted on the note and the mortgagee filed a complaint on the note in the Law Division. Less than a month after filing the Law Division action, the mortgagee filed the separate mortgage foreclosure action against the mortgagor in the Chancery Division. In that action, the mortgagee sought judgment in its favor, fixing the amount due on the note and mortgage. The mortgagor challenged the second action, asserting that the amount sought was substantially higher than the final judgment previously entered on the note in the Law Division action. The Court agreed and held that the doctrine of issue preclusion called for the second action to be bound by the first to the extent that the same categories of damages were claimed. 190 N.J. at 344-350.

The PKF decision rendered by the U.S. District Court concerned the identical records requested herein, requested from the identical requestor as in the instant matter. The U.S. District Court conducted a hearing to determine the disclosability of the names,

addresses and social security numbers contained within the certified payroll records requested, and in so doing, balanced the competing interests for and against disclosure. The court determined that the requestor, a trade union, failed to establish how the release of the names and addresses contained in the requested records would serve a legitimate public interest. 565 F. Supp. 2d at _____. Moreover, the court found that dissemination of the requested records would put the employees at risk of having their privacy unreasonably invaded while revealing nothing about the inner workings of government. *Id.* The Court therefore granted the plaintiffs' request for injunctive relief prohibiting the disclosure of the requested records.

The issues in the instant Denial of Access complaint are therefore identical to the issues decided in the prior proceeding, and these issues were actually litigated in the prior proceeding. The U.S. District Court issued a final judgment on the merits regarding the disclosability of the certified payroll records. The determination of the issues regarding the competing privacy interests was essential to the granting of the motion for injunctive relief prohibiting the dissemination of the certified payroll records. Finally, the New Jersey Building Trades Council was a party to the PKF matter: the GRC notes that the Complainant herein filed this Denial of Access complaint on behalf of Plumbers and Pipefitters Local 9, which is an affiliate member of the New Jersey Building Trades Council.¹⁰ The party against whom issue preclusion is being asserted is therefore in privity with a party to the earlier proceeding.

Moreover, federal court decisions, while not binding on New Jersey courts, are entitled to respectful consideration in the interests of judicial comity. Judicial comity helps to ensure uniformity and discourage forum shopping. Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 80 (1990).

Thus, the New Jersey Supreme Court's decision in Burnett does not apply because the issues regarding the disclosability of the requested certified payroll records were fully litigated in the U.S. District Court in the PKF matter, and the Complainant is precluded from relitigating those issues before the GRC.

Because the Complainant is precluded from relitigating the issues surrounding the disclosability of the requested certified payroll records because these issues were fully litigated and disposed of by the U.S. District Court in the PKF matter, the Complainant's remaining arguments, that the GRC's analysis lacked an application of the balancing test enunciated in Doe v. Poritz, 142 N.J. 1 (1995) to the facts of the Complainant's case and that the potential for harm and injury from disclosure of records is speculative and unfounded, are moot.

The Complainant also asserts that he, and labor unions generally, act as investigators to enforce the New Jersey Prevailing Wage Act, and that the public interest is served by having the Complainant and labor unions provide expertise to help the State recoup penalties for the failure to comply with said rules and regulations. The New Jersey Prevailing Wage Act, however, specifically confers upon the Commissioner of the Department of Labor and Workforce Development the authority to investigate and

¹⁰ According to the website of the New Jersey Building Trades Council at <http://www.njbctc.org/affiliates.html>

ascertain the wages of workmen employed in any public work in the State. N.J.S.A. 34:11-56.31(a). Complainant's claim in this regard is therefore not supported by the law. *See also* N.J.S.A. 34:11-56.35(a) and (b); N.J.S.A. 34:11-56.43.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra*. The Complainant failed to do so. The Complainant has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably in reaching its decision. *See D'Atria, supra*.

Therefore, because the Complainant has failed to establish in his motion for reconsideration of the Council's April 29, 2009 Decision and Findings and Recommendations that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in reaching its decision, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant has failed to establish in his motion for reconsideration of the Council's April 29, 2009 Findings and Recommendations that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably in reaching its decision, said motion for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Karyn Gordon, Esq.
In House Counsel

Approved By: Catherine Starghill, Esq.
Executive Director

September 23, 2009



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

JOSEPH V. DORIA, JR.
Commissioner

FINAL DECISION

April 29, 2009 Government Records Council Meeting

Dean Feasel
Complainant

Complaint No. 2008-103

v.

City of Trenton (Mercer)
Custodian of Record

At the April 29, 2009 public meeting, the Government Records Council (“Council”) considered the April 22, 2009 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’s April 9, 2008 request for an extension is insufficient under OPRA because the Custodian did not request a specific extension of time on which access to the requested records would be granted or denied. Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Similar to the U.S. District Court’s decision in John Does & PKF-Mark III, Inc. v. City of Trenton Dep’t of Pub. Works - Water Div., 565 F. Supp. 2d 560 (D.N.J. 2008), the evidence of record shows that the Complainant’s need for access does not outweigh the Custodian’s need to safeguard the personal information contained in the requested certified payroll records. The release of the employee 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 names and addresses contained in the requested certified payroll records pursuant to N.J.S.A. 47:1A-1, which states that a public agency has a responsibility and an obligation to safeguard from public access a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy.



3. Although the Custodian's April 9, 2008 request for an extension failed to specify a time period requested, thus resulting in a deemed denial of the Complainant's OPRA request, a violation of N.J.S.A. 47:1A-5.i. and the Council's decision in Hardwick n. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the Custodian did not unlawfully deny the Complainant access to the names and addresses contained in the requested certified payroll records pursuant to N.J.S.A. 47:1A-1. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's deemed denial of the Complainant's OPRA request appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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 29th Day of April, 2009

Robin Berg Tabakin, Chairwoman
Government Records Council

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

Janice L. Kovach
Government Records Council

Decision Distribution Date: May 4, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 29, 2009 Council Meeting**

**Dean Feasel¹
Complainant**

GRC Complaint No. 2008-103

v.

**City of Trenton (Mercer)²
Custodian of Records**

Records Relevant to Complaint:

Certified payroll records from Marshall Industries of Trenton for the work they performed for the City of Trenton between June, 2005 and August, 2007.

Request Made: April 3, 2008

Response Made: April 17, 2008

Custodian: Juanita Joyner, Acting City Clerk

GRC Complaint Filed: April 30, 2008³

Background

April 3, 2008

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.

April 9, 2008

Letter from the Custodian to the Complainant. Custodian requests an extension of time to respond to the Complainant's April 3, 2008 OPRA request.⁴

April 17, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the tenth (10th) business day following receipt of such request. The Custodian states that access to the requested record is denied because legal counsel has advised that the City of Trenton is engaged in litigation involving the release of copies of certified payroll records to third parties. The Custodian further stated that a temporary injunction is in place that prevents the City from releasing the certified payroll records in that case. The Custodian states that because the same privacy issues exist with the instant OPRA request, access to the records sought in this matter is denied pending the outcome of the litigation.

¹ Represented by Raymond G. Heineman, Esq., Kroll, Heineman & Giblin (Iselin, NJ).

² Represented by Joseph Alacqua, Esq. (Turnersville, NJ).

³ The GRC received the Denial of Access Complaint on said date.

⁴ The Custodian did not specify a time period sought for the extension of time.

April 30, 2008

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

- Complainant’s OPRA request dated April 3, 2008
- Letter from the Custodian to the Complainant dated April 9, 2008
- Letter from the Custodian to the Complainant dated April 17, 2008

The Complainant asserts that he is affiliated with Plumbers Local 9, an affiliate of the New Jersey Building and Construction Trades Council, which routinely monitors the certified payrolls of contractors on public works jobsites in order to ensure compliance with the New Jersey Prevailing Wage Act, N.J.S.A. 34:11-56.40,⁵ as well as N.J.S.A. 34:20-8⁶ and *N.J.A.C.* 12:60-5.1(c).⁷

The Complainant asserts that because Local 9 and the Construction Trades Council have the statutory right to enforce violations of the New Jersey Prevailing Wage Act, and a statutory right to gain access to certified payroll records, they have an interest in detecting violations under the Act pursuant to OPRA requests.

The Complainant contends that although OPRA exempts personal identifying information such as social security numbers from disclosure, OPRA does not generally exempt home addresses from disclosure pursuant to N.J.S.A. 47:1A-1.1. The Complainant contends that home addresses are exempt from disclosure pursuant to N.J.S.A. 47:1A-2.2 only where a convict requests the home address of a crime victim. The Complainant states that OPRA specifically excludes twenty-one (21) categories of information deemed to be confidential, none of which include general requests for home addresses.

The Complainant further contends that if the Legislature had intended to exempt home addresses from disclosure generally, it would have listed them among the twenty-one (21) enumerated exemptions. The Complainant cites to Brodsky v. Grinnel Haulers, Inc., 181 N.J. 102, 112 (2004) for the proposition that well settled principles of statutory construction state that in a detailed list of enumerated actions, the mention of one thing in a statute implies an intention to exclude those things not specifically mentioned.

The Complainant further asserts that the Legislature carefully considered the privacy interests of individuals and did not exempt home addresses generally. The Complainant contends that OPRA should therefore be construed as permitting disclosure of the names and addresses of workers on public projects in the instant case. The

⁵ N.J.S.A. 34:11-56.40 states in pertinent part: “[a]ny workman shall be entitled to maintain such action for and on behalf of himself or other workmen similarly situated, and such workman and workmen may designate an agent or representative to maintain such action for and on behalf of all workmen similarly situated.”

⁶ N.J.S.A. 34:20-8 permits a labor organization to maintain an action against a public works contractor based on misclassification of workers.

⁷ *N.J.A.C.* 12:60-5.1(c) facilitates the detection of prevailing wage violations by requiring that certified payroll records be available for inspection as follows: “[t]he public body shall receive, file, store, and make available for inspection at its normal place of business and during normal business hours the certified payroll records.”

Complainant argues that the disclosure of such names and addresses does not rise to constitutional dimensions, and cites to Price v. Corzine, 2006 WL 1080491 (D.N.J. 2006) for the proposition that the Federal District Court recognized that the disclosure on annual Financial Disclosure Statements of names and home addresses of casino employees did not violate the privacy interest protected by the U.S. Constitution. The Complainant contends that the disclosure of names and addresses of workers on public works projects is much less invasive of personal privacy than the financial information required to be disclosed by the Casino Control Commission. The Complainant notes that home addresses are generally available on voter registration lists, deeds, plan books and numerous other records freely available to the public, and states that workers on public works projects possess only a slight privacy interest in non-disclosure which has been adequately considered by the Legislature. The Complainant states that the only real interest to be served by non-disclosure of the names and home addresses of workers on public works projects is the interest of contractors in avoiding the private enforcement of New Jersey's labor legislation.

The Complainant did not agree to mediate this complaint.

July 16, 2008

Request for the Statement of Information sent to the Custodian.

July 22, 2008

Custodian's e-mail to the GRC. The Custodian requests an extension of time to file the Statement of Information. The GRC grants the Custodian a five (5) business day extension of time to July 31, 2008, to file the Statement of Information.

July 29, 2008⁸

Custodian's Statement of Information ("SOF") with the following attachments:⁹

- Complainant's OPRA request dated April 3, 2008
- Letter from the Custodian to the Complainant dated April 9, 2008
- E-mail from Joseph Alacqua, Esq., to the Custodian dated April 17, 2008
- Letter from the Complainant to the Custodian dated April 17, 2008
- Memorandum Opinion in John Does and PKF-Mark III, Inc. v. City of Trenton, Docket No. 08-607 (GEB)(June 16, 2008)¹⁰

The Custodian certifies that her search for the requested records included forwarding the Complainant's April 3, 2008 OPRA request to departments within the City of Trenton to ascertain whether said departments possessed records responsive to the request.

⁸ The GRC received subsequent correspondence from the parties which is not relevant to the adjudication of this Denial of Access Complaint.

⁹ The Custodian attached additional records which are not relevant to the adjudication of this Denial of Access Complaint.

¹⁰ John Does & PKF-Mark III, Inc v. City of Trenton Dep't of Pub. Works - Water Div., 565 F. Supp. 2d 560 (D.N.J. 2008).

The Custodian also certifies that on April 17, 2008, she received an e-mail from Joseph Alacqua, Esq., Special Counsel to the City of Trenton, which stated that:

“[t]he City is currently involved in litigation involving the release of copies of certified payroll records to third parties. A temporary injunction is in place that prevents the City from releasing the certified payroll records in that case. Since the same privacy issues exist with this OPRA request, the request should be denied pending the outcome of the litigation.”

The Custodian certifies that based on the e-mail from Joseph Alacqua, Esq., she sent a letter to the Complainant dated April 17, 2008, in which the Custodian denied the Complainant’s OPRA request because legal counsel had advised that the City of Trenton is engaged in litigation involving the release of copies of certified payroll records to third parties. The Custodian further stated that a temporary injunction is in place that prevented the City from releasing the certified payroll records in that case. The Custodian states that because the same privacy issues exist with the instant OPRA request, access to the records sought in this matter is denied pending the outcome of the litigation.

The Custodian contends that the Complainant was denied access to the entirety of the records requested because certified payroll records may only be released with the names and addresses of workers redacted. The Custodian states that this denial of access is based on the provisions of N.J.S.A. 47:1A-1, which exempt from disclosure information exempt pursuant to “federal law, federal regulations or federal order.” The Custodian argues that OPRA also creates “a responsibility and an 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.” The Custodian asserts that OPRA deems confidential and not subject to disclosure any “information which is to be kept confidential by court order.”

In support of these arguments, the Custodian refers to a Memorandum Opinion of Garret E. Brown, Jr., U.S.D.J., in the matter of John Does and PKF-Mark III, Inc. v. City of Trenton, wherein Judge Brown, in considering a request for unredacted certified payroll records in a similar case, and issuing a permanent injunction against the release of such records, stated:

“[T]he Court is convinced that the dissemination of this information would put these employees’ at risk of having their privacy unreasonably invaded. Disclosure of employees’ personal information to third parties while revealing nothing about the inner workings of government, not only violates these employees’ reasonable expectation of privacy under the Federal Constitution, but also does nothing to advance the purpose of OPRA, which is to promote transparency in government. Accordingly, the Court grants Plaintiffs’ request for injunctive relief.”

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*... all government records shall be subject to public access unless exempt from such access by: ... [OPRA]; any federal law, federal regulation, or federal order; ... a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy[.]” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

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

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

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

OPRA also states that:

“[a] request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian. A custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record. If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5.g.

OPRA further provides in pertinent part that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access to a government record or deny a request for access to a government record as soon as possible, *but not later than seven business days after*

receiving the request, provided that the record is currently available and not in storage or archived. ... The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied." (Emphasis added). N.J.S.A. 47:1A-5.i.

OPRA also states:

"[t]he provisions of this act ... shall not abrogate or erode any ... grant of confidentiality heretofore established or recognized by ... judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record." N.J.S.A. 47:1A-9.b.

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 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.

The Custodian responded in writing to the Complainant's April 3, 2008 OPRA request on April 17, 2008, ten (10) business days after receipt of the request, denying access to the records requested. Although on April 9, 2008, the Custodian requested in writing an extension of time to respond to the Complainant's OPRA request, the request for an extension failed to set forth a specific date on which the Complainant could expect a response to his OPRA request.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a "deemed" denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In Hardwick n. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the Custodian provided the Complainant with a written response to his request on the seventh (7th) business day following receipt of such request in which the Custodian requested an extension of time to fulfill said request but failed to notify the Complainant of when the requested records would be provided. The Council held that:

“...because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the requested records would be made available pursuant to N.J.S.A. 47:1A-5.i., the Custodian’s written response to the Complainant dated June 20, 2007 and the request for an extension of time dated June 29, 2007 are inadequate under OPRA and the Complainant’s request is ‘deemed’; denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley [v. Township of Rockaway], GRC Complaint No. 2007-11 (October 2007).”

The facts in Hardwick are similar to the facts in this instant complaint because the Custodian provided a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days in which the Custodian requested an extension of time but failed to provide an anticipated deadline upon which the requested records would be made available.

The Custodian’s April 9, 2008 request for an extension is insufficient under OPRA pursuant to the Council’s decision in Hardwick because the Custodian failed to request a specific extension of time on which access to the requested records would be granted or denied. The Custodian’s written response to the Complainant’s OPRA request denying access to the requested records occurred on the tenth (10th) business day following receipt of same. Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

In the instant matter, the Complainant seeks disclosure of certified payroll records from Marshall Industries of Trenton for the work they performed for the City of Trenton between June, 2005 and August, 2007. The Complainant asserts that because Local 9 and the Construction Trades Council, labor organizations with which the Complainant is affiliated, have the statutory right to enforce violations of the New Jersey Prevailing Wage Act, and a statutory right to gain access to certified payroll records, they have an interest in detecting violations under the Act pursuant to OPRA requests. The Complainant has stated that home addresses are not specifically exempted from disclosure under OPRA, and that had the Legislature wanted to exempt home addresses from disclosure under OPRA, they would certainly have done so. Complainant also argues that the disclosure of names and addresses of workers on public projects is less invasive of personal privacy than the financial information required to be disclosed by the Casino Control Commission. Finally, the Complainant notes that home addresses are generally available on numerous records which are freely available to the public.

The Custodian contends that the requested records are exempt from disclosure pursuant to N.J.S.A. 47:1A-1 (exempting from public disclosure information which is exempt by “federal law, federal regulations or federal order”) and N.J.S.A. 47:1A-1.1 (creating in a public agency “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”), and the decision in the matter of John Does & PKF-Mark III, Inc. v. City of Trenton Dep’t of Pub. Works - Water Div., 565 F. Supp. 2d 560 (D.N.J. 2008).

In PKF, the plaintiffs represented a labor union (hereinafter “PKF”) which contracted with the City of Trenton to work on a certain municipal project. Pursuant to the New Jersey Prevailing Wage Act, PKF filed with the City of Trenton weekly certified payroll reports containing employees’ names, homes addresses and social security numbers, as well as additional work-related information. *Id.* at 560-61. In response to an OPRA request made by the Foundation for Fair Contracting, Ltd. (“FFC”), the City provided copies of PKF’s weekly certified payroll reports containing the personal information to FFC. *Id.* at 561. PKF filed a complaint and motion for injunctive relief, seeking to enjoin the City from disseminating the names, addresses, social security numbers and other personally identifying information of any person employed on the project to any third party. *Id.* at 563.¹¹ The court subsequently granted New Jersey Building Trades Council (“NJBTC”) motion to intervene because it was one of their affiliated member groups which had received the certified payroll records from the City, and NJBTC asserted that it was entitled to seek such records on an ongoing basis.¹² *Id.*

The plaintiffs argued that the names, addresses, and social security numbers of PKF employees fell within the zones of privacy protected by the United States Constitution and should not be disseminated to third parties who lack a legitimate interest in obtaining this personal information. Plaintiffs asserted that PKF employees were previously harassed by various entities as a result of such disclosure, and the plaintiffs feared that they would suffer future harm if their personal information continued to be disclosed to the public. *Id.* at 564. Plaintiffs argued that the privacy interests of PKF employees greatly outweighed the interest of the unions, and that the disclosure of the information sought would not aid in the enforcement of prevailing wage laws. Finally, plaintiffs asserted that such disclosure of personal information conflicted with OPRA. *Id.*

NJBTC argued that the disclosure of personal information is not within any of the fundamental zones of privacy recognized by the U.S. Supreme Court. With regard to the applicability of OPRA, NJBTC argued that the only redaction mandated by OPRA was for social security numbers. *Id.* at 565.

The court noted that although the U.S. Constitution does not mention an explicit right to privacy, and the U.S. Supreme Court has never proclaimed that such a right exists, the Supreme Court has nevertheless recognized certain “zones of privacy” inherent

¹¹ The court’s decision notes that oral argument was held on March 25, April 21 and April 25, 2008 regarding PKF’s motion for injunctive relief and the motion was granted on May 19, 2008.

¹² The court later modified NJBTC’s status to amicus because during the pendency of the case NJBTC informed the court that none of its affiliates had any pending OPRA requests for certified records of PKF employees before the City of Trenton. *Id.* at 563.

in the amendments to the U.S. Constitution, one of which is avoiding disclosure of personal matters. *Id.* at 567. The court also noted that OPRA commands public agencies 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[.]” and that this safeguard was emphasized by Governor James McGreevey in Executive Order 21. *Id.*, quoting N.J.S.A. 47:1A-1.

The court recognized that in order to determine whether a particular intrusion into an individual’s privacy is justified, the court must engage in a balancing test by weighing the competing interests. *Id.*, citing Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 812 F.2d 105, 110 (3d Cir. 1987). The court recognized that the facts of Sheet Metal Workers Int’l Ass’n, Local Union No. 19 v. United States Dep’t of Veterans Affairs, 135 F.3d 891 (3d Cir. 1998) were very similar to the instant matter, and therefore found the Third Circuit’s reasoning to be useful and applicable, inasmuch as the Court of Appeals addressed the same concerns regarding an individual’s reasonable expectation of privacy in the face of a government records request.¹³ PKF, 565 F. Supp.2d at 567.

The court also took specific notice of the GRC’s decision in Bernstein v. Borough of Park Ridge, GRC Complaint No. 2005-99 (July 2005), in which the GRC found that the Borough of Park Ridge properly denied the plaintiff’s OPRA request for names and addresses of dog license owners in the Borough. PKF, *supra*, 565 F.Supp.2d at 570. The court also noted that the GRC’s basis for so doing was the recognition that dog license owners could be harmed through unsolicited contact from the plaintiff as well as others who might gain access to the lists; this unsolicited contact could result in diminished public trust in agencies to protect personal information. *Id.*

Considering the necessary factors required when weighing competing interests in disclosure of an otherwise public government record,¹⁴ the District Court found that the plaintiffs in PKF had made the necessary showing that the dissemination of employee names, addresses and other personal identifying information constituted a violation of the employee’s reasonable expectation of privacy. *Id.* at 571. The court found that NJBTC had failed to establish how the release of the employees’ names and addresses would serve a legitimate public interest, whereas dissemination of that information would put employees at risk of having their privacy invaded. *Id.* In doing so, the Court noted that “[d]isclosure of employees’ personal information to third parties while revealing nothing about the inner workings of government, not only violates these employees’ reasonable expectation of privacy under the Federal Constitution, but also does nothing to advance the purpose of OPRA, which is to promote transparency in government.” *Id.* The Court

¹³ Sheet Metal Workers concerned a union’s request for names, addresses and social security numbers pursuant to the Freedom of Information Act (“FOIA”), whereas the PKF matter concerned a request for similar records made pursuant to OPRA; however, the court noted that both FOIA and OPRA were enacted to foster transparency in government and both statutes forbid the disclosure of personal information that would amount to an unreasonable invasion of an individual’s privacy. PKF, *supra*, 565 F.Supp.2d at 567.

¹⁴ These factors include 1) the type of record requested; 2) the information the record contains; 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 recognizable public interest militating toward disclosure. PKF, 565 F.Supp.2d at 567, citing United States v. Westinghouse Corp., 638 F.2d 570, 578 (3d Cir. Pa. 1980).

therefore granted PKF's motion for an injunction prohibiting the release of the workers' names, home addresses, and other information. *Id.*

N.J.S.A. 47:1A-1 states in pertinent part 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. Moreover, N.J.S.A. 47:1A-9.b. states that OPRA shall not "abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by ... judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record."

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

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.

New Jersey courts have previously held that a citizen has a reasonable expectation of privacy in his or her home address. In Gannett New Jersey Partners LP v. County of Middlesex, 379 N.J.Super. 205 (App. Div. 2005), a news organization sought grand jury subpoenas served by a federal grand jury on the Office of the Governor and certain documents responsive to those subpoenas. *Id.* at 213. In rendering its decision, the court emphasized that the custodian and the court must delve into state and federal statutes and regulations to determine if the information is considered confidential and whether access to the information is inimical to the public interest or the individual interests of the persons about whom information is sought, particularly when those entities or individuals have not received notice of the request and are unable to express their privacy concerns. *Id.* at 213-14.

The court specifically rejected the news organization's request for a county freeholder's computer index of addresses and telephone numbers, stating that public officials have a right of confidentiality regarding individuals with whom they have spoken. *Id.* at 217. In doing so, the court noted that the New Jersey Supreme Court's decision in North Jersey Newspapers Co. v. Passaic County Bd of Chosen Freeholders, 127 N.J. 9 (1992), was dispositive, inasmuch as the New Jersey Supreme Court had found that the identities and telephone numbers of persons who call and are called by public officials are protected by an expectation of privacy. *Id.*, citing North Jersey Newspapers, 127 N.J. at 16-18.

Moreover, the GRC has consistently held that home addresses are appropriately redacted from government records pursuant to N.J.S.A. 47:1A-1, which states that a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy. *See*, Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (July 2004)(home address was appropriately redacted from copies of moving violations issued by a police officer as well as copies of that officer's training records and records of complaints or internal reprimands); Perino v. Borough of Haddon Heights, GRC Complaint No. 2004-128 (November 2004)(name, home address and telephone number appropriately redacted from a noise complaint filed with the Police Department due to potential harm of unsolicited contact); Avin v. Borough of Oradell, GRC Complaint No. 2004-176 (March 2005)(homeowners' names and addresses appropriately redacted from list of homeowners who applied for a fire or burglar alarm permit); Bernstein v. Borough of Park Ridge, GRC Complaint No. 2005-99 (July 2005)(names and addresses of dog license owners appropriately redacted due to potential for unsolicited contact, intrusion or potential harm that may result); Paff v. Warren County Office of the Prosecutor, GRC Complaint No. 2007-167 (February 2008)(name and address of a crime victim appropriately redacted due to privacy concerns). *See also*, Faulkner v. Rutgers University, GRC Complaint No. 2007-149 (May 2008)(Custodian did not unlawfully deny the complainant access to names and addresses of Rutgers University football and basketball season ticket holders based on the citizen's reasonable expectation of privacy in that information).

In the matter before the Council, the records requested by Complainant are certified payroll records from Marshall Industries of Trenton for the work they performed for the City of Trenton between June, 2005 and August, 2007. These records contain, among other employment-related information, the names and addresses of individuals who have performed work for Marshall Industries of Trenton. The potential harm that could result from the disclosure of the requested payroll records and home addresses of workers includes “misappropriation by marketers, creditors, solicitors and commercial advertisers, eroding the employees’ expectation of privacy[.]” Sheet Metal Workers Int’l Ass’n, Local Union No. 19 v. United States Dep’t of Veteran’s Affairs, 135 F. 3d 891 (3d Cir. 1998), as well as harassment by various entities. John Does & PKF-Mark III, Inc. v. City of Trenton Dep’t of Pub. Works - Water Div., 565 F. Supp. 2d 560, 562, 564, 567-68, 570-71 (D.N.J. 2008). Neither the Complainant nor the labor organizations with which he is affiliated have an express statutory mandate to enforce wage laws. The enforcement of wage laws is within the jurisdiction of the New Jersey Department of Labor. N.J.S.A. 34:11-56.34. Less intrusive means for obtaining information pertaining to wage and hour compliance is available to the Complainant, as was articulated in Sheet Metal Workers, *supra*, and in PKF, *supra*. As the court noted in PKF, once the personal information at issue is released, there is nothing to stop others from obtaining it to harass the employees of Marshall Industries. PKF, *supra*, 565 F. Supp.2d at 571.

The evidence of record, therefore, shows that, similar to the U.S. District Court’s holding in PKF, *supra*, the Complainant’s need for access does not outweigh the Custodian’s need to safeguard the requested personal information contained in the certified payroll records. The release of the employee 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 names and addresses contained in the requested certified payroll records pursuant to N.J.S.A. 47:1A-1, which states that a public agency has a responsibility and an obligation to safeguard from public access a citizen’s personal information with which it has been entrusted when disclosure thereof would violate the citizen’s reasonable expectation of privacy.

Whether the Custodian’s unlawful deemed denial of access rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

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:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances,

the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86 (App. Div. 1996) at 107).

In the instant matter, the Custodian responded in writing to the Complainant’s April 3, 2008 OPRA request on April 17, 2008, ten (10) business days after receipt of the request, denying access to the records requested. Although on April 9, 2008, the Custodian requested in writing an extension of time to respond to the Complainant’s OPRA request, the request for an extension failed to set forth a specific date on which the Complainant could expect a response to his OPRA request, a violation of N.J.S.A. 47:1A-5.i. and the Council’s decision in Hardwick n. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008). However, the Custodian did not unlawfully deny the Complainant access to the names and addresses contained in the requested certified payroll records pursuant to N.J.S.A. 47:1A-1. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s deemed denial of the Complainant’s OPRA request appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian’s April 9, 2008 request for an extension is insufficient under OPRA because the Custodian did not request a specific extension of time on which access to the requested records would be granted or denied. Therefore, the Custodian’s failure to respond in writing to the Complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

2. Similar to the U.S. District Court's decision in John Does & PKF-Mark III, Inc. v. City of Trenton Dep't of Pub. Works - Water Div., 565 F. Supp. 2d 560 (D.N.J. 2008), the evidence of record shows that the Complainant's need for access does not outweigh the Custodian's need to safeguard the personal information contained in the requested certified payroll records. The release of the employee 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 names and addresses contained in the requested certified payroll records pursuant to N.J.S.A. 47:1A-1, which states that a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy.

3. Although the Custodian's April 9, 2008 request for an extension failed to specify a time period requested, thus resulting in a deemed denial of the Complainant's OPRA request, a violation of N.J.S.A. 47:1A-5.i. and the Council's decision in Hardwick n. NJ Department of Transportation, GRC Complaint No. 2007-164 (February 2008), the Custodian did not unlawfully deny the Complainant access to the names and addresses contained in the requested certified payroll records pursuant to N.J.S.A. 47:1A-1. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's deemed denial of the Complainant's OPRA request appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

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Executive Director

April 22, 2009