



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

JON S. CORZINE  
Governor

CHARLES A. RICHMAN  
Acting Commissioner

**FINAL DECISION**

**August 11, 2009 Government Records Council Meeting**

Brian Reynolds  
Complainant

Complaint No. 2008-14

v.

New Jersey Board of Public Utilities  
Custodian of Record

At the August 11, 2009 public meeting, the Government Records Council (“Council”) considered the July 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. Although the Custodian certifies that Complainant did not submit his request on an official OPRA request form, the Custodian’s attempt to fulfill the request results in the request being considered a valid OPRA request pursuant to John Paff v. Borough of Audubon, GRC Complaint No. 2006-01 (March 2006).
2. 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).
3. Pursuant to N.J.S.A. 47:1A-1, the Custodian did not unlawfully deny access to the redacted portions of the requested records because the redacted portions are exempt from disclosure due to privacy concerns.
4. Although the Custodian failed to respond to the Complainant’s OPRA request within the statutorily mandated seven (7) business days, the Custodian did respond to the request on the eighth (8<sup>th</sup>) business day, and further, bore the burden of proving that the redacted names and addresses from the records responsive to the Complainant’s request were exempt from disclosure under OPRA. 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 unlawful “deemed” denial of access 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 11<sup>th</sup> Day of August, 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  
Government Records Council

**Decision Distribution Date: August 17, 2009**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
August 11, 2009 Council Meeting**

**Brian Reynolds<sup>1</sup>  
Complainant**

**GRC Complaint No. 2008-14**

v.

**NJ Board of Public Utilities<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Copy of the owner names and addresses and the system sizes for all solar PV systems approved and funded through the New Jersey Clean Energy Program (“NJCEP”) Customer On-Site Renewable Energy (“CORE”) rebate program between 2003 and December 1, 2007.

**Request Made:** November 27, 2007<sup>3</sup>

**Response Made:** December 7, 2007

**Custodian:** Kristi Izzo, Secretary of the NJ Board of Public Utilities (“BPU”)

**GRC Complaint Filed:** January 15, 2008<sup>4</sup>

**Background**

**November 27, 2007**

Complainant’s Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above.<sup>5</sup>

**December 7, 2007**

Custodian’s response to the OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the eighth (8<sup>th</sup>) business day following receipt of such request. The Custodian states that the CORE program manager provided her with the record responsive to the Complainant’s request. The Custodian states that she will not be in her office this date and asks the Complainant if he will agree to accept the requested record on December 10, 2007.

**December 7, 2007**

E-mail from the Complainant to the Custodian. The Complainant agrees to accept the record responsive to his request on December 10, 2007.

---

<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by DAG Cynthia Holland, on behalf of the New Jersey Attorney General.

<sup>3</sup> The Complainant’s request was undated but the Custodian acknowledges receiving the request on this date.

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

<sup>5</sup> The Complainant’s request was in letter form and not on an official OPRA request form.

**December 10, 2007**

Letter from the Custodian to the Complainant. The Custodian states that she will electronically transmit the records responsive to the Complainant's request. The Custodian also states that the residential owner's names and addresses will be redacted pursuant to N.J.S.A. 47:1A-1.1.<sup>6</sup> The Custodian further states that the cited section of OPRA provides that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy."

**December 11, 2007**

E-mail from the Custodian to the Complainant. The Custodian sends an electronic copy of the requested records to the Complainant. The records are redacted as described in the Custodian's letter to the Complainant dated December 10, 2007.<sup>7</sup>

**January 15, 2008**

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

- Complainant's undated OPRA request in letter format
- Letter from the Custodian to the Complainant dated December 10, 2007
- E-mail from the Custodian to the Complainant dated December 10, 2007
- E-mail from the Custodian to the Complainant dated December 11, 2007

The Complainant states that he telephoned the Custodian on November 27, 2007 to check on the status of an OPRA request he alleges he mailed to the Custodian on or about November 20, 2007. The Complainant states that the Custodian informed him that she did not receive said request and that the Complainant should resubmit the request via the BPU website. The Complainant states he subsequently resubmitted his request via the website.

The Complainant states the Custodian telephoned him on November 29, 2007 to inform him that the Custodian received the Complainant's OPRA request and that it was being processed by the agency. The Complainant also states that the Custodian said that some portions of the records may not be made available to the Complainant because the material may be exempt due to an issue with the customers' reasonable expectation of privacy. The Complainant further alleges that he informed the Custodian that all the information in the requested records should be available because it is available through other sources.

The Complainant states that he was contacted by the Custodian on December 7, 2007 and informed that the records were available and would be transmitted to him in redacted form. The Complainant further states that the Custodian sent him an electronic copy of the records on December 10, 2007 with an explanation that the data did not format in very legible condition but that the Custodian would attempt to send a more

---

<sup>6</sup>The proper section of OPRA for the provision cited by the Custodian is N.J.S.A. 47:1A-1.

<sup>7</sup>The evidence of record reveals the Custodian attempted to send the records to the Complainant on December 10, 2007 but the attachment as formatted failed to properly transmit.

legible copy of the record on the next business day. The Complainant states he received a readable copy of the requested record on December 11, 2007.

The Complainant states that the owner's name, address and contact information was redacted from the record he requested because the BPU believed the release of such information would violate the customers' reasonable expectation of privacy under OPRA. The Complainant states that the Custodian's concern for the customers' expectation of privacy is misplaced for several reasons.

The Complainant first argues that OPRA is intended to create government oversight and, by redacting the name, address and contact information from the record; the Custodian has defeated such intent.

The Complainant next argues that it is unreasonable for a homeowner to accept large sums of taxpayer money and maintain absolute anonymity. The Complainant claims that participation in the NJCEP CORE rebate program implies knowledge and acceptance by the customer that their personal information will be made available to third persons. The Complainant further contends that a name and address are a matter of public record. The Complainant also argues that by citing expectation of privacy, the Custodian is falsely assuming that the redacted information is private. The Complainant contends the information is not private and can be found by other means and/or through other sources.

Finally, the Complainant argues that additional safeguards exist to protect a person's privacy. The Complainant states that judicial and legislative mechanisms exist governing when someone may be contacted. The Complainant points to the "Do-Not-Call" list as one such mechanism.

The Complainant agreed to mediate this complaint.

**January 31, 2008**

Offer of Mediation sent to the Custodian.

**February 1, 2008**

The Custodian agrees to mediation.

**February 6, 2008**

The complaint is referred for mediation.

**January 27, 2009**

The complaint is referred back from mediation to the GRC for adjudication.

**January 27, 2009**

Request for the Statement of Information sent to the Custodian.

**January 27, 2009**

Telephone call from the Custodian to the GRC. The Custodian asks for another copy of the Statement of Information form and copies of any and all correspondence the GRC may have regarding the outcome of the mediation process.

**January 28, 2009**

E-mail from the GRC to the Custodian. The GRC sends to the Custodian as attachments to the e-mail a blank Statement of Information form and a copy of an e-mail from the Office of Dispute Resolution to the GRC dated January 27, 2009, which refers this complaint back from mediation to the GRC for adjudication.

**February 4, 2009**

Letter from the GRC to the Custodian. The GRC sends a letter to the Custodian indicating that the GRC provided the Custodian with a request for a Statement of Information on January 27, 2009 and to date has not received a response. Further, the GRC states that if the Statement of Information is not submitted within three (3) business days, the GRC will adjudicate this complaint based solely on the information provided by the Complainant.

**February 5, 2009**

E-mail from the Custodian to the Complainant. The Custodian states she received correspondence from the GRC requesting the Statement of Information. The Custodian further states that she thought the matter was still in mediation, but subsequently learned that the matter was referred back to the GRC because the Complainant failed to cooperate with the mediator. The Custodian asks the Complainant to advise her how he would like to proceed in this matter.

**February 10, 2009**

Telephone call from the Custodian to the GRC. The Custodian informs the GRC that she sent correspondence to the Complainant asking the Complainant if he wanted to continue this matter post-mediation, but the Custodian states she never received a reply. The Custodian requests that the GRC contact the Complainant to determine if he was satisfied with the outcome of the mediation or still wants the GRC to adjudicate his complaint.

**February 10, 2009**

E-mail from the GRC to the Complainant. The GRC informs the Complainant that if he does not want the GRC to adjudicate this matter he must withdraw his complaint within five (5) business days.

**February 20, 2009**

E-mail from the GRC to the Custodian. The GRC informs the Custodian that the Complainant never responded to the GRC's e-mail dated February 10, 2009; therefore, the GRC will adjudicate the complaint.

**March 4, 2009**

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

- Complainant's undated OPRA request in letter format<sup>8</sup>
- Letter from the Custodian to the Complainant dated December 10, 2007

The Custodian certifies that she received the Complainant's OPRA request on November 27, 2007. The Custodian also certifies that she spoke to the Complainant on November 29, 2007 and explained that the information sought by the Complainant would be compiled. The Custodian further certifies she informed the Complainant that the agency will not disclose customer addresses because disclosing the addresses would violate the reasonable expectation of privacy provision set forth in N.J.S.A. 47:1A-1.

The Custodian certifies that she e-mailed the Complainant on December 7, 2007 to obtain an extension of time until December 10, 2007 in order to transmit the record responsive to the Complainant's request. The Custodian further certifies that she transmitted the requested record to the Complainant on December 10, 2007, but had difficulties transmitting it in readable form. The Custodian certifies she successfully transmitted the record on December 11, 2007.

The Custodian avers that she was contacted by the Complainant on January 8, 2008, whereupon she states the Complainant protested the redaction of personal information on the requested records. The Custodian further certifies the Complainant asked for the redacted information so he could use it for business purposes.

The Custodian certifies that the only information that was not disclosed on the requested records was redacted pursuant to N.J.S.A. 47:1A-1., which is in accord with the court's decision in Serrano v. South Brunswick Township, 358 N.J. Super. 352, 368-69 (App. Div. 2003) and the Council's decision in Merino v. Ho-Ho-Kus, GRC Complaint No. 2003-110 (February 2004). The Custodian further certifies the information was redacted because disclosure of said information would implicate privacy interests as noted by the New Jersey Supreme Court in Doe v. Portiz, 142 N.J. 1, 82 (1995).

### **March 4, 2009**

Letter from the GRC to the Custodian. The GRC requests that the Custodian respond to the following questions so that the GRC may employ the common law balancing test established by the New Jersey Supreme Court in Doe v. Portiz, 142 N.J. 1 (1995):

1. The type of record(s) requested.
2. The information the requested record(s) do or might contain.
3. The potential harm in any subsequent non-consensual disclosure of the requested record(s).
4. The injury from disclosure to the relationship in which the requested record was generated.
5. The adequacy of safeguards to prevent unauthorized disclosure.
6. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access.

---

<sup>8</sup>This copy of the request is in an e-mail format. It is sent from a State OPRA return e-mail address to the Custodian dated November 27, 2007.

**March 4, 2009**

Letter from the GRC to the Complainant. The GRC requests that the Complainant respond to the following questions so that the GRC may employ the common law balancing test established by the New Jersey Supreme Court in Doe v. Poritz, 142 N.J. 1 (1995):

1. Why do you need the requested record(s) or information?
2. How important is the requested record(s) or information to you?
3. Do you plan to redistribute the requested record(s) or information?
4. Will you use the requested record(s) or information for unsolicited contact of the individuals named in the government record(s)?

**March 9, 2009**

E-mail from the Custodian to the GRC. The Custodian forwards the following responses to the GRC’s balancing test questionnaire:

<b>Questions</b>	<b>Custodian’s Response</b>
<b>1. The type of record(s) requested:</b>	A copy of the system owner names, addresses for, and system sizes of all solar PV systems approved and funded through the New Jersey Clean Energy Program (“NJCEP”) Customer On-Site Renewable Energy (“CORE”) rebate program between 2003 and December 1, 2007.
<b>2. The information the requested records do or might contain:</b>	Owner first and last name, street number and name (in the case of residential applicants this would be a home address) and system size.  The information was extracted from a database which has other fields as well, but only the requested fields were provided. The home street number and name were redacted.
<b>3. The potential harm in any subsequent non-consensual disclosure of the requested records:</b>	Any non-consensual disclosure of this information could result in the unsolicited contact of the individuals on the list. The list could be redistributed. Owners of solar systems could be subjected to unsolicited contact by a number of different companies for services related to the panels or by anyone with environmentally friendly products as these households would be considered “green.” Other potential solar installers may also contact them with questions concerning the experience. Unwanted telephone calls, correspondence and visits could ensue. Thus, disclosure



	<p>results in potential harm to CORE applicant's privacy and security as identified by the Supreme Court of New Jersey in <u>Doe v. Poritz</u>.</p>
<p><b>4. The injury from disclosure to the relationship in which the requested record was generated:</b></p>	<p>Citizens may no longer trust the agency with this information for fear that their privacy or security will not be protected.</p> <p>The Electric Discount and Energy Competition Act of 1999 ("EDECA") requires the BPU to determine the programs to be funded within the NJCEP. <u>N.J.S.A.</u> 48:3-60a(3). EDECA mandates that the BPU include incentive programs for the installation of solar systems, such as the CORE program. <i>Ibid.</i> In order to discharge this statutory duty, the BPU needs the installation address for the solar systems funded through the CORE program. <u>See In re Valley Road Sewerage Co.</u>, 154 <u>N.J.</u> 224, 235 (1998) (noting that the BPU's authority extends beyond the powers expressly granted by statute to include incidental powers needed to fulfill the BPU's statutory mandate). The distrust that would result from the BPU's failure to safeguard home addresses may lead to citizens' decreased interest in participating in the NJCEP and interfere with the realization of the Legislature's goal of "[p]rovid[ing] diversity in the supply of electric power throughout this State." <u>N.J.S.A.</u> 48:3-50a(7).</p> <p>The Supreme Court of New Jersey considered the Legislature's goals in enacting the Solid Waste Utility Control Act of 1970 in determining that the BPU's statutory duties required the solid waste utilities to provide their customer lists to the agency. <u>In re Solid Waste Utility Customer Lists</u>, 106 <u>N.J.</u> 508, 523 (1987). In rejecting the utilities' contention that the lists were "trade secrets," the Court acknowledged the value of customer lists to the solid waste utilities, but found that the BPU's duty outweighed their property interest. <i>Ibid.</i> Nevertheless, the Court</p>

	<p>stated that the BPU “should provide adequate safeguards against public disclosure.” <i>Ibid.</i> The Court also stated that “[t]he power of the regulator to obtain information in the public interest should not be subverted...for private gain.” <i>Id.</i> at 525.</p> <p>In addition, the disclosure of home addresses may diminish the wide range of regulatory power delegated to the BPU by the Legislature. <u><i>In re Valley Road Sewerage Co.</i></u>, 154 N.J. at 235 (citing <u><i>Township of Deptford v. Woodbury Terrace Sewerage Corp.</i></u>, 54 N.J. 418 (1969)). The Supreme Court of New Jersey has stated that the BPU’s regulation and control of utilities exists for the benefit of the State and its citizens. <u><i>In re Petition of South Jersey Gas Co.</i></u>, 116 N.J. 251 (1989) (citing <u><i>Junction Water Co. v. Riddle</i></u>, 108 N.J. Eq. 523 (Ch. 1931)). In protecting citizens’ privacy, EDECA sets forth certain consumer protection standards that prohibit public utilities’ disclosure of customers’ personal information except in certain circumstances. <u>N.J.S.A. 48:3-85b</u>. The BPU’s regulations further state that a utility cannot disclose customer information “without the affirmative written consent of the customer or alternative Board-approved consent methodology” except for change orders or under certain conditions. <u>N.J.A.C. 14:4-7.8</u>. A requirement that the BPU disclose home addresses would run contrary to these statutory restrictions on utilities and lessen the BPU’s sweeping grant of power to benefit New Jersey citizens through its regulations.</p>
<p><b>5. The adequacy of safeguards to prevent unauthorized disclosure:</b></p>	<p>The Board has not released home street number and address in the past. All requests for this information are redacted in the same fashion. Any information provided on the website is also redacted to prevent unintended disclosure of the same</p>

	information. However, there is nothing to prevent the redistribution of this information once it is released from the agency.
<b>6. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access:</b>	The Open Public Records Act, <u>N.J.S.A. 47:1A-1</u> et seq., militates toward public access of government records; however, the legislature specifically recognized the agency's duty to safeguard citizens' privacy interests. Furthermore, see the discussion in question 4, above.

### Analysis

#### **What constitutes a valid OPRA records request?**

In this complaint, it is undisputed between the parties that the Complainant submitted his request on November 27, 2007. The Complainant's request was in letter form and not on an official OPRA request form. The Custodian certifies that she provided a written response to the Complainant's request on December 7, 2007.

Review of the OPRA statute and its legislative intent lead the Council to conclude that use of the request form is required for all requestors. The statute provides that the custodian "shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency." N.J.S.A. 47:1A-5.f. The statute specifically prescribes what must be on the form:

- (1) space for the name, address and phone number of the requestor and a brief description of the government record sought;
- (2) space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged;
- (3) specific directions and procedures for requesting a record;
- (4) a statement as to whether prepayment of fees for a deposit is required;
- (5) the time period in which the public agency is required by OPRA to make the record available;
- (6) a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal;
- (7) space for the custodian to list reasons if a request is denied in whole or in part;
- (8) space for the requestor to sign and date the form;
- (9) space for the custodian to sign and date the form if the request is fulfilled or denied.

*Id.*

Although the statute does not expressly state that OPRA requests must be on the form adopted by the agency pursuant to N.J.S.A. 47:1A-5.f., principles of statutory construction show that the Legislature intended use of this form by all requestors to be

mandatory. In interpreting a statute, it is axiomatic that “each part or section [of the statute] should be construed in connection with every other part or section so as to produce a harmonious whole.” Matturi v. Bd. of Trustees of JRS, 173 N.J. 368, 383 (2002), quoting In re Passaic Cty. Utilities Auth., 164 N.J. 270, 300 (2000). In addition, a construction which renders statutory language meaningless must be avoided. Bergen Comm. Bank v. Sisler, 157 N.J. 188, 204 (1999). See also G.S. v. Dept. of Human Serv., 157 N.J. 161, 172 (1999). (a statute should be interpreted so as to give effect to all of its provisions, without rendering any language inoperative, superfluous, void, or insignificant).

As noted, N.J.S.A. 47:1A-5.f. requires that custodians adopt a request form, and sets forth a detailed list of what the form must contain. The next subsection of the statute provides:

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.* The custodian *shall sign and date the form and provide the requestor with a copy thereof.* (Emphasis added.)  
N.J.S.A. 47:1A-5.g.

The form to which N.J.S.A. 47:1A-5.g. refers is the form required by N.J.S.A. 47:1A-5.f. In providing, in 5.g., that the custodian “shall” sign and date the form, indicate the basis for denial on the form, and return the form to the requestor, the Legislature evidenced its clear intent that it is mandatory for the form to be used by requestors. See Harvey v. Essex Cty. Bd. Of Freeholders, 30 N.J. 381, 391-92 (1959) (the word “shall” in a statute is generally mandatory). The express requirement that the custodian use the request form in denying an OPRA request, construed together with the preceding statutory requirement that the custodian adopt a request form, demonstrates that the Legislature intended that this form would be used for all OPRA requests. If all requestors are not required to submit requests on the form prescribed by the statute, then the statutory provisions requiring the custodian to sign and date the form, and return it to the requestor, would be meaningless. Indeed, a custodian would be unable to fulfill these express requirements of N.J.S.A. 47:1A-5.g. if the requestor does not use the form in submitting his request.

The Appellate Division has indicated that the statute’s form requirement serves the additional purpose of prompting the legislative policy that a requestor must specifically describe identifiable records sought. See MAG Entertainment LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (an open-ended request that fails to identify records with particularity is invalid). In Bent v. Twp. of Stafford Police Dept., 381 N.J. Super. 30, 33 (App. Div. 2005), the Court held that the requestor’s general request for information violated this policy and was therefore invalid. In reaching this conclusion, the Court noted that OPRA mandates that the request form provide space for a “brief description” of the record request. *Id.* Similarly, in Gannett New Jersey Partners L.P. v. County of Middlesex, 379 N.J. Super. 205, 213 (App. Div. 2005), the Court specifically pointed to the same statutory request form requirement in determining that OPRA does not authorize requestors to make blanket requests for agency records.

Accordingly, based on the language of the statute, as well as judicial recognition of the importance of the statutory request form, it is determined that the statute requires all requestors to submit OPRA requests on an agency's official OPRA records request form. OPRA's provisions come into play only where a request for records is submitted on an agency's official OPRA records request form.

It should be noted that the Council takes cognizance of the Appellate Division's recent decision in Renna v. County of Union, 407 N.J. Super. 230 (App. Div. 2009), Docket No. A-0821-07T2. In Renna, the Appellate Division held that:

“...all requests for OPRA records must be in writing; that such requests shall utilize the forms provided by the custodian of records; however, no custodian shall withhold such records if the written request for such records, not presented on the official form, contains the requisite information prescribed in N.J.S.A. 47:1A-5.f. Where the requestor fails to produce an equivalent writing that raises issues as to the nature or substance of the requested records, the custodian may require that the requestor complete the form generated by the custodian pursuant to N.J.S.A. 47:1A-5.g.”

Renna was decided on May 21, 2008, over sixteen (16) months after the complaint was filed in the instant matter. Therefore, for the Renna decision to be considered in this matter it will have to be retroactively applied.

The New Jersey Supreme Court “has adopted the United States Supreme Court's definition that a ‘ “case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government . . . [or] if the result was not dictated by precedent existing at the time the defendant's conviction became final.”’ State v. Lark, 117 N.J. 331, 339 (1989) (quoting Teague v. Lane, 489 U.S. 288, 301, 109 S. Ct. 1060, 1070, 103 L. Ed.2d 334, 349 reh'g denied, 490 U.S. 1031, 109 S. Ct. 1771, 104 L. Ed.2d 266 (1989)). See also State v. Johnson, 166 N.J. 523, 546-47 (2001); State v. Knight, 145 N.J. 233, 250-51 (1996).” State v. Yanovsky, 340 N.J. Super. 1 (App. Div. 2001).

Although retroactive application of laws is generally disfavored, Gibbons v. Gibbons, 86 N.J. 515, 521 (1981), a clear intention by the Legislature that retroactive application is intended will be given effect. Phillips v. Curiale, 128 N.J. 608, 618 (1992). Courts recognize that retroactive laws enacted pursuant to the police power may impair the rights of individuals, Rothman v. Rothman, 65 N.J. 219, 225-226 (1974), but where the public interest sufficiently outweighs the impaired private right, retroactive application is permissible. State Troopers Fraternal Assoc. v. New Jersey, 149 N.J. 38, 57 (1997).

In determining retroactive application of a new rule, four judicial options are available:

- (1) make the new rule of law purely prospective, applying it only to cases whose operative facts arise after the new rule is announced;
- (2) apply the

new rule to future cases and to the parties in the case announcing the new rule, while applying the old rule to all other pending and past litigation; (3) grant the new rule limited retroactivity, applying it to cases in (1) and (2) as well as to pending cases where the parties have not yet exhausted all avenues of direct review [pipeline retroactivity]; and, finally, (4) give the new rule complete retroactive effect, applying it to all cases, even those where final judgments have been entered and all avenues of direct review exhausted. State v. Nash, 64 N.J. 464, 468-70 (1974). State v. Knight, 145 N.J. 233, 249 (1996).

The determination of retroactive application is generally guided by three factors: "(1) the purpose of the rule and whether it would be furthered by a retroactive application, (2) the degree of reliance placed on the old rule by those who administered it, and (3) the effect a retroactive application would have on the administration of justice." *Id.* at 251 (citation and internal quotations omitted).

In Knight, the Court granted pipeline retroactivity to the rule previously announced in State v. Sanchez, 129 N.J. 261 (1992), that "post-indictment interrogation of defendant violated his right to counsel under Article 1, paragraph 10 of the New Jersey Constitution" requiring suppression of his confession, *Id.* at 279, because the purpose of that exclusionary rule was also to enhance the reliability of confessions. Knight supra, 145 N.J. at 256-58.

Although the Knight Court was addressing the retroactive application of a new rule in a criminal setting, the New Jersey Supreme Court has applied similar reasoning in the civil setting. In Olds v. Donnelly, 150 N.J. 424, 442 (1997), the Court abrogated its decision in Circle Chevrolet Co. v. Giordano, Halleran & Ciesla, 142 N.J. 280 (1995) and exempted attorney malpractice actions from the entire controversy doctrine. In addressing whether the decision should be applied retroactively or prospectively, the Court recognized that "[o]rdinarily, judicial decisions apply retroactively. Crespo v. Stapf, 128 N.J. 351, 367 (1992)... [but] [p]olicy considerations may justify giving a decision limited retroactive effect." *Ibid.* The Court then examined the considerations articulated in Knight and concluded that the Olds decision should be given limited "pipeline" retroactivity because such application "adequately protect existing relationships[.]" and because the application of pipeline retroactivity to pending cases "serves the interests of justice by permitting resolution of their claims on the merits." *Id.* at 450. Perhaps most importantly, the Court recognized that complete retroactive application potentially exposes the judicial system to the undue burden of revisiting numerous matters already concluded. *Id.* See, e.g., Constantino v. Borough of Berlin, 348 N.J. Super. 327 (App. Div. 2002)(holding that the public interest in retroactive application of the Age Discrimination in Employment Act, 29 U.S.C.A. §621 et seq., which specifically prohibited municipalities from hiring persons as police officer under age 21 or over age 35, outweighs an individual's private rights); State v. Yanovsky, 340 N.J. Super. 1 (App. Div. 2001)(holding that State v. Carty, 332 N.J. Super. 200 (App. Div. 2000) established a new rule of law during the pendency of the case, but that the public interest and administration of justice favored limited application of retroactivity); Zuccarelli v. NJDEP, 376 N.J. Super. 372 (App. Div. 1999)(holding that cases which held New

Jersey's waste flow control system was unconstitutional and discriminatory should be applied retroactively only to cases in the “pipeline”).

Here, the GRC examined the degree of reliance placed upon the prevailing Council decisions with respect to the use of request forms and found that the conclusion that *OPRA's provisions come into play only where a request for records is submitted on an agency's official OPRA records request form* was repeatedly cited by the GRC in prior adjudications. And because records custodians relied upon said decisions, the retroactive application of the new rule articulated in Renna, *supra*, would likely foster confusion among many records custodians who already responded to OPRA requests predating the Renna court's decision. Accordingly, the GRC will not apply the Renna court's rule retroactively, but rather only apply it, when applicable, to complaints whose operative facts arise after the rule was articulated.

Under existing procedure then, the GRC requires that custodians direct requestors to the agency's official OPRA request form when denying a letter request on the basis that said request is not submitted on an official request form. If the requestor refuses to use the form the Custodian can lawfully deny access because the request is not a valid OPRA request. See GRC Advisory Opinion 2006-01. Here, however, the Custodian chose to fulfill the Complainant's request as submitted in letter form.

In John Paff v. Borough of Audubon, GRC Complaint No. 2006-01 (March 2006), after initially denying the Complainant's request for records because it was not submitted on the agency's official OPRA request form, the Custodian decided to fulfill the Complainant's request. The Council subsequently determined that: “[t]he Custodian was not obligated to fulfill the Complainant's request, however she chose to do so and certifies that she notified the Complainant of such on January 9, 2006...” Thus, in Paff, the Council concluded that while the Complainant's request was not submitted on an official OPRA request form, because the Custodian attempted to fulfill the request, OPRA's provisions come into play.

Therefore, although the Custodian certifies that the Complainant did not submit his request on an official OPRA request form, the Custodian's attempt to fulfill the request results in the request being considered a valid OPRA request pursuant to Paff, *supra*.

### **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 further 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 also provides that:

"...[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefore on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof..." N.J.S.A. 47:1A-5.g.

Additionally, OPRA provides 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 ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ..." (Emphasis added.) N.J.S.A. 47:1A-5.i.

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.

The GRC first turns to the issue of whether the Custodian responded to the Complainant's OPRA request in a timely manner. The Custodian certified that she provided a written response to the Complainant's November 27, 2007 OPRA request on December 7, 2007, requesting an extension of time until December 10, 2007, in order to provide the Complainant with the requested records. Accordingly, the Custodian



admitted that she responded to the Complainant's OPRA request on the eighth (8<sup>th</sup>) business day following receipt of the Complainant's 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.<sup>9</sup> 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).

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).

Next, the GRC examines whether there was an unlawful denial of access because the Custodian redacted the names and addresses from the requested records. The Custodian redacted from the records only the residential owner's names and addresses. The Custodian certified that she redacted this information pursuant to N.J.S.A. 47:1A-1.1.<sup>10</sup>

In redacting the records, the Custodian certified she was following the OPRA mandate 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's contention was that if the owner's names and addresses were disclosed it would open up the owners to unsolicited contact by a number of different companies for services related to their solar panels or by anyone with environmentally-friendly products because the listed households would be targeted as potential customers. Further, the Custodian certified that if the list was redistributed, the owners could be subjected to unwanted telephone calls, correspondence and visits by other environmentally-friendly product sellers or installers. The Custodian therefore asserted that disclosure of the redacted information could result in potential harm to the owner's privacy and security and consequently result in a loss of citizen trust in the agency. The Complainant cited the Council's decision in Merino, supra, and the Superior Court's decision in Serrano, supra, in support of her position. The Custodian further certifies the information was redacted

---

<sup>9</sup> It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

<sup>10</sup> The Custodian means N.J.S.A. 47:1A-1.

because disclosure would implicate privacy interests as noted by the New Jersey Supreme Court in Doe v. Portiz, 142 N.J. 1, 82 (1995).

The Complainant filed his complaint on January 15, 2008, objecting to the redacted information. The Complainant argued (1) that OPRA is intended to create government oversight and redaction of the requested information defeated such intent; (2) that names and addresses are a matter of public record, and it is therefore unreasonable for a homeowner to accept large sums of taxpayer money and maintain absolute anonymity; and (3) that other safeguards exist to protect a person's privacy.

OPRA does require a public agency to "safeguard from public access a citizen's personal information...*when disclosure thereof would violate the citizen's reasonable expectation of privacy...*" (Emphasis added.) N.J.S.A. 47:1A-1.

In Merino v. Ho-Ho-Kus, GRC Complaint No. 2003-110 (February 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).

More specifically, with respect to a residential address, 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 certain individuals were outweighed by any factors militating in favor of disclosure of the addresses.

In the instant complaint, since the Complainant requests information, the disclosure of which could violate the citizen's reasonable expectation of privacy, it is necessary to employ the balancing test set forth by the New Jersey Supreme Court and utilized in previous GRC cases. While OPRA does not require a requestor to reveal to a records custodian his or her need for access to the government records requested, the legal advice received from the New Jersey Attorney General's Office advises the GRC to make just such an inquiry to accurately perform the common law balancing test.

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?

To balance the Complainant's articulated need for the redacted information against the Custodian's rationale for maintaining the confidentiality of said information; the GRC asked the Complainant to respond to the following inquiries:

1. The type of record(s) requested.
2. The information the requested record(s) do or might contain.
3. The potential harm in any subsequent non-consensual disclosure of the requested record(s).
4. The injury from disclosure to the relationship in which the requested record was generated.
5. The adequacy of safeguards to prevent unauthorized disclosure.
6. Whether there is an express statutory mandate, articulated public policy or other recognized public interest militating toward access.

The Custodian articulated several reasons why the redacted information should not be disclosed, which are set forth *infra*; however, the Custodian's most persuasive reasons are as follows:

- Any non-consensual disclosure of this information could result in the unsolicited contact of the individuals on the list via unwanted telephone calls, correspondence and visits
- The list could be redistributed and provided to a number of different companies providing related services
- Participants may no longer trust the agency with this information for fear that their privacy or security will not be protected and this will undermine the program

- Disclosure of the information would run contrary to statutory restrictions on utilities and lessen the future ability of utilities to benefit New Jersey citizens through its regulations

The Complainant never responded to the GRC's request for answers to the aforementioned questions; therefore, it is not known precisely how the Complainant intends to use the information if provided to him, and if on balance, the Complainant's need for the information would outweigh the Custodian's reasons for maintaining the confidentiality of the redacted information. Accordingly, in balancing the Complainant's need for the redacted information versus the potential harm should the information be released, the potential harm must necessarily outweigh the Complainant's need for access.

Therefore, pursuant to N.J.S.A. 47:1A-1, the Custodian did not unlawfully deny access to the redacted portions of the requested records because the redacted portions are exempt from disclosure due to privacy concerns.<sup>11</sup>

**Whether the Custodian's delay in access to the requested records 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

---

<sup>11</sup> The Custodian also mentioned another statute and regulation which precludes disclosure of certain customer personal information, but the Custodian did not specifically identify which customer information was exempt. Further, the privacy concerns articulated under N.J.S.A. 47:1A-1 are sufficient to justify the redactions.

(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).

Although the Custodian failed to respond to the Complainant's OPRA request within the statutorily mandated seven (7) business days, the Custodian did respond to the request on the eighth (8<sup>th</sup>) business day, and further, bore the burden of proving that the redacted names and addresses from the records responsive to the Complainant's request were exempt from disclosure under OPRA. 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 unlawful "deemed" denial of access 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. Although the Custodian certifies that Complainant did not submit his request on an official OPRA request form, the Custodian's attempt to fulfill the request results in the request being considered a valid OPRA request pursuant to John Paff v. Borough of Audubon, GRC Complaint No. 2006-01 (March 2006).
2. 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).
3. Pursuant to N.J.S.A. 47:1A-1, the Custodian did not unlawfully deny access to the redacted portions of the requested records because the redacted portions are exempt from disclosure due to privacy concerns.
4. Although the Custodian failed to respond to the Complainant's OPRA request within the statutorily mandated seven (7) business days, the Custodian did respond to the request on the eighth (8<sup>th</sup>) business day, and further, bore the burden of proving that the redacted names and addresses from the records responsive to the Complainant's request were exempt from disclosure under OPRA. 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 unlawful "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: John E. Stewart  
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.  
Executive Director

July 22, 2009